NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

RODOLFO ORTIZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether reasonable jurists could debate whether controlling circuit precedent precludes issuance of a certificate of appealability in a 28 U.S.C. § 2255 proceeding.

2. Whether a movant's procedural default may be excused because his constitutional vagueness challenge was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

3. Whether a general verdict that was obtained in reliance on the unconstitutionally vague residual clause in 18 U.S.C. § 924(c)(3)(B) may be sustained based on the reviewing court's finding that the jury also relied on a valid basis to convict.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Rodolfo Ortiz v. United States, No. 19-23752-Cv-Lenard (Apr. 10, 2023)

Rodolfo Ortiz v. United States, No. 16-23035-Cv-Lenard (Oct. 5, 2018)

Rodolfo Ortiz v. United States, No. 13-21028-Cv-Ungaro (Sept. 9, 2015)

United States v. Rodolfo Ortiz, No. 09-20710-Crim-Lenard (Jan. 24, 2011)

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

United States v. Rodolfo Ortiz, No. 23-11967 (Nov. 16, 2023)

In re Rodolfo Ortiz, No. 19-13167 (Sept. 6, 2019)

In re Rodolfo Ortiz, No. 15-14541 (Oct. 5, 2016)

United States v. Rodolfo Ortiz, No. 12-13283 (March 4, 2013)

United States v. Rodolfo Ortiz, No. 11-10496 (Oct. 28. 2011)

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Rodolfo Ortiz v. United States, No. 15-8182 (Mar. 7, 2016)

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PETITION FOR WRIT OF CERTIORARI

Rodolfo Ortiz respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-11967 in that court on November 16, 2023, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and reproduced in Appendix A-1. The district court's final judgment and opinion are both unreported and reproduced at Appendices A-2 and A-3, respectively. The magistrate judge's report and recommendation is also unreported and reproduced at Appendix A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on November 16, 2023. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The lower court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, &2255.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3) (2012)

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

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

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

Title 28, U.S.C. § 2253(c)

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

* * *

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

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

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

STATEMENT OF THE CASE

Petitioner's jury was instructed that it could rely on any one of four predicate "crimes of violence" to convict him of an 18 U.S.C. § 924(c) offense that added a consecutive life term of imprisonment to his total sentence. Two of those predicates – conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery -- do not qualify as a "crime of violence" under the elements clause in § 924(c)(3)(A). *See, e.g., United States v. Taylor*, 596 U.S. ___. 142 S. Ct. 2015 (2022). And this Court found the residual clause in § 924(c)(3)(B) unconstitutionally vague in *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). Accordingly, neither predicate qualifies under either definition of "crime of violence" in § 924(c)(3).

Nonetheless, the district court relied on controlling Eleventh Circuit precedent, primarily *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022) (No. 21-6171), to deny Petitioner both § 2255 relief and a certificate of appealability (COA). *See* App. A-3. The Eleventh Circuit summarily denied a COA. *See* App. A-1. In the Eleventh Circuit, binding circuit precedent precludes issuance of a COA despite split in the circuits on the question, "because reasonable jurists will following controlling law." *Hamilton v. Sec'y, Fla. Dep't Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (*per curiam*). Controlling circuit authority in the Eleventh Circuit – *Granda* – required rejection of Petitioner's claim, both as procedurally defaulted and on its merits.

To obtain a COA, the petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). The Eleventh Circuit's reliance on controlling circuit authority in *Granda* to deny a COA on whether Petitioner's challenge to his § 924(c) conviction is defaulted and whether he is entitled to § 2255 relief is a perversion of this standard.

For all these reasons, the petition should be granted.

1. The multi-count indictment returned by a grand jury against Petitioner included several firearm offenses. Relevant here is Count 6, which charged Petitioner with a violation of 18 U.S.C. § 924(c) for using, carrying, and possessing a firearm during and in relation to, and in furtherance of a crime of violence and a drug trafficking crime.

