No. 19-7369

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Appellee,

v.

MARCUS CRAWLEY

Appellant.

On Appeal from the United States District Court
For the Eastern District of Virginia, Richmond Division
No. 3:07-cr-00488-REP-RCY

OPENING BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

JURISDICTIONAL STATEMENT

Marcus Crawley filed a motion to vacate his sentence under 28 U.S.C. § 2255(a) in the United States District Court for the Eastern District of Virginia on June 6, 2016. JA 56-67.[1] Section 2255(a) granted the district court jurisdiction over the motion. The district court entered its Memorandum Opinion and Order denying Mr. Crawley's motion on September 10, 2019. JA 101. Mr. Crawley timely noted his appeal on September 25, 2019. JA 102; Fed. R. App. P. 4(a)(1). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 2253(a).[2]

STATEMENT OF THE ISSUE

Whether the district court erred in denying Mr. Crawley's 28 U.S.C. § 2255 motion to vacate the sentence for his 18 U.S.C. § 924(c) conviction given that the conviction relied upon the invalid predicate offense of conspiracy to commit Hobbs Act robbery.

[1] "JA" citations are to the Joint Appendix. "SA" citations are to the Sealed Appendix.
[2] Section 2253(c)(1)(B) requires a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). Mr. Crawley's notice of appeal constitutes a request for a certificate of appealability from this Court. *See* Fed. R. App. P. 22(b)(2). Mr. Crawley's case merits the issuance of a certificate of appealability because he has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

STATEMENT OF THE CASE

A. Introduction

In 2016, Marcus Crawley filed a motion to vacate his sentence for an 18 U.S.C. § 924(c) conviction under 28 U.S.C. § 2255 because the conviction relied on an invalid predicate offense. JA 56, 70. Back in 2008, Mr. Crawley pled guilty to conspiracy to interfere with commerce by threats and violence in violation of 18 U.S.C. § 1951(a) ("Hobbs Act Conspiracy") and to using, carrying, and brandishing firearms during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c). JA 23. At the time of the guilty plea, Hobbs Act Conspiracy was a crime of violence that could serve as a predicate for the § 924(c) charge. And though the Government initially charged Mr. Crawley with a drug trafficking offense that also could have served as a predicate for the § 924(c) charge, Mr. Crawley pled not guilty to the drug trafficking charge, and the Government later dismissed it. JA 22, 44.

In his 2016 § 2255 motion, Mr. Crawley asserted that his § 924(c) conviction must be vacated, arguing that Hobbs Act Conspiracy could not qualify as a crime of violence because the residual clause of § 924(c)(3)(B) was unconstitutionally vague. JA 70-77. Before the district court ruled on the motion, this Court and the Supreme Court agreed with this argument and invalidated § 924(c)(3)(B). *See United States v. Simms*, 914 F.3d 229, 236 (4th Cir. 2019) (en banc); *United States v. Davis*, 139

S. Ct. 2319, 2336 (2019). Accordingly, the district court recognized that a Hobbs Act Conspiracy conviction cannot serve as a predicate for a § 924(c) conviction. JA 98. Nevertheless, the district court denied Mr. Crawley's motion based on the theory that his § 924(c) conviction could be predicated on the dismissed drug trafficking charge. JA 96-100.

B. Mr. Crawley's Plea Agreement & Sentencing

In January 2008, a federal grand jury in the Eastern District of Virginia issued a superseding indictment charging 25-year-old Mr. Crawley and two co-defendants with four offenses: Hobbs Act Conspiracy (Count One); attempt to possess with intent to distribute cocaine hydrochloride and cocaine base in violation of 21 U.S.C. § 846 (Count Two); using, carrying, and brandishing firearms during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count Three); and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count Four). JA 14-16. The charges were brought in relation to a home invasion of a drug dealer's residence. Dist. Ct. ECF No. 1 ("Criminal Complaint"). Mr. Crawley pled not guilty to all counts at his arraignment. JA 22. On the day of the arraignment, the district court appointed Robert Edley, Jr., who primarily practiced in the field of tax law, to represent Mr. Crawley. Dist. Ct. ECF No. 34 ("Appointment of Attorney Robert Edley, Jr. for Marcus Crawley"). Mr. Crawley subsequently entered a guilty plea on March 7, 2008 pursuant to an

agreement with the Government. JA 23-36. He pled guilty to Counts One and Three of the superseding indictment:

- Hobbs Act Conspiracy (Count One); and
- Using, carrying, and brandishing firearms during and in relation to a crime of violence and a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count Three). JA 23.

The Government dismissed Counts Two and Four of the superseding indictment:

- X Attempt to possess with intent to distribute a controlled substance (Count Two); and
- X Possession of a firearm by a convicted felon (Count Four). JA 28, 44.

