

*GRANDA v. UNITED STATES: CRIMINAL DEFENDANT FAILS TO OVERCOME
PROCEDURAL BAR*

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In *Granda v. United States*,¹ the United States Court of Appeals for the Eleventh Circuit reviewed the denial of a plaintiff's § 2255 petition after he claimed the jury may have relied on an invalid predicate resulting in the conviction of a "non-existent crime."² Because the plaintiff failed to overcome procedural hurdles and could not prevail on the merits, his assertions regarding the predicate were futile.³ *Granda* reaffirms the notion that, in a criminal conviction, regardless of the likelihood of success an argument may have, the defendant must raise an available challenge on direct appeal or be barred from raising that claim in a habeas proceeding.⁴

In 2007, the plaintiff, Carlos Granda ("Granda"), and his brother met with an undercover detective posing as a drug trafficker who wanted to rob his boss.⁵ The undercover detective disclosed to the brothers the location of a truck with sixty to eighty kilograms of cocaine in Miami.⁶ The brothers and their "criminal crew" dressed as a police S.W.A.T. team to rob the truck, but they were met by police officers when they arrived at the warehouse where they believed the truck was located.⁷ A shootout ensued, resulting in the death of two of Granda's crew members and the injury of two others.⁸ Granda was arrested at a police blockade after attempting to flee the scene.⁹ Granda was charged with seven counts:

[C]onspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (Count 1); attempting to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 (Count 2); conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 3); attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count 4); attempted carjacking, in violation of 18 U.S.C. § 2119 (Count 5); conspiracy to use and carry a firearm

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¹ *Granda v. United States*, No. 17-15194, 2021 WL 923282 (11th Cir. Mar. 11, 2021).

² *Id.* at *1.

³ *Id.* at *10.

⁴ *Id.* at *5 (citing *Fordham v. United States*, 706 F.3d 1345, 1349 (11th Cir. 2013)).

⁵ *Id.* at *1.

⁶ *Id.*

⁷ *Granda*, 2021 WL 923282, at *2.

⁸ *Id.*

⁹ *Id.*

during and in relation to, and to possess a firearm in furtherance of, a crime of violence and drug-trafficking crime, in violation of 18 U.S.C. § 924(o) (Count 6); and possession of a firearm in furtherance of a crime of violence or drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 7).¹⁰

Granda was convicted at trial of counts one through six and acquitted of count seven; the Eleventh Circuit upheld his convictions on direct appeal.¹¹

After several unsuccessful collateral attacks, including an earlier § 2255 petition, Granda was granted leave to file a second § 2255 petition in which he claimed that his 18 U.S.C. § 924(o) conviction must be vacated because the predicate that may have been used for this conviction—conspiracy to commit Hobbs Act robbery—only qualified as a “crime-of-violence predicate” under § 924(c)’s residual clause.¹² Granda argued that under *Johnson v. United States*, “which . . . invalidated a similar residual clause . . . in the Armed Career Criminal Act,” § 924(c)’s residual clause was unconstitutionally vague.¹³ The district court partially adopted a magistrate judge’s Report and Recommendation holding that *Johnson* did not extend to § 924(c)’s residual clause under existing Eleventh Circuit precedent and, even if it did, Granda “failed to meet his burden of proving entitlement to relief under’ [*Johnson*.]”¹⁴ However, Granda was issued a certificate of appealability to assess whether *Johnson* extended to §924(o) and, if so, whether Granda satisfied the requisite burden of proof.¹⁵

After Granda proceeded pro se and filed the current appeal, the Supreme Court decided *United States v. Davis*, which concluded that the § 924(c) residual clause was “unconstitutionally vague.”¹⁶ The Eleventh Circuit began its analysis by noting that it authorized Granda to file a *Johnson* challenge because *Davis* had not yet been decided, but that it was going to apply the precedent set in *Davis* to resolve the *Johnson* challenge.¹⁷ In other words, the court was “applying *Davis* to resolve a pre-*Davis* petition that

¹⁰ *Id.*

¹¹ *Id.* (citing *United States v. Granda*, 346 F. App’x 524, 529 (11th Cir. 2009)).

¹² *Id.* (citing 18 U.S.C. § 924(c)(3)(B) (“defining ‘crime of violence’ in part as a felony ‘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’”).

¹³ *Granda*, 2021 WL 923282, at *2 (citing *Johnson v. United States*, 576 U.S. 591, 597 (2015); 18 U.S.C. § 924(e)(2)(B)(ii)).

¹⁴ *Id.* at *3 (quoting *Granda v. United States*, No. 16-CV-23426-MIDDLEBROOKS/BRANNON, 2017 WL 6554412, at *3 (S.D. Fla. Nov. 1, 2017)).