2. Count 6 is predicated on Counts 1 through 4 in the indictment. Counts 1 and 2 charged drug trafficking crimes in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 3 charged conspiracy to commit Hobbs Act robbery, and Count 4 charged attempted Hobbs Act robbery, both in violation of 18 U.S.C. § 1951(a). At the time, both conspiracy and attempted Hobbs Act robbery were considered valid predicate "crimes of violence" for Count 6.

3. After the jury found Petitioner guilty on all counts, the district court imposed a consecutive life sentence as to the § 924(c) conviction in Count 6.

4. In 2011, the United States Court of Appeals for the Eleventh Circuit vacated and remanded Petitioner's sentence for reasons not relevant here. *United States v. Rolon*, 445 F. App'x 314, 332 (11th Cir. 2011) (Nos. 11-10391, 11-10496), *cert. denied*, 565 U.S. 1271 (2012) (No. 11-8742). The district court again imposed a consecutive term of life imprisonment on Count 6. The Eleventh Circuit affirmed. *United States v. Rolon*, 511 F. App'x 883 (11th Cir. 2013) (No. 12-13283), *cert. denied*, 571 U.S. 848 (2013) (No. 12-10414).

5. After filing several unsuccessful 28 U.S.C. § 2255 motions, the Eleventh Circuit in 2019 granted in part Petitioner's application for authorization to file a second or successive § 2255 motion and allowed, *inter alia*, his challenge his § 924(c) conviction on Count 6 in light of *Davis*.

6. Thereafter, Petitioner filed a § 2255 motion in the district court raising the *Davis* challenge to his § 924(c) conviction. On August 24, 2021, the district court stayed decision on Petitioner's § 2255 motion pending this Court's decision in *Taylor*. After this Court decided *Taylor*, a magistrate judge recommended that the motion be denied. App. A-4. Over Mr. Ortiz's objections, the district court denied both the motion and a certificate of appealability, App. A-3, and entered final judgment, App A-2.

a. Citing *Granda v. United States*, 990 F.3d 1285 (11th Cir. 2021), a dozen times, the district court relied on that decision to find Petitioner's claims procedurally defaulted because he could not show cause, prejudice or actual innocence. App. A-3: 17-19 (citing *Granda*, 990 F.3d at 1286-92). Alternatively, the district court concluded that *Granda* also required Petitioner's claims to fail on their merits. *Id.* at 20-21

b. Specifically, the district court concluded that Petitioner could not show prejudice to excuse his default because the invalid predicate offenses of conspiracy to commit Hobbs Act robbery and attempted Hobbs Act robbery in Counts 3 and 4 were "inextricably intertwined" with his "valid" drug trafficking predicates in Counts 1 and 2. *Id.* at 19-20. The district court held further that Petitioner could not demonstrate actual innocence excusing default for the same reasons. *See id.* The district court also held that Petitioner's claims failed on the merits under *Granda* because that case was controlling circuit precedent. *Id.*

7. Finally, the district court denied a certificate of appealability (COA), citing *Hamilton v. Sec'y, Dep't of Corr.*, 793 F.3d 1261 (11th Cir. 2015), which holds that a court cannot grant a COA where binding Eleventh Circuit precedent forecloses a claim.

8. Petitioner appealed and moved the court of appeals for a COA. Petitioner specifically sought a certificate on whether the Eleventh Circuit's *Hamilton* rule was a misapplication of this Court's decisions articulating the

standard for granting a COA. He also moved for a COA on whether the Eleventh Circuit's decision in *Granda* required the conclusion that his claims were procedurally defaulted and that § 2255 relief be denied. The Eleventh Circuit summarily denied a COA. See App. A-1. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's rule that a COA may not be granted where binding circuit precedent forecloses a claim conflicts with this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759 (2017) and with the decisions of other circuits holding that a split in the lower courts on an issue warrants a COA.

