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

REPLY BRIEF OF THE APPELLANT

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INTRODUCTION

Marcus Crawley pled guilty to two crimes: (1) conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) ("Hobbs Act Conspiracy"), and (2) using, carrying, and brandishing a firearm in relation to a crime of violence or drug trafficking crime in violation of 18 U.S.C. § 924(c). At the time of his guilty plea, Hobbs Act Conspiracy was a "crime of violence" that could serve as a predicate for a § 924(c) conviction. But since this Court's ruling in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), and the Supreme Court's ruling in *United States v. Davis*, 139 S. Ct. 2319 (2019), Hobbs Act Conspiracy can no longer serve as a predicate for a § 924(c) conviction. The Government concedes as much in its brief, Appellee's Brief at 25, and the district court admitted so below. JA 99.

The Government also charged Mr. Crawley with a drug trafficking crime that *could* have supported his § 924(c) conviction. JA 16 (indictment setting forth Hobbs Act Conspiracy charge and attempted drug trafficking charge as predicates for the § 924(c) count). But Mr. Crawley pled *not* guilty to this charge, and the Government dismissed it under the Plea Agreement. When Mr. Crawley challenged his § 924(c) conviction arguing it rested on an invalid predicate, the district court, rather than vacate Mr. Crawley's sentence, scoured the Statement of Facts proffered by the Government and found that based on those facts, Mr. Crawley was also guilty of the

dismissed trafficking charge, and thus his "§ 924(c) conviction remains valid." JA 99.

This Court should vacate Mr. Crawley's sentence for his § 924(c) conviction. The district court sustained the § 924(c) conviction by finding Mr. Crawley guilty of a crime that was not proven beyond a reasonable doubt, in clear contravention of *Alleyne v. United States*, 570 U.S. 99, 114-16 (2013). In so doing, the district court relied solely on the Statement of Facts in spite of the Supreme Court's admonition that a defendant pleads guilty only to the elements of the charged offense, not every fact proffered by the prosecution. *See Descamps v. United States*, 570 U.S. 254, 269-70 (2013). Moreover, in a situation where there are two potential predicates for a conviction, as is the case here, this Court's precedent makes clear that a defendant admits to only the less serious conduct, which in this case was the Hobbs Act Conspiracy charge. *See United States v. Vann*, 660 F.3d 771, 774-75 (4th Cir. 2011) (en banc) (per curiam). Ultimately, the Government structured a plea agreement that included a constitutionally infirm charge with an invalid predicate. And as this Court declared last month, "if one predicate offense does not qualify, [it] would be required to vacate the conviction." *United States v. Runyon*, __ F.3d __, No. 17-5, 2020 WL 7635761, at *4 (4th Cir. Dec. 23, 2020). Fundamental fairness requires the sentence Mr. Crawley received for the § 924(c) charge to be vacated.

Mr. Crawley served his sentence for his Hobbs Act Conspiracy conviction. He is now sitting in prison—during a deadly pandemic—for a § 924(c) conviction that no longer has a valid predicate. This Court should vacate the sentence and order Mr. Crawley's immediate release.

ARGUMENT

A. The Government waived its procedural default argument and, in any event, it's meritless.

To avoid Mr. Crawley's claim that he is currently incarcerated on an invalid charge, the Government argues that Mr. Crawley procedurally defaulted his claim challenging his § 924(c) conviction. The Government admits that it did not raise this argument below. *See* Appellee's Br. at 11. This Court should find it waived.

The Supreme Court has held that procedural default is "not a jurisdictional matter." *Trest v. Cain*, 522 U.S. 87, 89 (1997). Thus "procedural default is normally a defense that the [Government] is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Id.* (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996)) (cleaned up). Like any other claim, because the Government did not raise procedural default in the district court, it should not be considered for the first time on appeal. *See, e.g.*, *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014) (explaining that this Court does not consider issues raised for the first time on appeal absent exceptional circumstances). Indeed, many of this Court's sister circuits have expressly held that the Government waives a procedural default argument if it does not raise it in the district court. *See, e.g.*, *Sotirion v. United States*, 617 F.3d 27, 32 (1st Cir. 2010) ("[A]s the government concedes, it did not raise this procedural default argument in the district court, and the district court did not dismiss Sotirion's § 2255 petition on this basis. Because the government failed to raise procedural

default as a defense to Sotirion's § 2255 petition, we deem it waived."); *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018) ("In Cross's case, the government waived its procedural default argument vis-à-vis Cross by failing to assert it adequately in the district court."); *United States v. Canady*, 126 F.3d 352, 360 (2d Cir. 1997) ("[B]ecause the government failed to raise its procedural default defense in the district court, it is precluded from doing so now."); *Shukwit v. United States*, 973 F.2d 903, 904 (11th Cir. 1992) ("[T]he government did not raise the procedural bar issue in the district court. Therefore, the government has waived its right to argue procedural default on appeal."); *United States v. Drobny*, 955 F.2d 990, 995 (5th Cir. 1992) ("To invoke the procedural bar, however, the government must raise it in the district court.").