The district court sentenced Mr. Crawley in May 2008. At sentencing, the Government admitted that Mr. Crawley "reach[ed] out shortly after he was arrested in this case and indicated that he wanted to speak to law enforcement and wanted to come clean." SA 52. The Government also conceded that Mr. Crawley "indicate[d] some sense of remorse." SA 52; *see also* SA 14 (Presentence Report stating that Mr. Crawley "demonstrated acceptance of personal responsibility" and "timely provided complete information to the Government concerning his own involvement in the offense"). Mr. Crawley then read a statement in open court expressing his remorse. He fully admitted that what he "did was wrong" and that he "was selfish and [made] a very bad decision." SA 57. He explained that he committed the crime because he was desperate for money as he and his girlfriend were "living in a hotel at the time and about to have a baby." SA 58. Mr. Crawley had "no one to turn to" because his

mother was "a victim of a homicide" and he "had seven murders in [his] family in three years." SA 58. He reiterated that he accepted "full responsibility for [his] actions" and that "[i]f [he] could take it all back, [he] would with no hesitation or thought." SA 58. And in light of all this, Mr. Crawley asked for "mercy" because given the circumstances of his upbringing, he had "been punished for most of [his] life." SA 58.

Without commenting on what Mr. Crawley had just said, the district court adopted the Government's sentencing recommendation. SA 59. It imposed a term of 150 months (12.5 years) in prison for the Hobbs Act Conspiracy conviction (Count One) to be served consecutively with a term of 84 months (7 years) in prison for the § 924(c) conviction (Count Three). JA 45. Mr. Crawley was also sentenced to five years of supervised release following his incarceration. JA 45. At the end of the sentencing hearing, the court informed 25-year-old Mr. Crawley, "[i]f you ever commit any other federal crime, you'll die in prison. That's what's going to happen to you." SA 63. The district court entered its judgment on June 3, 2008. JA 47-52.

Since his sentencing, Mr. Crawley has largely served as his own advocate. Though Mr. Crawley asked Mr. Edley to file an appeal, Mr. Edley never contacted him about doing so and thus no appeal was filed. Dist. Ct. ECF No. 104 ("Motion in Opposition to Government Motion to Dismiss Mr. Crawley's § 2255 Petition"). After he was unable to reach Mr. Edley for years, Mr. Crawley eventually learned

from the district court in 2015 that Mr. Edley was no longer permitted to practice in the district. Dist. Ct. ECF No. 139-2 ("Letter Received as to Marcus Crawley"). Through his own research, Mr. Crawley discovered that Mr. Edley had consented to the Virginia State Bar's revocation of his law license because of multiple disciplinary charges alleging misconduct during the period that Mr. Edley was representing Mr. Crawley in entering his plea agreement. Dist. Ct. ECF No. 151 at 1-2 ("Memorandum in Support re: Motion to Vacate Under 28 U.S.C. § 2255").

C. Mr. Crawley's Motion to Vacate the Sentence for His § 924(c) Conviction Under 28 U.S.C. § 2255

In May 2016, Mr. Crawley moved this Court for permission to file a successive application for relief under 28 U.S.C. § 2255. *In re Marcus Crawley*, No. 16-785 (4th Cir. May 16, 2016), ECF No. 2-2 ("Motion for Authorization to File Successive Habeas Application"). This Court granted the request, finding that Mr. Crawley had made a prima facie showing that the new rule of constitutional law announced in *Johnson v. United States*, 576 U.S. 591 (2015), and found to apply retroactively in *Welch v. United States*, 136 S. Ct. 1257 (2016), may apply to his case. JA 53. Mr. Crawley thereafter filed a § 2255 motion in the district court to vacate the sentence for his § 924(c) conviction, arguing that:

> the predicate offense to which he pleaded guilty, Hobbs Act Conspiracy, did not have as an element the use, attempted use, or threaten[ed] use of physical force required by 18 U.S.C. [§] 924(c)(3)(A) (the "§924(c) force clause"), and that based on [*Johnson*],

> the r[e]sidual clause of 18 U.S.C. §924(c)(3) (the "§924(c) r[e]sidual clause"), was unconstitutionally vague.

JA 70. The Government moved to dismiss Mr. Crawley's § 2255 motion on the theory that it was filed outside of the statute of limitations. JA 79-94. The Government did not address the merits of Mr. Crawley's § 2255 motion.

Mr. Crawley's § 2255 motion remained pending in the district court for nearly three years after the Government filed its Motion to Dismiss. In the intervening time, this Court and the Supreme Court vindicated Mr. Crawley's view that § 924(c)'s residual clause was unconstitutionally vague, and that Hobbs Act Conspiracy could not qualify as a crime of violence under the force clause. *See Simms*, 914 F.3d at 236; *Davis*, 139 S. Ct. at 2336. As a result, when it ruled on Mr. Crawley's § 2255 motion, the district court acknowledged that after *Simms*, Hobbs Act Conspiracy cannot serve as a predicate for a § 924(c) conviction. JA 98.