To appeal the denial of a 28 U.S.C. § 2255 motion, a habeas petitioner must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c). "Until a prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759, 773 (2017). To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard requires the petitioner to "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The ultimate resolution of the issues on appeal is irrelevant. "At the COA stage, the only question is whether the application has shown that 'jurists of reason would disagree with the district court's

resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

In light of this standard, this Court has repeatedly admonished the lower courts that it is error to deny a COA upon a finding that the petitioner's claims lack merit. Most recently in *Buck*, this Court reiterated that because "[t]he COA inquiry . . . is not coextensive with a merits analysis[,] . . . [t]his threshold question should be decided 'without full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). To do otherwise risks resolving the merits of an appeal without the jurisdiction to do so. "'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336-37).

The Eleventh Circuit has adopted a rule that effectively requires that COAs be adjudicated on the merits where there is controlling circuit precedent on the issue on which a COA is sought. Under that rule, a COA may not be granted where binding Eleventh Circuit precedent forecloses a claim. *See Hamilton v. Sec'y, Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015) (holding "no COA should issue where the claim is foreclosed by binding circuit precedent 'because reasonable jurists will follow controlling law.'" (quoting *Gordon v. Sec'y, Dep't of Corr.*, 479 F.3d 1299, 1300

(11th Cir. 2007)), *cert. denied*, 136 S. Ct. 1661 (2016). The Eleventh Circuit holds this to be true even where there is a split in the circuits on the question on which a COA is sought. *See id.* (rejecting circuit-split argument and writing that "we are bound by our Circuit precedent, not by Third Circuit precedent."); *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1171 (11th Cir.), *cert. denied*, 138 S. Ct. 217 (2017) (holding that despite split in the circuits on the issue on which a COA was sought it "need not evaluate that circuit split because [the petitioner's] argument is foreclosed by our binding [precedent] and his attempted appeal does not present a debatable question because reasonable jurists would follow controlling law."). It has therefore failed to heed this Court's repeated warnings that a court should not decline a COA simply because it believes that the petitioner's claim will not prevail on the merits.

In sharp contrast to the Eleventh Circuit's "binding circuit precedent" rule, the Third, Sixth, and Ninth Circuits have all held that adverse circuit precedent does not preclude a COA. To the contrary, in those courts a COA is warranted where there is split in the courts of appeal on the question. *See United States v. Doe*, 810 F.3d 132, 147 (3d Cir. 2015); *Lowe v. Swanson*, 663 F.3d 258, 260 (6th Cir. 2011); *Lambright v. Stewart*, 220 F.3d 1022, 1025-36, 1028-29 (9th Cir. 2000). The Fifth Circuit has granted a COA on a question on which there is a split in the circuits, albeit in an unpublished decision. *See Busby v. Davis*, 677 F. App'x 884, 890-91 (5th Cir. 2017). And this Court has held that a certificate of probable cause, the COA's precursor prior to the Antiterrorism and Effective Death Penalty Act of

1996, must be granted where there is a circuit split on the merits of the underlying claim. *See Lozada v. Deeds*, 498 U.S. 430, 432 (1991).

The Eleventh Circuit's reliance on its "binding circuit precedent" rule burdens petitioners too heavily at the COA stage. As this Court recently stated in *Buck*:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner at the COA stage. *Miller–El*, 537 U.S., at 336–337, 123 S. Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*

Buck, 137 S. Ct. at 774 (brackets and ellipses in original). Thus, a COA should be denied only when the resolution of the petitioner's claim is "beyond all debate." *Welch v. United States*, 578 U.S. 128, 136 S. Ct. 1257, 1264 (2016).

The Eleventh Circuit's *Hamilton* rule essentially requires a merits determination during the COA stage. It precludes the issuance of a COA even though reasonable jurists – including the justices of this Court – are debating the very issue on which a COA is sought. As such, it perverts the standard for the grant of a COA articulated by this Court.

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

II. The Court should resolve the circuit split regarding whether, and under what circumstances, a movant's procedural default may be excused because his constitutional vagueness challenge was "not reasonably available" prior to *Johnson v. United States*, 576 U.S. 591 (2015).