Here, the Government had ample opportunity to raise its procedural default defense in district court—Mr. Crawley's motion was pending for three years before the district court rendered a decision. Because the Government did not raise this defense below, this Court should find it waived.[1]

[1] The Government cites *United States v. Fugit*, 703 F.3d 248 (4th Cir. 2012) for the proposition that "the United States may defend a judgment on a ground such as procedural default, even if not relied upon by the district court." Appellee's Br. at 11. However, *Fugit* simply held that "the reference to 'stipulated conduct' in the certificate [of appealability did] not constrain [this Court's] consideration of [the defendant's] claim in view of all of the evidence in the record." *Id.* at 257. *Fugit* did not hold that the Government can raise a procedural default defense for the first time on appeal. In fact, *Fugit could not* have held this, as there, the district court addressed

But even if this Court were to consider the Government's procedural default claim, it fails because Mr. Crawley can show both "cause" and "prejudice," thereby excusing any alleged default.[2]

A habeas petitioner's procedural default is excused if he can demonstrate the "cause" for the default as well as "prejudice" arising from the default. *Murray v. Carrier*, 477 U.S. 478, 485 (1986). A petitioner shows "cause" by demonstrating that the claim asserted was "not reasonably available to [trial or direct appeal] counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984). One way to satisfy the "cause" requirement is by showing the Supreme Court created a new constitutional rule by overruling its prior precedent. *Id.* at 17.

It is well-established that *Johnson v. United States*, 576 U.S. 591 (2015), announced a new rule of constitutional law by invalidating the Armed Career Criminal Act's residual clause as unconstitutionally vague. This rule was later found to be retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016). A new rule of constitutional law was likewise announced in *Davis*, 139 S. Ct. at 2336, when the Supreme Court, following *Johnson*, invalidated 18 U.S.C. § 924(c)'s similar residual

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procedural default and found "several [of the claims] were procedurally defaulted." *Id.* at 252.

[2] The Government raised this exact procedural default argument in *United States v. Taylor*, 978 F.3d 203 (4th Cir. 2020). *See* Brief of the United States at 23-41, *United States v. Taylor*, 978 F.3d 203 (4th Cir. 2020) (No. 19-7616), 2020 WL 2501177. This Court apparently found the argument so insubstantial that it did not even feature in the opinion.

clause, under which Mr. Crawley's Hobbs Act Conspiracy charge had qualified as a predicate for his § 924(c) conviction.

Johnson and its progeny represented a stark reversal from the Supreme Court's prior precedent. In *James v. United States*, 550 U.S. 192, 210 n.6 (2007), the Court explicitly held that the residual clause later struck down in *Johnson* was *not* void for vagueness. Therefore, any constitutional challenge to the ACCA residual clause, or the almost-identically worded § 924(c) residual clause, was foreclosed by *James*.

The Government fails to recognize that, at the time that his conviction became final, Mr. Crawley's argument, which is rooted in *Johnson* and *Davis*, was not "available" in any sense of the word. Mr. Crawley was indicted in January of 2008, and the district court entered its judgment in his case in June of 2008. JA 14-17; 47.[3] The previous year, the Supreme Court had issued its decision in *James* explicitly foreclosing the arguments that Mr. Crawley now is entitled to make post-*Johnson*.

Instead of recognizing that the claim Mr. Crawley brings now on collateral review was unavailable to him in 2008, the Government wrongly relies upon *Bousley v. United States*, 523 U.S. 614 (1998), to argue Mr. Crawley cannot show cause. *See* Appellee's Br. 15. *Bousley* stated that "futility cannot constitute cause if it means

[3] Mr. Crawley asked his attorney to file a direct appeal, but no appeal was ever filed. As a result, his sentence became final shortly after his sentencing in June of 2008.

simply that a claim was 'unacceptable to that particular court at that particular time.'" *Bousley*, 523 U.S. at 623 (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)). But *Bousley* is inapposite as it did not involve a situation where the claim the petitioner was raising was foreclosed by Supreme Court precedent. As the First Circuit explained, "[u]nlike the defaulted argument in *Bousley*, [the petitioner's *Johnson*] argument was not available at all until the Supreme Court explicitly [overruled *James*.]" *Lassend v. United States*, 898 F.3d 115, 123 (1st Cir. 2018) (internal citations and quotation marks omitted). Here, "*Bousley* is no help to the government because the petitioner's argument in that case was not based on a constitutional right created by the Supreme Court's overruling of its own precedent." *Id.*

The Supreme Court decided *Johnson*, overruling *James*, seven years after Mr. Crawley's conviction became final. The *Johnson*-based argument was not available to Mr. Crawley at the time of his conviction. As soon as *Johnson* was handed down, Mr. Crawley filed a motion for permission to file a successive habeas petition to raise a *Johnson*-based claim, which this Court granted. *In re Marcus Crawley*, No. 16-785 (4th Cir. May 16, 2016). Thus, Mr. Crawley's case fits squarely within the *Reed* exception to procedural default. The Supreme Court "explicitly overrule[d] one of [its] precedents," and therefore there was "no reasonable basis upon which" Mr. Crawley's trial attorney could have urged the district "court to adopt the position

that [the Supreme] Court has ultimately adopted." *Reed*, 468 U.S. at 17. Mr. Crawley has sufficiently demonstrated cause for any procedural default.