Despite this, the district court opined that Mr. Crawley's claim "plainly lack[ed] merit." JA 96. It concluded that "[Mr.] Crawley's § 924(c) conviction in Count Three was predicated on <u>both</u> conspiracy to commit Hobbs Act robbery, <u>and</u> on use, carry, and brandish firearms during a drug trafficking crime as charged in Count Two." JA 99 (emphasis in original). The district court noted that the superseding indictment listed the Count One Hobbs Act Conspiracy and Count Two drug trafficking crime as predicates for the § 924(c) charge. JA 99. It also asserted that "the Government provided the factual basis for the guilty plea, and the factual

basis . . . clearly included both the conspiracy to commit Hobbs Act robbery offense charged in Count One and the drug trafficking crime charged in Count Two." JA 99. The district court did not explain how, in its view, the factual basis "clearly included" the dismissed drug trafficking crime. The district court then held that the dismissed drug trafficking charge (Count Two) was a valid predicate for the § 924(c) conviction. JA 99. The district court denied Mr. Crawley's § 2255 motion and a certificate of appealability on September 10, 2019. JA 101. Mr. Crawley timely filed his Notice of Intent to Appeal on September 25, 2019. JA 102.

This Court appointed counsel for Mr. Crawley and identified the issue of particular interest as the "[v]alidity of [Mr. Crawley's] § 924(c) conviction for brandishing firearms during and in relation to conspiracy to commit Hobbs Act robbery and [a] drug trafficking crime." Notice Issued re: Accepting Appointment of Counsel for Appellant 1.

SUMMARY OF THE ARGUMENT

The district court improperly denied Mr. Crawley's § 2255 motion to vacate his sentence for his constitutionally infirm 18 U.S.C. § 924(c) conviction. A § 924(c) conviction like Mr. Crawley's that uses Hobbs Act Conspiracy as the applicable predicate offense is no longer valid, per this Court's decision in *Simms* and the Supreme Court's decision in *Davis*. The Government has acknowledged this in cases that have collaterally attacked § 924(c) convictions that used Hobbs Act Conspiracy as a predicate offense.

The district court recognized that Hobbs Act Conspiracy cannot serve as a predicate for a § 924(c) conviction. But instead of vacating the sentence, the district court improperly searched the record for a reason to sustain it. The Supreme Court has repeatedly held that judges are not permitted to make findings of fact that increase a defendant's punishment. Despite this clear admonition, the district court attempted to retroactively justify Mr. Crawley's § 924(c) conviction by finding Mr. Crawley guilty of the drug trafficking charge that he pled not guilty to and that the Government dismissed. The district court made this finding by looking to superfluous facts accompanying the Plea Agreement, and in so doing, contravened another line of Supreme Court precedent that explains that a defendant only pleads guilty to the elements of a crime, not all of the facts proffered by the Government.

The district court erred by sustaining the sentence for Mr. Crawley's § 924(c) conviction based on a dismissed charge.

Even if the district court could consider the dismissed drug trafficking charge as a predicate, it erred in its analysis of a guilty plea to a conjunctively charged offense. The Government-crafted language of the Plea Agreement rests the § 924(c) charge conjunctively upon the Hobbs Act Conspiracy to which Mr. Crawley pled guilty and the drug trafficking charge to which Mr. Crawley pled not guilty. The drug trafficking charge is more serious than the charge of Hobbs Act Conspiracy, and when dealing with a conjunctively charged offense, this Court has held that the defendant only pleads guilty to the least serious conduct. Thus, if there was any doubt, this Court's precedent makes clear that Mr. Crawley pled guilty only to the less serious Hobbs Act Conspiracy charge, and it was accordingly improper for the district court to find that he was also guilty of the drug trafficking charge in order to sustain the sentence for the § 924(c) conviction.

The district court's decision is also fundamentally unfair. The district court maintained the sentence for the § 924(c) conviction based upon mere speculation that Mr. Crawley acted in a way that justified a conviction for brandishing a firearm in relation to a drug trafficking charge, offending the presumption of innocence and the spirit of the Supreme Court's holding in *Davis*. It was improper for the district

court to revise the Plea Agreement post hoc, especially since any ambiguity in the agreement must be resolved against the Government.

The district court erroneously denied Mr. Crawley's § 2255 motion. This Court should reverse the district court's judgment and vacate the sentence for Mr. Crawley's § 924(c) conviction.

ARGUMENT

Mr. Crawley's Sentence for His § 924(c) Conviction Must Be Vacated Because It Rests Upon an Invalid Predicate Offense and the District Court Erroneously Supported the Conviction with a Dismissed Charge.

This case concerns Marcus Crawley's continued incarceration for a constitutionally infirm conviction. The district court imposed a 150-month (12.5 year) sentence for the Hobbs Act Conspiracy count to be served consecutively with an 84-month (7 year) term for the § 924(c) conviction. JA 45. Mr. Crawley has already been incarcerated for more than 12.5 years and is currently serving the 7-year sentence for the § 924(c) conviction. Because the § 924(c) conviction rests on the Hobbs Act Conspiracy conviction, which is no longer a valid predicate offense, Mr. Crawley filed a § 2255 motion to vacate his sentence for that conviction. JA 56-78. The district court denied the motion, holding that Mr. Crawley's § 924(c) conviction could be predicated upon a dismissed drug trafficking charge. JA 99. Mr. Crawley timely appealed. JA 102. In an appeal from the denial of a § 2255 motion, this Court reviews the district court's legal conclusions de novo. *United States v. Nicholson*, 475 F.3d 241, 248 (4th Cir. 2007).