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

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

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

Here, Petitioner's first direct appeal was decided after *James* and *Sykes*, but before *Johnson* and *Davis*. He did not challenge to his § 924(c) conviction on direct appeal, and that challenge was therefore procedurally defaulted. The district court found the Eleventh Circuit's decision in *Granda* compelled it to hold that Petitioner could not show "cause" sufficient to excuse the default and also to deny relief on the merits. *See* App. A-3 at 17-20. Thereafter, the Eleventh Circuit summarily denied a COA. *See* App. A-1.

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

attention of the appellate court is focused on his case." *Reed v. Ross*, 468 U.S. 1, 10 (1984)

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

> First, a decision of this Court may explicitly overrule one of our precedents. . . . Second, a decision may 'overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.'. . . And, finally, a decision may 'disapprov[e] a practice this Court has arguably sanctioned in prior cases.

Id. (citations omitted).

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

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

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

The Seventh Circuit followed *Snyder*, and found cause for a defendant's failure to bring a residual clause challenge under the mandatory guidelines, explaining that "*Johnson* represented the type of abrupt shift with which *Reed* was concerned." *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018).

> Until *Johnson*, the Supreme Court had been engaged in a painful effort to make sense of the residual clause. In *James*, it took the position that the validity of the residual clause was so clear that it could summarily reject Justice Scalia's contrary view in a footnote. That

> footnote provided no argument, noted that the constitutional issue was not even "pressed by James or his *amici*," and took comfort from the broad use of "[s]imilar formulations" throughout the statute books. *James*, 550 U.S. at 210 n.6, 127 S. Ct. 1586. Eight years later, the Court made a U-turn and tossed out the ACCA residual clause as unconstitutionally vague.

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

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

Although the Tenth and Seventh Circuits have held that defendants sentenced before *James* can demonstrate cause under *Reed* for failing to raise a challenge to the residual clause, the Fourth and Sixth Circuits take a more restricted view. Those circuits hold only that defendants whose cases became final after *James* but before *Johnson* can show "cause" for procedural default of a residual

clause challenge. For example, in *United States v. McKinney*, 60 F.4th 188, (4th Cir. 2023), the Fourth Circuit concluded that "[t]he third *Reed* category contemplates precisely the type of novel claim McKinney advances here" because when he was sentenced in 2013, this Court had "affirmatively upheld the constitutionality of residual clauses like the one at issue here." *Id.* at 194 (citing *James* and *Sykes*).

Similarly, the Sixth Circuit "part[ed] ways" with the Seventh and Tenth Circuits in *Gatewood v. United States*, 979 F.3d 391 (6th Cir. 2020), holding that because there was no binding precedent of this Court foreclosing the challenge to the residual clause at the time of the Gatewood's direct appeal, which became final before *James*, he could not show "cause" under *Reed*. *See Gatewood*, 979 F.3d at 397-98 ("In so holding, we part ways with the Seventh and Tenth Circuits, which have concluded that, under *Reed*, *Johnson*'s overruling of *James* and *Sykes* creates cause even for petitioners whose convictions became final before *James* was decided."), *cert. denied*, 141 S. Ct. 2798 (2021). Therefore, in the Sixth Circuit, *Johnson* will provide cause only for defendants whose cases became final after this Court foreclosed the argument in *James*. *See id.* at 397-398 (distinguishing *Raines v. United States*, 898 F.3d 680 (6th Cir. 2018), on this ground).

The Sixth Circuit rejected the argument that a default could be excused based on a "near-unanimous body" of adverse circuit authority. *Id.* at 395 (citations omitted). While "*Reed* did suggest that this species of 'novelty,' later described by the Court as 'futility' could excuse procedural default," the court of appeals found

that *Bousley v. United States*, 523 U.S. 614, 622 (1998), and *Smith v. Murray*, 477 U.S. 527, 536 (1986) have narrowed *Reed* to the point where futility exists only where precedent of this Court forecloses the claim. *See id*. (citations omitted).

