NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JULIAN BREAL,

PETITIONER,

vs.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

I.

Whether the Petitioner was denied his due process Fifth Amendment right to the United States Constitution due to being procedurally defaulted from presenting his vagueness challenge pursuant to *United States v. Davis,* 139 S.Ct. 2319 (2019) in his Motion to Vacate Sentence pursuant to 28 U.S.C. §2255 where at the time of his direct appeal of his conviction and 50 year sentence of imprisonment, the *Davis* claim was not reasonably available to him due to the state of the law at that time?

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Julian Breal, Appellant

Juan Gonzalez, United States Attorney

Anthony Lacosta, Assistant United States Attorney

The Honorable Federico Moreno, United States District Judge

Angela Noble, Clerk, United States District Court

Curt Obront, Esq., Attorney for Julian Breal

The Honorable Lisette Reid, United States Magistrate Judge

Lisa Rubio, Assistant United States Attorney

David J. Smith, Clerk, Eleventh Circuit Court of Appeals

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vs.

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RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

Petitioner, JULIAN BREAL, respectfully prays that a Writ of Certiorari issue to review the denial of his Motion to Vacate Sentence by the United States Court of Appeals for the Eleventh Circuit in contravention of this Court's decisions

in *United States v. Davis,* 139 S.Ct. 2319 (2019); *James v. United States*, 550 U.S. 192 and *Johnson v. United States*, 575 U.S. 594, 135 S.Ct. 2551 (2015).

## OPINIONS BELOW

The Order the Court of Appeals for the Eleventh Circuit Affirming Denial of Petitioner's Motion to Vacate Sentence dated May 9, 2023 and appears in Appendix "A". The Report and Recommendation of Magistrate Judge dated November 19, 2021 and appears in Appendix "B". The Order Adopting Report and Recommendation of Magistrate Judge and Order Denying Motion to Vacate Sentence dated May 11, 2022 and appears in Appendix "C". The Fifth Amendment to the United States Constitution and appears in Appendix "D".

## JURISDICTION

The Court of Appeals Order in this matter was filed on May 9, 2023 pursuant to 28 U.S.C. §2253. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Five to the United States Constitution is set forth in Appendix "D". The United States District Court, Southern District of Florida has jurisdiction pursuant to 28 U.S.C. Section 2255. An appeal was brought from the Order Adopting Magistrate Judge's Report and Recommendation and Order

Denying Motion to Vacate Sentence entered in this action on May 11, 2022 which was affirmed by the United States Court of Appeals for the Eleventh Circuit. This Petition for Writ of Certiorari follows.

## STATEMENT OF THE CASE

The Petitioner, JULIAN BREAL, was charged by way of a Second Superseding Indictment which was returned on April 10, 2012. The Second Superseding Indictment charged BREAL along with several Co-Defendants with the following charges: (1) conspiracy to commit hostage taking, in violation of 18 U.S.C. § 1203(a) (Count One); (2) substantive hostage taking in violation of 18 U.S.C. § 1203(a) (Count Two); (3) kidnapping, in violation of 18 U.S.C. § 1201(a) (Count Three); (4) carjacking resulting in bodily injury, in violation of 18 U.S.C. § 2119 (Count Four); and (5) possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c) (Count Five). The 924(c) charge in Count Five was explicitly predicated on all of the offenses charged in Counts One, Two, Three, and Four. The jury found BREAL guilty of all five charges in a general verdict. BREAL was sentenced to a term of imprisonment of 50 years, consisting of concurrent 45-year sentences for Counts One through Three, a concurrent 25 year sentence for Count Four, and a consecutive five-year sentence for Count Five.

In 2015, BREAL filed his original § 2255 Motion, which the District Court denied on the merits. However, neither the District Court nor the Eleventh Circuit Court of Appeal granted a Certificate of Appealability. Subsequently, BREAL filed an application for leave to file a second or successive § 2255 Motion, arguing that his § 924(c) conviction was invalidated by *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018), and *Johnson v. United States,* 575 U.S. 594, 135 S.Ct. 2551 (2015). That Court denied his application on the basis that neither *Dimaya* nor *Johnson* supported a vagueness-based challenge to § 924(c).

Petitioner filed the instant Motion to Vacate, with assistance of court appointed counsel, on November 4, 2019. The Government filed their Response on December 16, 2019, and Petitioner filed his Reply on January 9, 2020.

Subsequently, the Court issued a Report and Recommendation recommending denying the Motion to Vacate 28 U.S.C. 2255 on February 5, 2021 which recommended that this case be held in abeyance pending disposition of *Foster v. United States,* 996 F.3d 1100 (11th Cir. 2021) and *Granda v. United States,* 990 F.3d 1272 (11th Cir. 2021). Petitioner objected to the report only to the extent it recommended "denying" the claim, but not to holding the case in abeyance pending the *Granda* and *Foster* decisions by the Eleventh Circuit Court of Appeal.

On February 22, 2021, the District Court entered an Order Adopting the Report and Recommendation and Order Staying Case and Placing Case in Civil Suspense File.

The Honorable Magistrate Judge Reid entered a Report and Recommendation on November 22, 2021, recommending a denial of BREAL'S Motion to Vacate. The District Court adopted the Magistrate Judge's Report and Recommendation on May 13, 2022 and adjudged that a Certificate of Appealability issue as to whether the procedural default rule bars relief in this case. The District Court's denial of BREAL'S Motion to Vacate Sentence was later affirmed by the Eleventh Circuit Court of Appeals on May 9, 2023. This Petition for Writ of Certiorari follows.

## FACTUAL BACKGROUND

The facts of the underlying case have been set out in the Eleventh Circuit Court's Opinion affirming BREAL'S conviction on his direct appeal. See, *United States v. Breal*, 593 F.App'x 949 (11th Cir. 2014).

In February of 2012, BREAL and his co-conspirators conspired to rob a drug dealer. Prior to the robbery, BREAL provided his co-conspirators, who did not know the victim, with information about the victim that would aid in their robbery. The co-conspirators agreed that after the robbery, BREAL would receive a portion

of the ill-gotten proceeds. Originally, the co-conspirators planned to rob the victim while he was on a fishing trip; however, they changed their plan and decided instead to rob the victim's house once BREAL discovered that the victim had sold his fishing boat. BREAL gave his co-conspirators the victim's address and agreed to serve as a lookout, but upon arriving to the house, the co-conspirators determined that there were too many people inside so they aborted the plan.