A. Because Mr. Crawley's § 924(c) conviction relies on the invalid predicate offense of Hobbs Act Conspiracy, his sentence must be vacated.

In March 2008, Mr. Crawley pled guilty to Hobbs Act Conspiracy and to using, carrying, and brandishing firearms during and in relation to a crime of

violence and a drug trafficking crime in violation of § 924(c).[3] JA 23. At the time of the guilty plea, Hobbs Act Conspiracy qualified as a predicate crime of violence under § 924(c)(3)(B)'s now invalidated residual clause. *See Simms*, 914 F.3d at 236.

Mr. Crawley's § 924(c) conviction must now be vacated because it relies on an invalid predicate offense. Under the simplest interpretation of Mr. Crawley's Plea Agreement, his § 924(c) conviction rested on the Hobbs Act Conspiracy charge to which he pled guilty rather than on the dismissed drug trafficking charge. *See United States v. Fentress*, 792 F.2d 461 (4th Cir. 1986) (applying contractual principles in interpreting plea bargains); *United States v. Barefoot*, 754 F.3d 226, 246 (4th Cir. 2014) ("We again keep in mind that all ambiguities in the Plea Agreement are to be construed against the government as its drafter."). But Hobbs Act Conspiracy no longer qualifies as a crime of violence under either the force clause or residual clause

[3] Section 924(c) punishes the use or carry of a firearm "during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(a). The statute defines a "crime of violence" as a federal offense that is a felony and—

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsections (A) and (B) have been commonly referred to as the "force clause" and "residual clause," respectively. Last year in *Davis*, the Supreme Court struck down the residual clause as unconstitutionally vague. *Davis*, 139 S. Ct. at 2336.

of § 924(c). This Court, sitting en banc, recognized in *Simms* that "conspiracy to commit Hobbs Act robbery . . . does not categorically qualify as a crime of violence under the elements-based categorical approach." *Simms*, 914 F.3d at 233. Accordingly, the Government agreed in another case before this Court that "conspiracy to commit Hobbs Act robbery no longer qualifies as a valid § 924(c) predicate." *United States v. Taylor*, No. 19-7616, 2020 WL 6053317, at *1 (4th Cir. Oct. 14, 2020). And the district court similarly acknowledged that Hobbs Act Conspiracy is no longer a valid predicate for a § 924(c) conviction. JA 98-99. Because Mr. Crawley's Hobbs Act Conspiracy conviction has been universally acknowledged to be an invalid predicate offense, Mr. Crawley's sentence for his § 924(c) conviction must be vacated.

B. Because the district court erred in searching the record to save Mr. Crawley's sentence from the proper application of precedent, his sentence must be vacated.

Despite the fact that Mr. Crawley's § 924(c) conviction rested on an invalid predicate, the district court refused to vacate his sentence and order his release. Instead of looking at the face of the Plea Agreement to determine whether the sentence for the § 924(c) conviction could stand, the district court scoured the record to find a way to support Mr. Crawley's conviction. The district court declined to vacate Mr. Crawley's sentence for his § 924(c) conviction based on the reasoning that "[i]n the Statement of Facts supporting the guilty plea, the Government provided

the factual basis for the guilty plea, and the factual basis for the § 924(c) charge clearly included both the [Hobbs Act Conspiracy] charged in Count One and the drug trafficking crime charged in Count Two." JA 99. Notably, the district court did not spell out how the facts accompanying the Plea Agreement supported a drug trafficking charge**.** Nevertheless, the district court concluded that "[Mr.] Crawley's § 924(c) conviction remains valid because it also rests on the drug trafficking crime charged in Count Two," JA 99, even though the Government dismissed that charge.

The district court erred by looking past the Plea Agreement and searching the Statement of Facts to uphold Mr. Crawley's sentence for his § 924(c) conviction for four reasons. One, the district court's improper factfinding resulted in its holding that Mr. Crawley was guilty of a crime that was not proven beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 114-16 (2013). Two, the district court improperly relied on the Statement of Facts accompanying the Plea Agreement to support the § 924(c) conviction when the Supreme Court has made clear that a defendant pleads guilty only to the elements of the charged offense, not every fact proffered by the prosecution. *Descamps v. United States*, 570 U.S. 254, 269-70 (2013). Three, Mr. Crawley pled guilty to a charge which alleged conjunctively the disjunctive components of § 924(c) and accordingly admitted only to Hobbs Act Conspiracy, the less serious of the disjunctive statutory conduct. *United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012). Finally, four, the district court's

upholding Mr. Crawley's § 924(c) conviction based on a charge to which he pled not guilty and which was subsequently dismissed was fundamentally unfair.[4] This Court should reverse the district court's decision and vacate the sentence for Mr. Crawley's § 924(c) conviction.