¹⁵ *Id.*

¹⁶ *Id.* (citing *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019)).

¹⁷ *Id.*

raised a *Johnson* claim”¹⁸ Specifically, Granda challenged his conviction for “conspiracy to use or carry a firearm during and in relation to, and to possess a firearm in furtherance of, a drug-trafficking crime or a crime of violence in violation of 18 U.S.C. § 924(o).”¹⁹ Section 924(c) specifically defines a “drug trafficking crime” as “any felony punishable under the Controlled Substances Act”²⁰ However, § 924(c)’s definition of a “crime of violence” is not as clear:

[A] “crime of violence” means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.²¹

These two subsections are known, respectively, as the “elements clause” and “residual clause.”²²

Because *Davis* invalidated the residual clause, and because the jury was instructed to consider that clause as one of several grounds for his conviction, Granda purported that the mere chance that the jury could have relied on that invalidated clause was enough to warrant vacation of his conviction.²³ The Eleventh Circuit rejected this argument for several reasons.²⁴ The court stated that Granda’s main issue was a procedural default that could be overcome by showing “cause to excuse the default and actual prejudice from the claimed error,” or by showing actual innocence.²⁵ Granda failed to make any such showings.²⁶

First, Granda’s claim was not “sufficiently novel to establish cause” to excuse his procedural default.²⁷ A defendant may excuse their failure to raise a claim when the claim is “so novel” that there is no readily available

¹⁸ *Id.*

¹⁹ *Granda*, 2021 WL 923282, at *4. Section 924(o) provides that “[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both.” 18 U.S.C. § 924(o).

²⁰ *Granda*, 2021 WL 923282, at *4 (quoting 18 U.S.C. § 924(c)(2)).

²¹ *Id.* (quoting 18 U.S.C. § 924(c)(3)).

²² *Id.*

²³ *Id.* at *5 (“The district court told the jury that in order to sustain a conviction on Count 6, they had to find beyond a reasonable doubt that ‘the object of the unlawful plan was to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, one of the federal drug trafficking crimes, or one of the federal crimes of violence, or both, as charged in counts 1, 2, 3, 4, or 5 of the Superseding Indictment.’”).

²⁴ *See id.*

²⁵ *Id.*

²⁶ *Granda*, 2021 WL 923282, at *10.

²⁷ *Id.* at *5–6.

legal basis for it.²⁸ Establishing novelty requires “a sufficiently clear break with the past” such that an attorney could not have reasonably raised the claim.²⁹ The Supreme Court has recognized novelty as cause for failure to raise a claim in three circumstances: when the Supreme Court “explicitly” overrules its own precedent;³⁰ when the Supreme Court overturns a “longstanding and widespread” practice that it was silent on but nearly all lower courts had expressly approved of;³¹ and when the Supreme Court “disapproves of a practice [it] arguably has sanctioned in prior cases.”³² The Eleventh Circuit found that Granda’s claim fit “most neatly” in the third category.³³

At the time of Granda’s direct appeal, his best argument to show that a claim for vagueness was novel was that the Supreme Court in *James v. United States* “had directly rejected the argument that the Armed Career Criminal Act’s residual clause was unconstitutionally vague.”³⁴ However, the Eleventh Circuit rejected this argument because *James* did not consider the § 924(c) residual clause and, contrary to Granda’s argument, Justices Scalia, Stevens, and Ginsburg showed interest in entertaining vagueness challenges to ACCA’s residual clause in their dissent.³⁵ Additionally, there were other defendants after *James* who challenged ACCA’s residual clause on vagueness as well.³⁶ The Eleventh Circuit conceded that the fact few litigants had challenged § 924(c) as being unconstitutionally vague before Granda’s appeal was over “cuts in favor of finding novelty.”³⁷ However, the “behavior of other litigants” is not the sole consideration in determining whether an argument is novel.³⁸ Thus, the Eleventh Circuit held that Granda had legal basis to challenge the § 924(c) residual clause as unconstitutionally vague and was therefore not excused for his failure to raise the issue on direct appeal.³⁹

²⁸ *Id.* at *5 (quoting *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004)).

²⁹ *Id.* at *6 (quoting *Howard*, 374 F.3d at 1072).

³⁰ *Id.* (citing *Reed v. Ross*, 468 U.S. 1, 17 (1984)).

³¹ *Id.* (quoting *Reed*, 468 U.S. at 17).

³² *Granda*, 2021 WL 923282, at *6 (quoting *Reed*, 468 U.S. at 17).

³³ *Id.*

³⁴ *Id.* (citing *James v. United States*, 550 U.S. 192, 210 n.6 (2007)).