BREAL'S co-conspirators later abducted the victim at gunpoint as he was leaving a bar, drove him to a co-conspirator's house, tortured him, and demanded the names of people they could call to request the ransom payment. BREAL was not present at the kidnapping or the house, but after the victim provided the co-conspirators with several names one of the co-conspirators called BREAL stating "we got him." The co-conspirators then asked BREAL to confirm the names and addresses of the listed persons as potential targets for ransom money. BREAL confirmed. After that, the co-conspirators called the victim's brother to demand ransom money while torturing the victim until he screamed. A few months later, BREAL was interviewed by police where he waived his rights to counsel and silence and confessed to his role in the crimes.

BREAL was convicted of conspiracy to commit hostage taking; hostage taking; kidnapping; carjacking resulting in bodily injury; and possession of a

firearm in furtherance of a crime of violence following a jury trial before the Honorable Judge Moreno in the District Court, Southern District of Florida on November 14, 2013.

BREAL'S jury returned a general verdict and did not identify which of the four predicate offenses charged in the indictment it relied upon in support of their 924(c) conviction. Further, it is undisputed that three of the four predicate offenses charged in the indictment are not, as a matter of law, valid predicate offenses to support a 924(c) conviction. The only potential predicate offense that arguably may have been a valid predicate offense (Count 4, carjacking), were committed by BREAL'S Co-Defendants at a time when BREAL was not even physically present.

Subsequent to his conviction, this Court decided *Davis* which held in the context of an 18 U.S.C. 924(c) conviction premised on a conspiracy to commit Hobbs Act robbery that 924(c)(3)(B) is unconstitutionally vague.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this petition presents an important issue that at the time of BREAL'S direct appeal, his vagueness claim made pursuant to *United States v. Davis*, 139 S.Ct. 2319 (2019) was not procedurally defaulted by him as it was not reasonably available to him at the time of his direct appeal since this Court had rejected similar challenges in *James v. United States*,

550 U.S. 192, 210. n.6 (2007) and *Johnson v. United States*, 575 U.S. 594, 135 S.Ct. 2551 (2015).

## DENIAL OF PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS BY PROCEDURALLY DEFAULTING HIS DAVIS VAGUENESS CHALLENGE RAISED PURSUANT TO HIS MOTION TO VACATE SENTENCE

### Background

In *United States v. Davis*, 139 S.Ct. 2319 (2019), this Court held, in the context of 18 U.S.C. § 924(c) convictions premised on conspiracy to commit Hobbs Act robbery, that § 924(c)(3)(B) is unconstitutionally vague. This Court affirmed the Fifth Circuit's decision vacating the § 924(c) convictions for which the predicate crime of violence was Hobbs Act robbery conspiracy. Id. *Davis* overruled the Eleventh Circuit's decision in *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc), on which BREAL'S prior SOS application was denied and remanded to the Fifth Circuit for consideration of a motion for rehearing filed in that court by the *Davis* petitioners, seeking to vacate their sentences in their entirety and to vacate their convictions of a second § 924(c) offense that was predicated on a completed Hobbs Act robbery. *Davis*, 139 S.Ct. at 2336.

In light of *Davis's* holding that the firearm enhancement residual clause, 18

U.S.C. § 924(c)(3)(B), is unconstitutionally vague and cannot support a § 924(c) conviction, and in light of the fact that the elements essential to the Movant's conviction under § 924(c) in the present case encompass the predicate offense of conspiracy to commit hostage taking; substantive hostage taking; and kidnapping, all of which are not valid predicate offenses to a § 924(c) conviction, Movant should have been granted relief on his 28 U.S.C. § 2255 motion, as will be more fully articulated, infra[1].

**Breal Has Not Procedurally Defaulted His Claim**

BREAL seeks relief from this Court based on the Eleventh Circuit's conclusion that he is procedurally barred from raising his claim (Apx. A).

In *Davis*, this Court has extended its holdings in *Johnson* and *Dimaya* to § 924(c) and held that § 924(c)(3)(B)'s residual clause, like the residual clauses in the ACCA and § 16(b), is unconstitutionally vague. *In Re: Hammoud*, 931 F. 3d 1032,1037 (11th Cir. 2019) (citing *Davis*, 588 U.S. at ____, 139 S. Ct. at 2336).



[1] Three of the four potential predicate offenses (Counts 1, 2 and 3) charged in the Second Superseding Indictment are not crimes of violence in light of *Davis*. The only one that is a potential crime of violence is Count 4, carjacking resulting in bodily injury. See, e.g., *In Re: Smith,* 829 F.3d 1276, 1280-81 (11th Cir. 2016). However, due to the dynamic flux of appellate decisions on that issue, undersigned counsel also asserted the same argument, viz-a-viz, the carjacking resulting in bodily injury count (Count Four), as the other three counts (Counts One, Two, and Three).

Hence, *Davis*, like *Johnson* before it, announced a new substantive rule because it narrowed the scope of § 924(c) by interpreting its terms, specifically, the terms "crime of violence" and "in striking down § 924(c)'s residual clause, *Davis* narrowed the class of people who are eligible to be convicted under § 924(c)." Thus, for purpose of § 2255(h)(2)...taken together, this Court's holding in *Davis* and *Welch* necessarily dictate that *Davis* has been made retroactively applicable to criminal cases that became final before *Davis* was announced. Thus, *Davis* is also a new rule of constitutional law, made retroactive to cases on collateral review, that was previously unavailable to BREAL. 28 U.S.C. § 2255(h)(2).

BREAL'S offense occurred in January and February of 2012 and BREAL was convicted on September 19, 2013, and his appeal became final on March 30, 2015 when this Court denied his Petition for Writ of Certiorari. Hence, the "novelty" analysis should be made in the context of whether or not a *Davis* claim was reasonably available to BREAL or his counsel in 2013 when he was convicted and filed his direct appeal. It is respectfully submitted that the Eleventh Circuit's conclusion that BREAL is now procedurally defaulted from raising this *Davis* claim some six years after his conviction is misplaced, due to the substantial changes in the law, viz-a-viz, a now viable *Davis* claim.