1. *The district court engaged in impermissible factfinding to hold that Mr. Crawley was guilty of a crime that was not proven beyond a reasonable doubt.*

The Supreme Court has held that it is improper for district courts to engage in factfinding that increases a defendant's punishment, as that arrogates power to the judge that is constitutionally reserved to the jury. *Alleyne*, 570 U.S. at 114-16. As the Court held in *Alleyne*, a case involving a § 924(c) conviction: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114-15. In *Alleyne*, the defendant objected to judicial factfinding that increased his mandatory minimum sentence from five to seven years, and the Supreme Court agreed that the factfinding was improper. *Id.* at 104, 115. There, the jury convicted the defendant of a § 924(c) charge, expressly finding that he used or carried a firearm as part of a crime of violence; the jury did not expressly find that he had brandished a firearm. *Id.* at 104. Section 924(c) provides for a mandatory

[4] Because the district court did not request briefing on the grounds for its decision, the district court did not consider any of these arguments or lines of precedents when dismissing Mr. Crawley's motion.

minimum sentence of five years for using or carrying a firearm, but the district court judge found that "the evidence supported a finding of brandishing" a firearm—not just using or carrying one—which instead carries a mandatory minimum sentence of seven years. *Id.* It was this judicial finding of fact that the *Alleyne* Court deemed improper; "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range . . . ." *Id.* at 115.

Here, the district court found facts that increased Mr. Crawley's applicable punishment, thus violating *Alleyne*. It concluded that the drug crime had been sufficiently proven to serve as a § 924(c) predicate, despite Mr. Crawley's plea of not guilty to the charge and the Government's dismissal of the charge. JA 22, 44, 99. Just as the judicial determination that Alleyne had brandished a firearm increased his minimum sentence, the district court's factual determination that Mr. Crawley was guilty of a drug offense that could serve as a predicate for his § 924(c) conviction increased his punishment: without the district court's determination that the drug charge was sufficiently proven, Mr. Crawley's sentence for his § 924(c) conviction would have had to have been vacated and the district court would have had to order his release from prison. Therefore, the district court's finding that Mr. Crawley was guilty of a drug trafficking offense increased Mr. Crawley's punishment by the

mandatory seven-year term for the § 924(c) conviction, which must be served consecutively with any other sentence. JA 48.

The Eleventh Circuit relied on *Alleyne* to denounce the same type of judicial factfinding that occurred here. *See In re Gomez*, 830 F.3d 1225 (11th Cir. 2016). The defendant in *Gomez* filed an application to file a successive § 2255 motion based on an argument that under *Johnson*, his § 924(c) sentence must be vacated because it rested on an invalid predicate. *Id.* at 1226. In that defendant's case, the jury had returned a general verdict form without specifying whether the § 924(c) conviction rested upon a Hobbs Act robbery charge, a Hobbs Act conspiracy charge, or a drug trafficking charge. *Id.* at 1227. The *Gomez* court explained that "a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all . . . predicate offenses, or guilty of conspiring during some and not others." *Id.* "An indictment that lists multiple predicates in a single § 924(c) count" makes it possible for a defendant's "minimum [sentence] to be increased" without a clear, unanimous verdict from the jury, and such an increase would be contrary to what *Alleyne* requires. *Id.* While the Eleventh Circuit remanded the case to the district court for it to decide in the first instance whether to grant relief, the *Gomez* court made clear that a court is prohibited from using trial or sentencing documents to guess which predicate offense supports a § 924(c) conviction because "*Alleyne*

expressly prohibits this type of 'judicial factfinding' when it comes to increasing a defendant's mandatory minimum sentence." *Id.* at 1228.

The district court in this case did exactly what the Eleventh Circuit warned against in *Gomez*, and sustained Mr. Crawley's sentence for his § 924(c) conviction by engaging in "judicial factfinding" based on nothing more than trial court documents. *Id.* The district court rested Mr. Crawley's § 924(c) conviction upon a drug trafficking charge that he pled *not guilty* to. The district court did so because, like in *Gomez*, Mr. Crawley's indictment "lists multiple predicates in a single § 924(c) count." *Id.* at 1227. But as the *Gomez* court reasoned, *Alleyne* prohibits judges from "mak[ing] a guess" about which predicate offense supported a conviction using "documents from [a defendant's] trial or sentencing." *Id.* at 1228. Here, there was no need to guess which predicate offense supported Mr. Crawley's § 924(c) conviction because he pled guilty to Hobbs Act Conspiracy, which was a valid predicate at the time of the guilty plea but is no longer valid after the Supreme Court's ruling in *Davis*. Despite this, the district court used the Statement of Facts accompanying the Plea Agreement to speculate that Mr. Crawley's § 924(c) conviction could also be supported by the dismissed drug trafficking charge, thereby engaging in the exact type of judicial factfinding *Alleyne* forbids. *Id.* at 1227. The district court erred by searching the record as part of its mission to avoid vacating Mr. Crawley's mandatory seven-year sentence for the § 924(c) conviction.