> When, at the time of default, a petitioner's argument was foreclosed by Supreme Court precedent, then "[b]y definition, . . . there will almost certainly have been no reasonable basis upon which an attorney ... could have urged a ... court to adopt the position that [the Supreme] Court has ultimately adopted. *Reed,* 468 U.S. at 17, 104 S. Ct. 2901. At that point in time, every court in the country would have been bound to reject the argument. But when, at the time of default, the Supreme Court had not yet foreclosed the argument, the argument was not "[b]y definition" futile, because that that time state courts, lower federal courts, and the Supreme Court itself still remained free to adopt it. *Reed*'s discussion of cases where the Supreme Court "explicitly overrule[s] one of [its] own precedents," *id*., thus must be read as taking for granted that, at the time of default, the precedent that would later be overturned was the law of the land.

Id. at 398. Thus, in the Sixth Circuit, "[a] claim foreclosed by Supreme Court precedent the time of default qualifies as actually futile, whereas a claim foreclosed by lower court precedent does not." *Id*. at 397 (citation omitted).

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

whether the argument is available or not." *Granda*, 990 F.3d at 1286 (quotation omitted). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was available at all." *Id.*

In a 2-1 decision, the Fifth Circuit joined the Eleventh. *See United States v. Soto*, 35 F.4th 979, 995 (5th Cir. 2022). Over a lengthy dissent by Judge W. Eugene Davis, the majority held that a § 2255 movant whose direct appeal was decided after *James* but before *Johnson* could not show "cause" to excuse procedural default for failure to raise vagueness challenge on direct appeal. *Id.* (citing *Granda*, 990 F.3d at 1285-88).

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

As demonstrated above, the Eleventh Circuit's jurisprudence on "cause" for procedural default of *Johnson* and *Davis* claims filed after *James* places it in the minority of a 4-2 split in the circuit courts. Because this case presents an important and recurring question of federal law on which the circuits are divided, the Court should grant review.

III. A conviction obtained in reliance on an unconstitutional ground cannot be sustained based on a reviewing court's finding that the jury additionally relied on one or more valid bases to convict.

This case presents a constitutional question that has been left unresolved by previous decisions of the Court. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Leary v. United* States, 395 U.S. 6, 31-32 (1969) (citing *Stromberg v. California*, 283 U.S. 359 (1931)). In *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*), the Court held that such errors are not structural, and do not require reversal in the absence of prejudice. *Pulido*, however, left the standard by which harmlessness is to be assessed in this context unspecified.

The standard was again left undefined in *Skilling v. United States,* 561 U.S. 358 (2010), after the Court held that one of theories under which the defendant may have been convicted of fraud was invalid. The government argued that error is harmless when a conviction based on a legally invalid theory logically entails conviction on a legally valid theory. The defendant argued that the government

must show that the "conviction rested ***only***" on the legally valid theory. *See Skilling*, 561 U.S. at 414. The Court "[left] this dispute for resolution on remand" *id.,* and the circuits are in disarray.

It is undisputed that the jury in Petitioner's case likely relied on the unconstitutional residual clause to convict him of an offense that added a mandatory consecutive life term to his total sentence. The district court, compelled by the Eleventh Circuit's decision in *Granda*, found the error harmless based on its belief that the jurors must additionally have relied on one or more valid bases to convict. This Court, however, has repeatedly held that a conviction based on both a valid *and* constitutionally invalid theory cannot stand; and there is no reason to believe that *Pulido* undermined those holdings. Nonetheless, the circuits have jettisoned the Court's precedents on this issue, and failed to develop a coherent means of evaluating prejudice in their stead.