In further support of BREAL'S assertion that this was a novel claim, in 2015

BREAL filed a 2255 Petition and attempted to file an application for leave to file a second or successive Section 2255 Motion (SOS) arguing that his 924(c) conviction was invalidated by *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018) and *Johnson v. United States,* 575 U.S. 594, 135 S.Ct. 2551 (2015). The Eleventh Circuit Court of Appeal denied his application on the basis that neither *Dimaya* nor *Johnson* supported a vagueness based challenge to §924(c). In other words, BREAL unsuccessfully tried to do exactly what the District Court and Eleventh Circuit suggest he should have done when it reasonably became at least arguable that an extension of *Johnson's* invalidation of the similar residual clause in an ACCA context or *Dimaya's* extension to a 16(b) context should apply to 924(c)(3). Hence, BREAL unsuccessfully tried to do exactly that *post-Johnson* and *post-Dimaya* and now once again *post-Davis.* Accordingly, the Eleventh Circuit's holding that BREAL is procedurally defaulted from asserting his *Davis* claim should not be affirmed by this Court under these facts. Clearly, in light of the above, BREAL has shown cause, and receiving a 60-month consecutive sentence under Count 5 for his §924(c) conviction establish prejudice.

Because the *Davis* claim was previously unavailable to BREAL, and it was not "reasonably available to counsel at the time of his direct appeal", Movant has demonstrated cause to excuse the procedural default of the claim. See also, *Lynn v.*

*United States*, 365 F.3d 1225, 1232 (citing *United States v. Mills*, 36 F.3d 1052, 1055 (11th Cir. 1994) (per curiam)). Moreover, since BREAL had previously attempted to challenge his § 924(c) conviction in 2015 and subsequently in a SOS application arguing that his conviction was invalidated by *Sessions v. Dimaya*[2] and *Johnson v. United States*, further militates in favor of finding that BREAL did not procedurally default his claim.

## CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the denial of Petitioner's Motion to Vacate Sentence by the Eleventh Circuit Court of Appeals in this matter.

Dated: August 7, 2023.



[2] In *Sessions v. Dimaya*, 584 U.S. ____, 138 S.Ct. 1204 (2018, this Court held that the residual clause of the federal code's definition of "crime of violence", as incorporated into the Immigration and Nationality Act's definition of aggravated felony, was impermissibly vague in violation of due process.

Respectfully submitted,

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By: _____
CURT OBRONT, ESQ.

ATTORNEYS FOR PETITIONER

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to all counsel of record this the 7th day of August, 2023.

_____
CURT OBRONT, ESQ.

# APPENDIX A

[DO NOT PUBLISH]

# In the United States Court of Appeals For the Eleventh Circuit

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No. 22-12222

Non-Argument Calendar

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JULIAN BREAL,

Petitioner-Appellant,

*versus*

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-23158-FAM

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Before WILLIAM PRYOR, Chief Judge, and ROSENBAUM and JILL PRYOR, Circuit Judges.

PER CURIAM:

Julian Breal, a federal prisoner, appeals the order denying his successive motion to vacate, 28 U.S.C. § 2255, his conviction and sentence for possessing a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c). Breal obtained leave to file his motion seeking a vacatur based on *United States v. Davis*, 139 S. Ct. 2319 (2019). The district court ruled that Breal procedurally defaulted his claim for relief. We affirm.

## I. BACKGROUND

In 2012, Breal and five others conspired to rob a drug dealer. Breal provided information about the victim, his assets, and his movements, so that the other conspirators, none of whom were known to the victim, could execute the robbery. The other conspirators agreed that Breal would receive a share of the proceeds of their crime.

The conspirators' initial plan was to intercept the victim on his return from a fishing trip, but they altered their plan when Breal learned that the victim had sold his fishing boat. They decided instead to rob the victim's house. Breal provided the address and agreed to serve as lookout. But there were too many people at the victim's house, so the conspirators aborted the robbery.

Breal's co-conspirators later abducted the victim at gunpoint as he was exiting a bar. They forced the victim into the back of his car and drove him to a co-conspirator's house, where they tortured the victim and demanded the names of people they could call to demand ransom. Breal was not present, but after the victim provided several names, one of the co-conspirators called Breal, told Breal "we got him," and asked Breal to confirm the names and phone numbers as potential targets for ransom money. Breal confirmed the information. The co-conspirators then called the victim's brother, tortured the victim so that he screamed over the phone, and demanded ransom. About two months later, the police interviewed Breal. After he waived his right to counsel and his right to remain silent, Breal confessed to his role in the crimes.

Breal and the five other conspirators were charged in a superseding indictment with conspiring to commit hostage taking, 18 U.S.C. § 1203(a), hostage taking, *id.* §§ 1203(a), 2, kidnapping, *id.* §§ 1201(a), 2, carjacking, *id.* §§ 2119, 2, and possessing a firearm in furtherance of a crime of violence, *id.* §§ 924(c)(1)(A), 2, as set forth in the preceding four counts. All of the co-conspirators pleaded guilty, save for Breal. He was convicted of all counts following a jury trial and sentenced to a total term of 50 years of imprisonment, which included a mandatory consecutive five-year term of imprisonment for the firearm conviction. Breal challenged his convictions and sentence, without success, on direct appeal. *United States v. Breal*, 593 F. App'x 949 (11th Cir. 2014).

After Breal filed a motion to vacate in 2015, which the district court denied, we denied him a certificate of appealability. Breal did not challenge the constitutionality of the residual clause in section 924(c) in either his direct appeal or his initial motion to vacate. In 2018, Breal applied for leave to file a second motion to vacate based on *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), but we denied his application. *In re Julian Breal*, No. 18-14347 (Nov. 14, 2018). We later granted Breal leave to file a successive motion to vacate to raise a *Davis* challenge to the validity of his firearm offense. *See* 28 U.S.C. § 2255(h)(2).