2. The district court improperly relied on the Statement of Facts even though the Supreme Court has made clear that a defendant pleads guilty only to the elements of the charged offense.

The Supreme Court has also made clear that a district court cannot rely on a Plea Agreement's Statement of Facts to impose additional punishment. Mr. Crawley entered a plea of guilty to Count Three of the indictment, JA 23, which charged him with using, carrying, and brandishing firearms during and in relation to a crime of violence and a drug trafficking crime in violation of § 924(c). JA 15-16. However, contrary to the language in the indictment, 18 U.S.C. § 924(c)(1)(A) punishes the use or carrying of a firearm "during and in relation to any crime of violence *or* drug trafficking crime" (emphasis added). Thus, § 924(c) sets forth two separate offenses. *See Gomez*, 830 F.3d at 1227 (explaining that § 924(c) provides crimes of violence and drug trafficking crimes as alternative predicate offenses and that § 924(c) charges based on distinct predicates would charge separate offenses). And proof of the type of predicate crime needed to establish one offense does not suffice as proof of the other—each offense "requires proof of an additional fact which the other does not." *United States v. Martin*, 523 F.3d 281, 291 (4th Cir. 2008) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)) (discussing when statutory provisions set forth separate offenses in the context of double jeopardy analysis). For example, a prosecutor seeking a conviction for carrying a firearm during and in relation to a drug trafficking crime would have to prove that the defendant committed

a drug trafficking crime, but this fact would not be necessary to obtain a conviction for carrying a firearm during and in relation to a crime of violence.

Accordingly, Count Three of the indictment suffers from the "infirmity" of being "duplicitous" in that it charged Mr. Crawley with two distinct offenses—carrying a firearm in relation to a crime of violence and carrying a firearm in relation to a drug trafficking crime. *See Gomez*, 830 F.3d at 1227 (criticizing an indictment that was framed similarly). The district court seemed to acknowledge that Count Three was duplicitous when denying Mr. Crawley's § 2255 motion, writing the "§ 924(c) conviction in Count Three was predicated on both conspiracy to commit Hobbs Act robbery, and on use, carry, and brandish firearms during a drug trafficking crime as charged in Count Two." JA 99 (emphasis in original).

But Mr. Crawley only pled guilty to a single violation of § 924(c) and one predicate offense: Hobbs Act Conspiracy. He did not plead guilty to using, carrying, and brandishing firearms during a Hobbs Act Conspiracy *and* to using, carrying, and brandishing firearms during a drug trafficking crime as the district court held. In fact, Mr. Crawley pled *not guilty* to the drug trafficking crime in Count Two, JA 22, and the Government dismissed the charge. JA 28. And because the commission of a drug trafficking crime was not necessarily an element of Mr. Crawley's § 924(c) conviction given that he had pled guilty to what was then a predicate crime of violence, the district court could not rely on the Statement of Facts to find that Mr.

Crawley was guilty beyond a reasonable doubt of a predicate drug trafficking charge.[5] Indeed, the district court did precisely what the Supreme Court admonished against in *Descamps*, 570 U.S. 254.

In *Descamps*, the Court noted that "when a defendant pleads guilty to a crime, he waives his right to a jury determination of *only* that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Id.* at 270 (emphasis added). Otherwise, judges would be able to impose sentences based upon facts not proven beyond a reasonable doubt. *Id.* at 269-70. In the view of the *Descamps* Court, judicial factfinding raises "Sixth Amendment concerns . . . from sentencing courts' making findings of fact that properly belong to juries." *Id.* at 267. "The Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . facts[] unanimously and beyond a

[5] This case is accordingly distinguishable from any case in which the Government set forth multiple predicates to support a conviction of a single § 924(c) offense. For example, before *Simms* and *Davis*, the Government may have offered evidence that a defendant committed conspiracy to commit Hobbs Act robbery and substantive Hobbs Act robbery in order to obtain a § 924(c) conviction on brandishing firearms during and in relation to a crime of violence. All of this evidence would be relevant to proving an element of that offense: the commission of a crime of violence. *See United States v. Cannon*, 778 F. App'x 259, 260-61 (4th Cir. 2019) (per curiam) (unpublished) (finding no plain error on a direct appeal of the district court's determination that there was a sufficient factual basis for the defendant's guilty plea to a § 924(c) charge predicated on Hobbs Act conspiracy and substantive Hobbs Act robbery when the stipulated facts established that he committed the substantive robbery).

reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense . . . .” *Id.* at 269-70.