The Eleventh Circuit's reasoning in *Granda* raises a host constitutional problems, and conflicts with decisions of the Second and Fifth Circuits, which have applied the modified categorical approach to determine which of multiple alleged predicate offenses formed the basis of a § 924 conviction. *See United States v. Heyward*, 3 F.4th 75 (2d Cir. 2021); *United States v. McClaren*, 13 F.3d 386, 413-14 (5th Cir. 2021). The Court should grant the petition. Alternatively, the Court should hold the petition pending its resolution of the certiorari petition in *Granda*.

A. Prior to 2008, the error in this case would have required reversal.

The rule that a general verdict which "may have rested" on a constitutionally invalid ground must be set aside, dates back at least to *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In *Stromberg*, a 19-year old member of the Young Communist League was convicted of violating a California law that criminalized the display of a flag for any of three specified purposes: "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchist action or as an aid to propaganda that is of a seditious character." *Stromberg*, 283 U.S. at 361. "The charge in the information as to the purposes for which the flag was raised, was laid conjunctively." *Id.* The jury instructions, however, "followed the express terms of the statute and treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named." *Id.* at 363.

The state appellate court doubted the constitutionality of the clause of the statute that prohibited the raising of a flag "as a sign . . . of opposition to organized government," but held that the conviction could be sustained based on the other two clauses. *See id.* at 367. This Court reversed. The jury had returned a general verdict and did not specify which way the statute had been violated. "As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it [was] impossible to say under which clause of the statute the conviction was obtained."

Stromberg, 283 U.S. at 368. The "necessary conclusion" was that, "if any if the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Id.* at 368. Because the Court determined that at least the first clause of the statute was unconstitutional, the conviction was vacated.

The Court applied the same rule to an improper jury instruction in *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part on other grounds, Burks v. United States*, 473 U.S. 1 (1978). There, the jury had been improperly instructed with respect to one object of the conspiracy for which the petitioners were convicted. The government contended "that even if the trial court was mistaken in its construction of the statute, the error was harmless" because the conspiracy charge had embraced a valid objective as well, "and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives." *Id.* at 311. The Court disagreed, finding that the jury instructions were "not sufficiently clear or specific to warrant drawing the inference" that the jury understood it must find both the valid and invalid object in order to convict. *See id.* The jury was required to find only a singular "object or purpose" charged in the conspiracy, and the Court had no way of knowing which object or purpose the jury relied on. The Court further noted that "[t]he character of most of the overt acts alleged associates them as readily with" both the improper and proper object. *Id.* at 312. "In these circumstances," the Court thought the "proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground, but

not another, and it is impossible to tell which ground the jury selected." *Id*. (citing *Stromberg*, 283 at 367-68; *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); and *Cramer v. United States*, 352 U.S. 1 (1945)).

The Court derives two "rules" from *Stromberg*. *See Zant v. Stephens*, 462 U.S. 862, 881 (1983) (holding that *Stromberg* did not require the invalidation of a death sentence under Georgia's capital sentencing scheme, where the jury specifically found three aggravating factors, one of which was legally insufficient to support the death sentence). The first rule "requires that a general verdict must be set aside if the jury was instructed that it could rely upon any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively upon the insufficient ground." *Zant*, 462 U.S. at 881 (citing *Williams*, 317 U.S. at 292; *Cramer*, 325 U.S. at 36 n.45; *Terminello v. Chicago*, 377 U.S. 1, 5-6 (1946); and *Yates*, 354 U.S. at 311-12).

"The second rule derived from *Stromberg*" is that – at least where constitutionally protected conduct is involved – "*Stromberg* encompasses a situation in which the general verdict on a single count indictment or information rested on ***both*** a constitutional and an unconstitutional ground." *Zant*, 462 U.S. at 881-882 (emphasis in original). The rationale is "that when a single-count indictment or information charges the commission of a crime by virtue of the defendant's having done both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the

trial of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together." *Id.* at 881-82 (quoting S*treet v. New York*, 394 U.S. 576, 586-90 (1969)). *See also Thomas v. Collins*, 352 U.S. 516 (1945).

B. The Court has left unresolved whether the "second rule derived from *Stromberg*" survived *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (*per curiam*).