Breal moved to vacate his firearm conviction. 28 U.S.C. § 2255. He argued that his firearm conviction was invalid because three of his predicates—conspiracy to commit hostage taking, hostage taking, and kidnapping—were no longer "crimes of violence" after *Davis*. He argued that the jury's general verdict precluded knowing which of the four predicate offenses it relied on to convict him of the firearm offense but that the jury most likely relied on the offense of conspiracy to commit hostage taking because he was not physically present for any of the substantive offenses. The government responded that Breal's *Davis* argument was procedurally defaulted and failed on the merits.

The magistrate judge recommended a stay pending the resolution of similar cases in this circuit, which the district court granted. Following our decisions in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022), and *Foster v. United States*, 996 F.3d 1100 (11th Cir. 2021), *cert. denied*, 142 S. Ct.

500 (2021), Breal argued that his case was distinguishable from *Granda* and *Foster* because the essence of his convictions was based on his imputed, not active, participation, making it more likely that the jury relied on an invalid predicate offense. He also argued that he had shown cause to overcome the procedural default because his *Davis* argument was not reasonably available to counsel during his direct appeal.

The government responded that Breal could not show cause and prejudice because, as in *Granda*, the tools necessary for raising a vagueness challenge to the residual clause in section 924(c) were available to him, and the valid and invalid predicate offenses were inextricably intertwined. It argued that, under *Pinkerton v. United States*, 328 U.S. 640 (1946), Breal was liable for the reasonably foreseeable substantive offenses that his co-conspirators committed in furtherance of the conspiracy, so his physical absence during the substantive offenses did not distinguish his case from *Granda*.

The magistrate judge recommended denying Breal's motion because, based on *Granda*, his argument was procedurally defaulted, and he could not establish cause and prejudice or actual innocence. The district court overruled Breal's objections, adopted the report and recommendation, and denied his motion to vacate. The district court issued Breal a certificate of appealability as to "whether the procedural default rule bars relief in this case."

## II. STANDARD OF REVIEW

The application of the doctrine of procedural default to a motion to vacate presents a mixed question of fact and law, which we review *de novo*. *Granda*, 990 F.3d at 1286.

## III. DISCUSSION

A federal prisoner can move to vacate, set aside, or correct his sentence on the "ground that . . . sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). A motion for collateral relief is subject to the doctrine of procedural default. *Granda*, 990 F.3d at 1280. That doctrine bars a prisoner from obtaining postconviction relief based on an argument that he could have raised at trial and on direct appeal. *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). A prisoner can excuse his procedural default by establishing both "cause to excuse the default and actual prejudice from the claimed error," or actual innocence. *Granda*, 990 F.3d at 1286.

*Granda* controls this appeal. Ordinarily, a prisoner can establish cause if his postconviction motion is based on a novel legal rule that was unavailable to counsel on direct appeal. *See id.* In *Granda*, we considered the issue whether a *Davis* challenge presented a novel constitutional rule that provided cause to excuse the movant's procedural default. We ruled that vagueness challenges to criminal statutes were "commonplace" at the time of Granda's direct appeal in 2009, so Granda "did not then lack the 'building blocks' of a vagueness challenge to the § 924(c) residual clause," and could not establish cause to excuse his default. *Id.* at 1287.

Breal argues that his *Davis* challenge was unavailable during his direct appeal in 2014. But he fails to explain how, if the building blocks of a vagueness challenge were available to Granda at least as early as 2009, those building blocks were unavailable to Breal during his direct appeal five years later. Breal seeks to distinguish his case from *Granda* based on his "prior attempts to file a 2255 Petition." But whether Breal previously sought to *collaterally* attack his section 924(c) conviction based on *Dimaya* or *Johnson v. United States*, 135 S. Ct. 2551 (2015), matters not. To avoid procedural default, he was required to make this challenge *"on direct appeal,"* and, to establish cause to excuse the default, he must establish that the argument was unavailable "at the time of the default." *Granda*, 990 F.3d at 1286 (emphasis added).

Breal also cannot establish prejudice or that actual innocence excuses his procedural default. Breal argues that he is innocent of the firearm offense because all of his predicate offenses are invalid, except for his carjacking offense which he acknowledges is a valid crime-of-violence predicate under our prior precedent. *See Steiner v. United States*, 940 F.3d 1282, 1293 (11th Cir. 2019); *In re Smith*, 829 F.3d 1276, 1280–81 (11th Cir. 2016). "Actual innocence means factual innocence, not mere legal innocence." *Granda*, 990 F.3d at 1292 (quoting *Lynn v. United States*, 365 F.3d 1225, 1235 n.18 (11th Cir. 2004)). To establish actual innocence, Breal must establish that no reasonable juror would have concluded that he possessed a firearm under any theory of liability in furtherance of the valid predicate offense of carjacking. *See id.* Breal cannot do so.

All of Breal's "predicates are inextricably intertwined, arising out of the same [] scheme." *Id.* at 1280. Breal conspired with the other conspirators to intercept and rob the victim. To effectuate their goal, the other conspirators forced the victim at gunpoint into the back of the victim's car and drove the car to one of the conspirator's homes. Indeed, as we explained in deciding Breal's direct appeal, the "substantive offense of carjacking was foreseeable because the original plan involved a carjacking. And the carrying or use of a firearm during the carjacking . . . of a drug dealer was reasonably foreseeable, based on the inherent dangers of the drug trade and the planned violent conduct in abducting the victim." *Breal*, 593 F. App'x at 952. Because Breal cannot show cause-and-prejudice or actual innocence, he cannot overcome his procedural default.

## IV. CONCLUSION

We **AFFIRM** the denial of Breal's motion to vacate.

# APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23158-CV-MORENO
(CRIMINAL CASE 12-20152-CR-MORENO)
MAGISTRATE JUDGE REID

JULIAN BREAL,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

**REPORT AND RECOMMENDATION**

This cause is before the Court upon Movant Julian Breal's ("Movant" or "Breal") Motion to Vacate pursuant to 28 U.S.C. § 2255 (the "Motion"). [CV ECF No. 9]. Breal seeks to vacate his conviction as to Count 5 under 18 U.S.C. § 924(c), because conspiracy to commit hostage taking, substantive hostage taking, and kidnapping are no longer valid predicates for § 924(c) convictions. *See United States v. Davis*, 139 S. Ct. 2319 (2019). For the reasons set forth below, this Court recommends that Movant's Motion be **DENIED**.