Despite the holding in *Descamps*, the district court engaged in judicial factfinding, looking beyond the elements of the offenses to which Mr. Crawley pled guilty to find that the facts set forth in Statement of Facts also supported a drug trafficking conviction, without explaining how they did so. JA 99. Since this factfinding increased Mr. Crawley’s sentence—his § 924(c) sentence would have otherwise been vacated—the district court could only use the facts supporting any alleged drug trafficking charge if they were proven beyond a reasonable doubt. The district court nonetheless looked to what Mr. Crawley said about “superfluous facts” set forth with the Plea Agreement to find a predicate to justify the continuing validity of the § 924(c) conviction. *Id.* at 270.

Supreme Court precedent forecloses this, since as the *Descamps* Court noted, plea agreement documents “will often be uncertain,” and “the statements of fact in them may be downright wrong.” *Id.* at 270. The Court again emphasized this point in *Mathis v. United States*, noting that “[s]tatements of ‘non-elemental fact’ . . . are prone to error.” 136 S. Ct. 2243, 2253 (2016). “[A]t plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’ . . . Such inaccuracies should not come back to haunt the defendant many years down the road . . . .” *Id.* (quoting *Descamps*, 570 U.S. at

270). The district court therefore erred by engaging in judicial factfinding, looking to the unreliable Statement of Facts to deny Mr. Crawley's § 2255 motion in violation of his constitutional rights.

The only case the district court relied on to support its decision was *United States v. Hare*, but *Hare* is inapposite. 820 F.3d 93 (4th Cir. 2016). In *Hare*, this Court upheld § 924(c) convictions predicated on a crime of violence and a drug trafficking crime when the jury's special verdict form clearly showed that it had "found [the] Appellants guilty of possessing a firearm in furtherance of both crimes." *Id.* at 106. It was therefore irrelevant whether the crime of violence at issue in *Hare* could support a § 924(c) conviction because a jury had explicitly found the appellants guilty of possessing a firearm in furtherance of the predicate drug trafficking crime that it had also convicted them of committing. *Id.* at 105-06. This Court highlighted the significance of the special verdict form, noting that "[a] general verdict . . . should be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." *Id.* at 106 (alterations in original) (quoting *United States v. Najjar*, 300 F.3d 466, 480 n.3 (4th Cir. 2002)). In *Hare*, there was proof beyond a reasonable doubt that the defendant was guilty of a valid predicate. *Compare United States v. Crump*, 120 F.3d 462, 466 (4th Cir. 1997) (holding that a defendant does not have to be convicted of a valid predicate offense so long as "the evidence was sufficient

to permit the jury to find [him guilty of the predicate] beyond a reasonable doubt"). But in this case, Mr. Crawley pled not guilty to and the Government dismissed the predicate drug trafficking charge the district court later found him guilty of committing in order to save the sentence for the § 924(c) conviction. The proof beyond a reasonable doubt of a valid predicate offense that this Court found important in *Hare* is lacking here, and *Descamps* and *Mathis* prohibited the district court from relying on superfluous statements of fact in place of that proof.

3. Even if the district court could consider the dismissed drug trafficking charge as a predicate, Mr. Crawley pled guilty to a charge which alleged § 924(c)'s disjunctive components conjunctively and accordingly admitted only to Hobbs Act Conspiracy, the less serious conduct.

The Plea Agreement makes clear that Mr. Crawley only pled guilty to one predicate for his § 924(c) conviction—Hobbs Act Conspiracy, which is now clearly invalid. JA 23; *Simms*, 914 F.3d at 236. But even if there was a question as to this point, this Court has held "when a defendant pleads guilty to a formal charge in an indictment which alleges conjunctively the disjunctive components of a statute, the rule is that the defendant admits to the least serious of the disjunctive statutory conduct." *Chapman*, 666 F.3d at 228. And this Court has rejected the argument that a defendant who pleads guilty to allegations charged conjunctively necessarily admits to each allegation. *United States v. Vann*, 660 F.3d 771, 774-75 (4th Cir. 2011) (en banc) (per curiam) (explaining that a guilty plea admits only to the elements of "the least serious of the disjunctive statutory conduct, not the entirety of

the conduct alleged in the conjunctive"). Mr. Crawley pled guilty to using, carrying, and brandishing firearms during and in relation to a crime of violence and a drug trafficking crime—alleged in the conjunctive, JA 23, when 18 U.S.C. § 924(c)(1)(A) punishes such conduct during and in relation to any crime of violence *or* drug trafficking crime—phrased in the disjunctive. Therefore, under the reasoning of *Vann* and *Chapman*, he admitted only to the less serious of the disjunctive statutory conduct, which in this case is Hobbs Act Conspiracy.

Mr. Crawley's Hobbs Act Conspiracy conviction required "the Government [to] prove only that [he] agreed with another to commit actions that, if realized, would violate the Hobbs Act." *Simms*, 914 F.3d at 233-34. The dismissed drug trafficking crime alleged in Count Two of the indictment would have required the Government to prove more than agreement, and establish that Mr. Crawley intended to commit a crime and "undertook a direct [and substantial] act in a course of conduct planned to culminate in his commission of the crime . . . ." *United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003). Because Mr. Crawley's Hobbs Act Conspiracy charge only required proof of an agreement and the attempted drug trafficking crime would have required proof of a substantial act that was "strongly corroborative of the defendant's criminal purpose," *id.*, Hobbs Act Conspiracy is the less serious conduct.