In *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (*per curiam*), the Court clarified that the sort of "alternative theory" instructional error identified in *Stromberg* and *Yates* is not "structural" error. Pulido had been convicted of felony murder. The jury was properly instructed that it could convict if it found that Pulido formed the intent to aid and abet the underlying felony before the murder; but the instructions also erroneously permitted the jury to convict if it concluded that Pulido formed the requisite intent only after the murder. *Pulido*, 555 U.S. at 59. The district court found that the error had a "substantial and injurious effect or influence" on the verdict and granted relief. *Id.* The state appealed to the Ninth Circuit. On appeal, Pulido argued that the district court's analysis was correct under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), but also raised structural error as an alternative ground to affirm. The Ninth Circuit stated that the error was structural and required setting aside the conviction unless the reviewing court "could determine with 'absolute certainty' that the defendant was convicted under a proper theory." *Id*. at 59-60 (internal quotation marks citations omitted).

By the time the case reached this Court, both parties agreed the Ninth Circuit had been wrong to characterize the error as structural. *Id*. at 57. The parties further agreed that "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict' under *Brecht*." *Id*. This Court agreed as well, and remanded the case to the Ninth Circuit for an evaluation of harmlessness. *Pulido*, 555 U.S. at 62.

The Court noted that "[b]oth *Stromberg* and *Yates* were decided before [the Court] concluded in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967), that constitutional errors can be harmless." *Pulido*, 557 U.S. at 60. "In a series of post-*Chapman* cases, however," the Court had "concluded that various forms of instructional errors are not structural error but instead trial errors subject to harmless-error review." *Id*. at 60-61(citing *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1966) (*per curiam*); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986)). The Court saw no reason why a "different harmless-error analysis should govern" review of an instructional error where the jury was instructed on multiple theories of guilt. *Id*. at 61. "In fact, drawing a distinction between alternative-theory error and the instructional errors in *Neder, Roy, Pope,* and *Rose*, would be 'patently illogical,' given that such a distinction 'reduces to the strange claim that, because he jury . . . received both a 'good' charge and a 'bad' charge, the error was somehow more pernicious than . . .

where the ***only*** charge on the critical issue was a mistaken one." *Id.* at 61 (emphasis in original and citations omitted).

The majority rejected Pulido's assertion that the Ninth Circuit had, in fact, engaged in the proper *Brecht* analysis despite its description of the error as "structural." The Court held "[i]n any event," that the "absolute certainty" standard applied by the Ninth Circuit was "plainly inconsistent with *Brecht*." *Id.* at 62. The Court did not, however, provide any further guidance regarding how to assess the impact of an erroneous instruction in the context of a general verdict.

The issue reemerged two years later, in *Skilling v. United States*, 561 U.S. 358, 369 (2010). Skilling had been convicted of crimes related to a scheme to defraud, which Congress had defined to include "a scheme or artifice to deprive another of the intangible right to honest services." *Skilling*, 560 U.S. at 369 n.1. In order to avoid an untenable vagueness problem, the Court limited the definition of "honest-services" fraud to "schemes to defraud involving bribes and kickbacks." 561 U.S. at 368. Skilling had not been alleged to participate in such conduct, and could not validly be convicted under an honest-services theory. "Because the indictment alleged three objects of the in conspiracy," which included an improperly-defined "honest-services" theory alongside two legitimate theories of fraud, the conviction was flawed. *See id.* at 414.