³⁵ *Id.* (citing *James*, 550 U.S. at 229–31 (Scalia, J., dissenting)).

³⁶ *Id.* (citing *United States v. Devo*, 457 F. App’x 908, 910 (11th Cir. 2012); *United States v. LaCasse*, 567 F.3d 763, 765 (6th Cir. 2009); *United States v. Spells*, 537 F.3d 743, 753 n.4 (7th Cir. 2008); *United States v. Verner*, 300 F. App’x 435, 435 (8th Cir. 2008); *United States v. Brown*, No. 2:11-cr-30-FtM-29DNF, 2012 WL 39383, at *5 (M.D. Fla. Jan. 9, 2012)).

³⁷ *Id.* at *7.

³⁸ *Granda*, 2021 WL 923282, at *7.

³⁹ *Id.*

Second, Granda failed to show actual prejudice to overcome the procedural default of his vagueness claim.⁴⁰ Actual prejudice “requires that the error worked to the petitioner’s actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”⁴¹ As such, Granda had to show there was at least a “substantial likelihood” that the jury relied on his conspiracy to commit Hobbs Act robbery conviction as a predicate to his 18 U.S.C. § 924(o) conviction.⁴² Because the other offenses Granda was charged with were so “inextricably intertwined,” he was unable to show a substantial likelihood that the jury relied only on the conspiracy to commit Hobbs Act robbery count as a predicate for his 18 U.S.C. § 924(o) conviction.⁴³

Third, Granda failed to show that he was actually innocent of his § 924(o) conviction.⁴⁴ This narrow exception only looks to the “petitioner’s actual innocence rather than his legal innocence.”⁴⁵ Granda would have had to show that “no reasonable juror would have concluded he conspired to possess a firearm in furtherance of any of the valid predicate offenses.”⁴⁶ Because the valid drug-trafficking and crime-of-violence predicates were “inextricably intertwined” with the invalid conspiracy to commit Hobbs Act robbery predicate, it was impossible for Granda to show that his § 924(o) conviction was based on the conspiracy-to-rob predicate.⁴⁷ Because Granda failed to establish cause, actual prejudice, and actual innocence, he could not overcome the procedural bar.⁴⁸

Fourth, the Eleventh Circuit found that, even if Granda was not procedurally barred from bringing his claim, his claim would still fail on the merits.⁴⁹ Granda argued, in part, that, because the general verdict did not reveal which predicate the jury relied on, the Eleventh Circuit should apply the categorical approach and assume that the jury relied on “the least culpable of the alternative offenses,” which Granda argued was the invalid conspiracy to commit Hobbs Act robbery predicate.⁵⁰ The categorical approach only examines the statutory elements used to convict the offender rather than the particular offender’s conduct.⁵¹ Additionally, under this approach, there is

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *Fordham v. United States*, 706 F.3d 1345, 1350 (11th Cir. 2013)).

⁴² *Id.* (quoting *Ward v. Hall*, 592 F.3d 1144, 1178–79 (11th Cir. 2010)).

⁴³ *Id.* at *10 (quoting *United States v. Cannon*, 987 F.3d 924, 948 (11th Cir. 2021)).

⁴⁴ *Granda*, 2021 WL 923282, at *10.

⁴⁵ *Id.* (quoting *Lynn v. United States*, 365 F.3d 1225, 1235 n.18 (11th Cir. 2004)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Granda*, 2021 WL 923282, at *13.

⁵¹ *Id.* at *12 (citing *United States v. Oliver*, 962 F.3d 1311, 1316 (11th Cir. 2020)).

the assumption that the conviction rested on the “‘least of the acts criminalized’ by the statute”⁵² However, rather than the categorical approach, the Eleventh Circuit applied the harmless error standard.⁵³ The harmless error standard states 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.”⁵⁴ The Eleventh Circuit ultimately held that the record did not reflect a “grave doubt” that Granda’s § 924(o) conviction could have been based on an invalid predicate because, again, the underlying facts of the valid predicates overlapped with the invalid, and, thus, any error Granda suffered was harmless.⁵⁵

In *Granda*, the Eleventh Circuit outlined in great detail and with great transparency what is required of a criminal defendant to overturn a conviction, and specifically what is required to overcome a procedural default. This case demonstrates the difficulty inherent in proving the necessary elements, as showing cause for an excuse plus actual prejudice or showing actual innocence can be extremely difficult for criminal defendants. Ultimately, the case affirms the notion that a criminal defendant should raise issues on direct appeal.

⁵² *Id.* (quoting *Oliver*, 962 F.3d at 1316).

⁵³ *Id.* at *10.

⁵⁴ *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015)).

⁵⁵ *Id.* at *11.