A look at the statutory penalties set by Congress only confirms that Hobbs Act Conspiracy is less serious than the dismissed drug trafficking charge. A Hobbs Act Conspiracy conviction has no mandatory minimum, but a statutory maximum of twenty years. 18 U.S.C. § 1951(a). The drug trafficking crime charged in Count Two had a statutory mandatory minimum of ten years and a statutory maximum of life in prison. 21 U.S.C. § 841(b)(1)(iii) (2006).[6] Congress did not find it necessary to require a person who commits Hobbs Act Conspiracy to spend any amount of time in prison, but someone who attempts to possess certain quantities of controlled substances with the intent to distribute them must be imprisoned for at least ten years. This clearly evinces that Congress viewed the drug trafficking crime as more serious. Because Hobbs Act Conspiracy is the less serious conduct, it is the conduct that Mr. Crawley admitted to in his guilty plea under the rule announced in *Vann* and applied in *Chapman*. *Vann* and *Chapman* further prove that the district court erred in upholding Mr. Crawley's sentence for his § 924(c) conviction based on the dismissed drug trafficking charge.

[6] At the time of Mr. Crawley's indictment, 21 U.S.C. § 841(b)(1)(iii) (2006) provided that the penalty for possessing with the intent to distribute more than 50 grams of a mixture containing cocaine base was to "not be less than 10 years or more than life."

4. *It was fundamentally unfair for the district court to uphold Mr. Crawley's sentence for the § 924(c) conviction based on a predicate to which he pled not guilty and which was subsequently dismissed.*

Finally, what the district court did here was fundamentally unfair. The district court justified the continuing validity of the § 924(c) conviction based upon a dismissed offense—Count Two of the indictment—to which Mr. Crawley pled not guilty. This offends the spirit of the Supreme Court's holding in *Davis*. Writing for the Court, Justice Gorsuch explained in *Davis* that "[i]n our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty." 139 S. Ct. at 2335. In our criminal justice system, defendants are presumed innocent until proven guilty. *See, e.g.*, *Coffin v. United States*, 156 U.S. 432, 459 (1895) ("[E]very man is presumed to be innocent until his guilt is proved beyond a reasonable doubt."). Yet the district court improperly maintained Mr. Crawley's § 924(c) conviction and the accompanying seven years in prison based upon a "speculative possibility" that Mr. Crawley *might* have acted in a way that justified a conviction on a § 924(c) offense predicated on Count Two. *Davis*, 139 S. Ct. at 2335.

What the district court did was doubly improper because it contradicted the terms of Mr. Crawley's Plea Agreement. The district court's assertion that "the factual basis for the § 924(c) charge clearly included both . . . Count One and . . . Count Two," JA 99, is unavailing when the binding terms of the Plea Agreement

required the Government to dismiss Count Two. JA 28. By pleading guilty to Counts One and Three and not guilty to Counts Two and Four, Mr. Crawley—acting on advice of his court-appointed (and now unlicensed) counsel—assented to the actual terms of the Plea Agreement, not some future court's hypothetical construction of the Plea Agreement. The Government is the master negotiator of all plea deals, and it was improper for the district court to revise the Government's agreement post hoc, especially because any ambiguity in a plea agreement must be resolved *against* the Government. As this Court explained, "constitutional . . . concerns require holding the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements." *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986); *see also Barefoot*, 754 F.3d at 246.

The most straightforward interpretation of the Plea Agreement makes clear that the predicate for the § 924(c) conviction was the Hobbs Act Conspiracy conviction. The Government is bound by that bargain. Moreover, because the Government agreed in the Plea Agreement to refrain from further prosecuting Mr. Crawley for the conduct described in the Superseding Indictment or Statement of Facts, JA 27, the district court could not fairly search the Statement of Facts to try to find proof of a dismissed charge. The district court erred by resting the § 924(c) conviction on the dismissed drug trafficking charge to evade the otherwise inevitable conclusion that Mr. Crawley's seven-year sentence for his § 924(c) conviction must

be vacated. Supreme Court precedent, this Court's precedent, and fundamental fairness require vacatur of Mr. Crawley's sentence.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below denying Mr. Crawley's § 2255 motion and order the district court to vacate his sentence for the § 924(c) conviction and appoint counsel for any further proceedings.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal and Local Rules of Appellate Procedure, Mr. Crawley respectfully requests that oral argument be granted in this case. The legal issue presented is sufficiently important and complex that oral argument would aid this Court in its decisional process.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 13,000 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 7,355 words.

Daniel S. Harawa (Counsel of Record)

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2020, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

Daniel S. Harawa (Counsel of Record)