## I. Background

In February of 2012, Movant and his co-conspirators conspired to rob a drug dealer. [CR ECF No. 384]. Prior to the robbery, Movant provided his co-conspirators, who did not know the victim, with information about the victim that would aid in their robbery. [*Id.*]. The co-conspirators agreed that after the robbery, Movant would receive a portion of the ill-gotten proceeds. [*Id.*]. Originally, the co-conspirators planned to rob the victim while he was on a fishing trip; however, they changed their plan and decided instead to rob the victim's house once Breal discovered that

the victim had sold his fishing boat. [*Id.*]. Breal gave his co-conspirators the victim's address and agreed to serve as a lookout, but upon arriving to the house, the co-conspirators determined that there were too many people inside, so they aborted the plan. [*Id.*].

Movant's co-conspirators later abducted the victim at gunpoint as he was leaving a bar, drove him to a co-conspirator's house, tortured him, and demanded the names of people they could call to request the ransom payment. [*Id.*]. Movant was not present at the kidnapping or the house, but after the victim provided the co-conspirators with several names, one of the co-conspirators called Breal stating "we got him." [*Id.*]. The co-conspirator then asked Breal to confirm the names and addresses of the listed persons as potential targets for ransom money. [*Id.*]. Breal confirmed. After that, the co-conspirators called the victim's brother to demand ransom money while torturing the victim until he screamed. [*Id.*]. A few months later, Movant was interviewed by police where he waived his rights to counsel and silence and confessed to his role in the crimes. [*Id.*].

In 2012, a twenty-two count Second Superseding Indictment was returned charging Movant and his co-conspirators with numerous federal crimes. [CR ECF No. 291]. Specifically, Movant was charged with conspiracy to seize, detain, and threaten to kill A.M.C. in order to compel a third person to do an act as a condition for the release of A.M.C., where at least one of the defendants or persons seized was not a national of the United States, in violation of 18 U.S.C. §§ 1203(a), (b)(2) (Count 1); seizing, detaining, and threatening to kill A.M.C. in order to compel a third person to do an act as a condition for the release of A.M.C., where at least one of the defendants or persons seized was not a national of the United States, in violation of 18 U.S.C. §§ 1203(a), (b)(2), and 2 (Count 2); kidnapping A.M.C. and holding him for ransom, and in furtherance thereof used a facility and an instrumentality of interstate and foreign commerce, in violation of 18 U.S.C. §§ 1201(a)(1) and 2 (Count 3); carjacking, in violation of 18 U.S.C. §§ 2119

and 2 (Count 4); and using and carrying a firearm during and in relation to a crime of violence, and possessing a firearm in furtherance of a crime of violence, felony offenses, in violation of 18 U.S.C. §§1201(a), 1203(a), and 2119, as set forth Counts 1, 2, 3, and 4 of the Second Superseding Indictment, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2 (Count 5). [CR ECF No. 291 at 1-5], (emphasis added). All of Movant's co-conspirators pleaded guilty prior to Movant's trial. [CR ECF Nos. 100, 115, 136, 137, 177, 183]. Movant proceeded to trial where he was found guilty as charged, following a jury verdict. [CR ECF No. 302]. Regarding Count 5, the jury found that a firearm was both used and carried during and in relation to a crime of violence, and that a firearm was possessed in furtherance of a crime of violence but did not specify whether it relied on some or all of the four counts in making that determination. [*Id.* at 2].

Movant was adjudicated guilty and sentenced to a total term of fifty years of imprisonment, consisting of: (1) three concurrent terms of forty-five years of imprisonment as to Counts 1, 2, and 3; (2) a concurrent term of twenty-five years of imprisonment as to Count 4; and, (3) a five-year term of imprisonment as to Count 5 to run consecutive to Counts 1, 2, 3, and 4. [CR ECF No. 321 at 2]. Movant's convictions and sentences were *per curiam* affirmed on appeal in a written, but unpublished decision. *See United States v. Breal*, 593 F. App'x 949, 953 (11th Cir. 2014). Certiorari review was denied on March 30, 2015. *Breal v. United States*, 135 S.Ct. 1727 (2015), [CR ECF No. 392]. And, an initial motion to vacate his conviction filed pursuant to 28 U.S.C. § 2255 was denied.

In 2019, Movant filed an application for leave to file a second or successive § 2255 motion, "arguing that his § 924(c) conviction was "attached to multiple predicate offenses," so that it was "unclear which predicate offense was the basis for the § 924(c) conviction." [CV ECF No. 1 at 4].

Movant argued that conspiracy to commit hostage taking no longer qualified as a "crime of violence" under §924(c)(3)(A)'s elements clause. [*Id.*].

The Eleventh Circuit Court of Appeals found Movant's § 924(c) conviction in Count 5 "was possibly predicated on four different charges, including conspiracy to commit hostage taking (Count One), substantive hostage taking (Count Two), kidnapping (Count Three), and carjacking resulting in bodily injury (Count Four)." [*Id.*]. The Eleventh Circuit Court of Appeals recognized that carjacking, one of the companion offenses, qualifies as a "crime of violence" under § 924(c)(3)(A)'s elements clause, but noted that neither it nor the United States Supreme Court had determined "whether the other crimes qualify as a crime of violence under only the residual clause or only the elements clause or both clauses of § 924(c)(3)." [*Id.* at 4]. Thus, the appellate court granted Movant permission to file a successive § 2255 motion finding his § 924(c) conviction as to Count 5 "may--not that it does, but that it may--implicate § 924(c)'s residual clause and *Davis*." [*Id.* at 4-5].