The Court recognized that this did not necessarily require reversal. *See Skilling*, 561 U.S. at 414 (noting that the Court had recently "confirmed . . . that

errors of the *Yates* variety are subject to harmless-error analysis"). The Court declined to resolve, however, how that harmless-error analysis should proceed. Notably, the parties advocated the same diametrically opposed theories of harmless error at issue in this case. Specifically, the government argued that the conviction should be sustained because "any juror who voted for conviction based on [the honest-services theory] also would have found [Skilling] guilty of conspiring to commit securities fraud." *Id.* at 414 (alteration and citation omitted). Skilling argued, by contrast, that the government was required to show "that the conspiracy conviction rested ***only*** on the securities-fraud theory, rather than the distinct, legally-flawed honest-services theory." *Id.* (emphasis in original, citation omitted). The Court did not decide between the two competing theories of harmlessness, and instead "[left] this dispute for resolution on remand." *See id.*

C. The circuits have failed to develop a coherent standard of harmless-error review.

The question remains unanswered, and has taken on renewed significance in the wake of *Davis*. The surge in post-*Davis* litigation has given rise myriad variations of harmless-error review. *Compare United States v. Wilson*, 960 F.3d 136, 151 (3d Cir. 2020) (affirming § 924(c) conviction after determining that "there is no 'reasonable possibility' that the jury based its § 924(c) convictions only" on the invalid predicate) (quotation omitted); *United States v. Eldridge*, 2 F.4th 27, 39 (2d Cir. 2021) (finding no prejudice because a properly instructed jury "would have returned" a guilty verdict); *Reyes v. United States*, 998 F.3d 753, 759 (7th Cir. 2021)

("No rational juror could have concluded that the gun was brandished in furtherance of only the conspirators' agreement to commit a robbery, but not in furtherance of the robbery itself, during which the gun was actually brandished."); *with United States v. Jones*, 935 F.3d 266, 273 (5th Cir. 2019) (finding a "reasonable probability that the jury's verdict would not have been the same" absent the error, where the invalid RICO conspiracy "encompassed conduct beyond the controlled-substance conspiracy"); *United States v. McClaren*, 13 F.4th 386, 414 (5th Cir. 2021) (following *Jones* and vacating where the court could not determine the basis for the conviction); *and United States v. Heyward*, 3 F.4th 75, 85 (2d Cir. 2021) (applying categorical approach and finding plain error where "924(c) conviction may very well have been premised on an unconstitutionally vague provision of that statute").

Significantly, those courts that have found prejudice in this situation have done so, whether expressly or implicitly, through application of the categorical approach. *See Heyward*, 3 F.4th at 81 ("Applying the foregoing analysis and taking into account the specific circumstances of this litigation, we cannot conclude that Heyward's § 924(c) conviction necessarily rested upon either a qualifying drug-trafficking offense or categorical crime of violence."); *Jones*, 936 F.3d at 272 (rejecting the government's assertion of harmlessness were the non-qualifying RICO conspiracy "encompassed a broader range of conduct than the controlled-substance conspiracy, allowing the jury to convict on the § 924 counts based on conduct unrelated to drug trafficking"); *McClaren*, 13 F.4th at 414 ("[W]e cannot determine

whether the jury relied on the RICO or drug-trafficking predicate, and because a RICO conspiracy is not a crime of violence, the basis for the conviction may have been improper.").

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

What these cases show, at a minimum, is that the circuits are in disarray as to the proper standard of harmless error review, where a jury has been instructed on multiple theories of guilt, one of which is invalid. This Court's intervention is needed to bring clarity and uniformity to the law.

D. The decision below is wrong.

In light of this confusion in the circuits, the Eleventh Circuit erred when it summarily denied a COA on the question of whether *Granda* required the denial of § 2255 relief on the merits of Petitioner's constitutional challenge to his § 924(c) conviction. As explained above, the court of appeals denied Petitioner a COA in light of its rule, established in *Hamilton*, that controlling circuit precedent on an issue precludes a COA. The combination of *Granda* and *Hamilton* required the Eleventh Circuit to deny a COA, and it summarily did so. But the confusion in the

circuits described above shows that reasonable jurists could debate the proper standard of harmless error review, where a jury has been instructed on multiple theories of guilt, one of which is invalid. Petitioner has therefore made the showing for a COA this Court articulated in *Miller-El* and *Buck*. The Eleventh Circuit's rejection of a COA on this important question was wrong, and the Court should grant the petition.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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