Upon receipt of the appellate court's opinion, this § 2255 proceeding was opened by the Clerk, after which the court entered an order appointing counsel for Movant, pursuant to 18 U.S.C. § 3006A, and a briefing schedule was entered. [CV ECF No. 3]. Movant then, through counsel, filed an amended § 2255 seeking to vacate his § 924(c) conviction on the basis that post-*Davis*, § 924(c)(3)(B)'s residual clause is unconstitutionally vague and cannot support his § 924(c) conviction. [CV ECF No. 9 at 2]. Movant further argued that the companion, predicate offenses—conspiracy to commit hostage taking, substantive hostage taking, and kidnapping—were not "crime[s] of violence" so they could not be used to support the § 924(c) conviction. [*Id.* at 2, 7-10]. Only carjacking, Count 4, remained a crime of violence. [*Id.* at 13].

Movant argued that, based on the reasoning in *Gomez*[1], where, as here, the charge is duplicitous, listing multiple predicate offenses, and the jury returned a general verdict, this court "must use the conspiracy to commit hostage taking, the least culpable offense, to analyze Breal's § 924(c) post-*Davis* conviction." [*Id.* at 13-14]. Because that offense no longer qualifies as a "crime of violence," post-*Davis,* Movant argued he was entitled to vacatur of his § 924(c) conviction and a resentencing hearing. [*Id.* at 14-18].

Movant also relied upon the United States Supreme Court decision in *Stromberg v. California*, 283 U.S. 359 (1931) claiming that when an indictment alleges various means of violating a statute, the court must presume the least predicate act was used to support the conviction. [*Id.* at17-19]. Movant argued that a jury verdict must be set aside if it is supported on one ground but not another, and it is impossible to determine which ground the jury selected. [*Id.*].

While the government concedes that Counts 1, 2, and 3 are no longer qualifying predicate offenses post-*Davis*, it maintains, however, that Movant is not entitled to relief because the predicate offense of carjacking (Count 4) still qualifies as a "crime of violence." [CV ECF No. 14 at 10-18; CV ECF No. 27 at 2]. As a result, the government, relying on *In re Cannon,* 931 F.3d 1236, 1243-44 (11th Cir. 2019) and *Beeman v. United States,* 871 F.3d 1215, 1221-22 (11th Cir. 2017), concluded that Movant could not meet his burden of proving "the likelihood that the jury based its guilty verdicts solely on a non-qualifying predicate offense," rather than on carjacking, a qualifying predicate offense. [*Id.* at 18-19].

Because these issues were pending before the Eleventh Circuit Court of Appeals in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021) and *Foster v. United States*, 996 F.3d 1100 (11th Cir. 2021), this Court issued a report recommending that the case be held in abeyance pending

[1] *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016).

their resolution. After the Eleventh Circuit issued its opinion in *Granda* and *Foster*, this case was re-opened, and the parties were invited to file supplemental memoranda. Breal filed a Supplemental Memorandum of Law in light of the *Foster* and *Granda* decisions. [CV ECF No 26]. The government responded [CV ECF No. 27], and Movant replied. [CV ECF No. 29].

## II. Procedural Bar

"[A] defendant generally must advance an available challenge to a criminal conviction on direct appeal or else the defendant is barred from raising that claim in a habeas proceeding." *Granda*, 990 F.3d at 1286 (quoting *Fordham v. United States*, 706 F.3d 1345, 1349 (11th Cir. 2013)). Breal did not argue at trial or on direct appeal that his § 924(c) conviction under Count 5 was invalid because the § 924(c)(3)(B) residual clause was unconstitutionally vague. He "therefore, procedurally defaulted this claim and cannot succeed on collateral review unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent of the § 924(o) and § 924(c) convictions." *Granda*, 990 F.3d at 1286.

Breal argues he can show both cause and prejudice, as well as actual innocence. Specifically, Breal argues that: (1) he can show cause, because "the *Davis* claim was previously unavailable to [him], and it was not 'reasonably available to counsel at the time of his direct appeal'" *See* [CV ECF No. 26]; and (2) he can show prejudice, because he "received an illegal sentence due to a conviction that was based on an improper predicate offense or offenses." *See* [*Id.*].

### A. Breal Cannot Show Cause

Breal argues that "his *Davis* claim was previously unavailable at the time of his direct appeal." This argument was rejected by the Eleventh Circuit in *Granda*. There, the Eleventh Circuit determined that while prior to Granda's *Davis* challenge few, if any, litigants had

contended that the § 924(c) residual clause was unconstitutionally valid, because other litigants had challenged other portions of § 924(c) as vague, the tools existed for Granda to challenge § 924(c)'s residual clause as vague. *Granda*, 990 F.3d at 1288. The same is true here. In his Reply to the Government's Supplemental Memorandum of Law, [CV ECF No. 29], Movant argues that "the Eleventh Circuit's reliance in *Granda* on *James v. United States*, 550 U.S. 192 (2007) is misplaced since *James* involved a different statue (the [Armed Career Criminal Act of 1984 ("ACCA")]) rather than the one at issue in the case at bar." However, *Granda* did not simply rely upon *James*; the Court further noted that "due process vagueness challenges to criminal statutes were commonplace," confirming that any defendant could have raised the issue. *Granda*, 990 F.3d at 1287. Thus, for the reasons discussed in *Granda*, Breal cannot show that his claim is "so novel that its legal basis [was] not reasonably available to [Breal's] counsel." *Granda*, 990 F.3d at 1286 (quoting *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004)).

**B. Breal Cannot Show Actual Prejudice**

Even if Breal were able to show cause for failing to raise the claim on appeal, his claim would still fail because, under the facts of his case, he cannot establish prejudice.

Under *Stromberg v. California*, 283 U.S. 359 (1931), a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient. This is because the verdict may have rested exclusively on the insufficient ground. *Id.* As explained in *Granda*, however, after the Supreme Court decided *Stromberg*, it decided *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), which clarified that *Stromberg* error is subject to the *Brecht v. Abrahamson*, 507 U.S. 619 (1993) harmless error standard.

Under the *Brecht* standard, reversal is warranted only when the petitioner suffered "actual prejudice" from the error. *Brecht*, 507 U.S. at 637. In other words, "the harmless error standard

mandates that 'relief is proper only if the ... court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict. There must be more than a reasonable possibility that the error was harmful.'" *Foster*, 996 F.3d at 1107 (citing *Davis v. Ayala*, 576 U.S. 257, 267– 68 (2015)). "Thus, it is proper to look at the record to determine whether the invalid predicate actually prejudiced the petitioner -- that is, actually led to his conviction - - or whether the jury instead (or also) found the defendant guilty under a valid theory." *Granda*, 990 F.3d at 1294.

The *Granda* court further clarified that "'[a]ctual prejudice means more than just the possibility of prejudice; it requires that the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Id.* at 1288. The court explained that

> [I]t is not enough for Granda to show that the jury *may* have relied on the Count 3 Hobbs Act conspiracy conviction as the predicate for his Count 6 § 924(o) conviction; Granda must show at least a 'substantial likelihood' that the jury *actually* relied on the Count 3 conviction to provide the predicate offense. More specifically, he must establish a substantial likelihood that the jury relied *only* on the Count 3 conviction.

*Id.* (emphasis added) (internal citations omitted).

In other words, to establish actual prejudice in this case, Breal must show a substantial likelihood that the jury relied *only* on Counts 1-3 as the predicate offenses for his conviction in Count 5.

Breal argues that because three of the four potential predicate offenses that were submitted to the jury are now invalid, and because the only valid predicate—the carjacking charged in Count 4—was not inextricably intertwined with the other offenses, he has shown prejudice. Breal, however, "points to nothing in the trial record that would suggest the jurors distinguished between [the] alternative predicate crimes," *Foster*, 996 F.3d at 1108, and identifies no credible basis for

his argument that it is more likely that the jury predicated his conviction on conspiracy to commit hostage taking, substantive hostage taking, and kidnapping rather than carjacking.

Breal suggests that his conduct was not inextricably intertwined with the carjacking offense because "he was not physically present during that offense," and because "his involvement related to the earlier meetings [] did not directly involve a carjacking offense, but rather implicated the robbery, kidnapping, and extortion offenses." These arguments fail and were clearly rejected by the jury.

Despite Breal being absent from the scene of the crimes, the jury unanimously found him guilty of conspiracy to commit hostage taking, substantive hostage taking, kidnapping, *and* carjacking. The trial record makes it abundantly clear that all of the jury's findings rested on the same operative facts and the same set of events—the jury found beyond a reasonable doubt that Breal and his accomplices conspired to take the victim hostage and completed the acts of taking the victim hostage, kidnapping the victim, and carjacking in order to steal valuables from him. The Eleventh Circuit, in reviewing Movant's conviction on appeal, noted that the carjacking was reasonably foreseeable under the *Pinkerton*[2] theory of liability "because the original plan involved a carjacking." *See United States v. Breal*, 593 F. App'x 949, 952 (11th Cir. 2014). Breal and his co-conspirators had originally planned to intercept the victim while he was driving back from a fishing trip and take both the victim and his car. [CR ECF No. 348 at 78]. Further, while planning the robbery, Breal informed his co-conspirators that the victim had valuables in his car. *See* [CR ECF No. 348 at 78, 96]. In short, the alternative predicate offenses are inextricably intertwined—each arose from the same plan and act of robbing a drug dealer of valuables with a firearm, *see Granda*, 990 F.3d at 1291, and Breal has failed to show a substantial likelihood that the jury relied

[2] *Pinkerton v. United States*, 328 U.S. 640, 645–48 (1946).

only on his convictions in Counts 1-3, rather than his conviction in Count 4, to predicate his conviction in Count 5.

**C. Breal Cannot Show Actual Innocence**

In his Supplemental Memorandum of Law, [CV ECF No. 26], Movant states that he "stands on all of his arguments previously raised in his Motion to Vacate (DE-CV-19 [sic]) as well as his Reply (DE-CV-17)." Breal makes no argument as to actual innocence in his Supplemental Memorandum of Law. He did, however, raise an argument as to actual innocence in his Reply. Breal relies on Judge Jill Pryor's dissent in *In re Smith*, 829 F.3d 1276 (11th Cir. 2016) to argue that carjacking should not be considered a crime of violence. This argument is a losing one.

First, carjacking is still considered a crime of violence in the Eleventh Circuit. *See In re Smith*, 829 F.3d at 1280–81 ("In short, our precedent holds that carjacking in violation of § 2119 satisfies § 924(c)'s force clause, and that ends the discussion."). Second, "[t]he actual innocence exception to the procedural default bar is 'exceedingly narrow in scope as it concerns a petitioner's actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence.'" *Granda*, 990 F.3d at 1292. Further, "'[t]o establish actual innocence, [the] petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *Id.* This, Breal has not done.

III. Breal Cannot Succeed on the Merits

Even if Breal could overcome procedural bar, for the reasons discussed, his claims would still fail on the merits. Under these facts, Breal cannot meet his burden to show that the jury relied solely upon the now invalid predicate offenses rather than the valid carjacking predicate. The invalid and valid predicates in this case are inextricably intertwined. Thus, "[t]here can be no grave doubt that the inclusion of the invalid predicate did not have a substantial influence in determining

the jury's verdict in this case." *See Foster*, 996 F.3d at 1108 (citing to *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). If there was any error here, it was harmless.

**D. Breal's Remaining Arguments were Rejected in *Granda***

As noted, in his Supplemental Memorandum of Law, [CV ECF No. 26], Movant states that he "stands on all of his arguments previously raised in his Motion to Vacate (DE-CV-19 [sic]) as well as his Reply (DE-CV-17)." In his Motion to Vacate, [CV ECF No. 9], Movant relies on *In re Gomez*, *Alleyne v. United States*, 570 U.S. 99 (2013), *Shepard v. United States*, 544 U.S. 13 (2005), *Parker v. Sec'y for Dep't of Corrs.*, 331 F.3d 764 (11th Cir. 2003), *Zant v. Stephens*, 462 U.S. 862 (1983), and *Stromberg*, to conclude that because the government drafted a "duplicitous indictment," the Court must use the least culpable offense—conspiracy to commit hostage taking—to analyze his § 924(c) conviction.

The court in *Granda* addressed and rejected Movant's arguments under *Gomez*, *Alleyne*, *Parker*, and *Stromberg*. *Granda*, 990 F.3d at 1292–96. For the reasons stated in *Granda*, Movant's arguments on those grounds fail.

Movant's argument that the court should apply the "least-culpable-offense" approach as outlined in *Shepard* also fails. First, *Shepard* applies only to "divergent decisions in the Courts of Appeals applying [*Taylor v. United States*, 495 U.S. 575] when prior convictions stem from guilty pleas, not jury verdicts." *Shepard*, 544 U.S. at 19. As this case involved a jury trial conviction and not a guilty plea, *Shepard* is inapposite. Second, *Taylor* and *Shepard* apply to a very narrow subset of cases. *Taylor* and *Shepard* involve the ACCA's mandate of a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. *See Shepard*, 544 U.S. at 15–16. Under the ACCA, burglary was only considered a violent felony if it was committed in a building or enclosed space; but some state statutes had broader or

multiple definitions of "burglary." Given these inconsistent definitions of "burglary," the court in *Taylor* found that "a [later] court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions"—i.e., "*Shepard* documents"—to determine whether the burglary offense a defendant had been convicted of qualified as a violent felony for the purposes of the ACCA. *Id.*

These cases are inapplicable. The federal offenses of conspiracy to commit hostage taking, substantive hostage taking, kidnapping, and carjacking are defined only under 18 U.S.C. § 1203, 18 U.S.C. § 1203, 18 U.S.C. § 1201, and 18 U.S.C. § 2119, respectively. In other words, there is no inconsistency in the definitions here.

## IV. Recommendations

Based on the foregoing, it is recommended that the Motion to Vacate be **DENIED**, and that no certificate of appealability be issued.

Objections to this report may be filed with the District Court Judge within fourteen days of receipt of a copy of the report, including any objections with regard to the denial of a certificate of appealability.

**SIGNED** this 19th day of November, 2021.

LISETTE M. REID
UNITED STATES MAGISTRATE JUDGE

cc: **U.S. District Judge Federico Moreno**; and
**All Counsel of Record via CM/DE**

# APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
**Case Number: 19-23158-CIV-MORENO**
**(12-20152-CR-MORENO)**

JULIAN BREAL,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

/

**ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND ORDER DENYING MOTION TO VACATE**

THE MATTER was referred to the Honorable Lisette M. Reid, United States Magistrate Judge, for a Report and Recommendation on Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. The Magistrate Judge filed a Report and Recommendation **(D.E. 30)**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

**ADJUDGED** that Magistrate Judge Reid's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

**ADJUDGED** that Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255 is DENIED. The movant seeks to vacate his conviction under 18 U.S.C. § 924(c), because conspiracy to commit hostage taking, substantive hostage taking, and kidnapping are no longer valid predicates for § 924(c) convictions. *United States v. Davis*, 139 S. Ct. 2319 (2019). The Government accepts that some of the predicate offenses no longer qualify as crimes of violence, but argues that because the Movant was also convicted of carjacking, which is a crime of violence, he

meet the burden of showing that the jury based its verdict on the non-qualifying predicate offenses instead of the qualifying carjacking offense.

Following *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the Report and Recommendation correctly finds that the Movant cannot show cause for failing to raise the vagueness challenge in his direct appeal. The Magistrate Judge also concludes that even if the Movant can show cause, he fails to show actual prejudice. *Granda* clarified that "actual prejudice means more than just the possibility of prejudice; it requires that the error worked to the petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 1288 (quoting *Fordham v. United States*, 706 F.3d 1345, 1350 (11th Cir. 2013)). The Report and Recommendation concludes the Movant failed to show that the jury was substantially likely to base the conviction in Count 5, the 18 U.S.C. § 924(c) conviction, on the predicate acts in Counts 1-3 and not on the carjacking predicate offense in Count 4. The Magistrate Judge correctly concludes the predicate offenses were inextricably intertwined and all arose from the same operative plan to intercept the victim (a drug dealer) while he was driving back from a fishing trip, rob him, and take his car along with the valuables inside the car. Finally, the Report and Recommendation finds that the Movant cannot show actual innocence, since he was actually guilty of the carjacking, which is a crime of violence.

In his objections, the Movant argues this case is distinguishable from *Granda*. He claims that in 2015 he sought leave to file a second or successive petition, where he tried to raise the vagueness challenge under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Eleventh Circuit denied the request. The Movant, therefore, claims that he can show cause and should not be procedurally defaulted from bringing this *Davis* claim. The procedural default rule, however, does not apply to a movant's attempts to seek leave to file a successive petition. "A defendant

must advance an available challenge to a criminal conviction on *direct appeal* or is barred from raising that claim in a habeas proceeding." *Granda*, 990 F.3d at 1286 (quoting *Fordham*, 706 F.3d at 1349). That Movant tried to raise the challenge in a prior habeas proceeding does not satisfy the procedural default rule's requirement that a movant raise the issue on a direct appeal. Therefore, the Movant's objection is not persuasive. If the Eleventh Circuit found Granda failed to show cause for not raising the issue in his 2009 appeal, the Eleventh Circuit would certainly find the Movant also fails to show cause for not raising the issue five years later in his 2014 direct appeal.

The Movant also objects to the Report's finding that he is not actually innocent. He argues that because three of the predicate offenses no longer qualify as crimes of violence that, in and of itself, establishes a substantial likelihood that the jury relied only on these improper predicates in convicting him for violating § 924(c). The Report and Recommendation discredits this argument because the Movant points to nothing showing the jury distinguished between the alternate predicate offenses, and by stating that like *Granda*, the predicate offenses all stem from the same criminal scheme. For this same reason, the Magistrate Judge correctly finds the Movant cannot prevail on the merits – the invalid and valid predicate offenses are inextricably intertwined. Accordingly, the Court finds it appropriate to adopt the Report and Recommendation and overrule the Movant's objections. It is further

**ADJUDGED** that a certificate of appealability issue as to whether the procedural default rule bars relief in this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th of May 2022.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Lisette M. Reid

Counsel of Record

# APPENDIX D

## AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.