The Government acknowledges that "some courts have held that the *Johnson-Dimaya-Davis* line of cases was so new as to permit litigants seeking habeas relief to demonstrate cause for defaulting such a claim," and cites a district court case out of Virginia that described *Johnson* and its progeny as being so novel as a "bolt of lightning from the clear blue sky." Appellee's Br. at 17 (quoting *United States v. Grogans*, No. 7:11-cr-21 (MFU), 2017 WL 946312, at *5 (W.D. Va. Mar. 9, 2017)). What the Government fails to mention is that this district court is joined by several federal courts of appeals in opining that habeas claims based on *Johnson* and its progeny are novel enough to establish cause. *See, e.g.*, *Cross v. United States*, 892 F.3d 288, 295 (7th Cir. 2018) (noting that no petitioner could have reasonably anticipated *Johnson* as "the *Johnson* Court expressly overruled its own precedent"); *United States v. Snyder*, 871 F.3d 1122, 1127 (10th Cir. 2017) (holding that a *Johnson* claim was novel enough to establish cause and noting that *Johnson* could not have been anticipated); *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016) (explaining that "it is fair to say that no one—the government, the judge, or the appellant—could reasonably have anticipated *Johnson*"); *Rose v. United States*, 738 F. App'x 617, 628 (11th Cir. 2018) (unpublished) (holding that a *Johnson* claim was "sufficiently 'novel' to support cause under *Reed*" despite the Government's

invocation of *Bousley*); *see also United States v. Garcia*, 811 F. App'x 472, 479-80 (10th Cir. 2020) (unpublished) (finding cause for a litigant bringing a *Davis* claim, despite the Government's contention of procedural default because *Johnson* had been decided at the time of the litigant's direct appeal). In fact, this Court has indicated that *Johnson* claims are novel by nature. *See United States v. Rumley*, 952 F.3d 538, 546 (4th Cir. 2020) (referring to *Johnson* and its progeny as a jurisprudential "sea change" that could not have been predicted).

These courts are clear—claims based on *Johnson* and its progeny are so novel that they establish cause for a procedural default.

Mr. Crawley can also establish prejudice. To establish prejudice, a habeas petitioner must show that the alleged error "worked to his actual and substantial disadvantage." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis removed). Here, the error is that Mr. Crawley was convicted of a crime that is legally invalid. The prejudice is obvious: Mr. Crawley is serving a seven-year sentence for that invalid crime. As the Tenth Circuit explained, "[a] sentence that is not authorized by law is certainly an actual and substantial disadvantage of constitutional dimensions," necessary to establish prejudice. *Snyder*, 871 F.3d at 1128 (quoting *Frady*, 456 U.S. at 170) (quotation marks omitted). As said the Seventh Circuit, there is "no doubt that an extended prison term . . . constitutes prejudice." *Cross*, 892 F.3d at 295.

In order to overlook the obvious prejudice of being incarcerated on an unlawful charge, the Government, without citing any relevant precedent, frames the prejudice inquiry as whether the error would have "affected the defendant's decision to plead guilty at all?" Appellee's Br. at 19. However, Mr. Crawley is not seeking to invalidate or withdraw his guilty plea.[4] Accordingly, the prejudice inquiry should focus on the judgment itself and whether Mr. Crawley was prejudiced. *See, e.g.*, *United States v. Jimenez-Segura*, No. 1:07-cr-146, 2020 WL 4514584, at *8 (E.D. Va. Aug. 4, 2020) ("Because defendant is currently sentenced to 84 months' imprisonment for a constitutionally invalid offense, [a § 924(c) conviction predicated on conspiracy to commit Hobbs Act robbery,] . . . defendant has made the requisite prejudice showing."). Given the seven-year sentence imposed pursuant to the unlawful § 924(c) conviction, the prejudice to Mr. Crawley is palpable.

[4] The Government cites *United States v. Dussard*, 967 F.3d 149 (2d Cir. 2020), as "helpful" in explaining the prejudice inquiry, Appellee's Brief at 19, but *Dussard* is dissimilar from this case in several key ways. Unlike Mr. Crawley, Dussard was in fact seeking to withdraw his guilty plea on direct appeal. *Id.* at 154. And Dussard pled guilty to the challenged charge in July 2017—after *Johnson* had been decided and while *Dimaya* was pending in front of the Supreme Court. *Id.* at 153. Thus, the "sea change" initiated by *Johnson* had already occurred, *Rumley*, 952 F.3d at 546, when Dussard failed to raise his challenge in the district court. Furthermore, the plea agreement at issue in *Dussard* contained a provision not at issue in this case that authorized the Government to reinstate dismissed charges if the guilty plea were to be vacated for any reason. *Id.* at 152-53. The defendant's exposure could have accordingly been increased if the Court had vacated his plea. *Id.* at 157.

This Court should find that the Government waived any procedural default argument. However, if this Court addresses the argument, it should hold that Mr. Crawley established both cause and prejudice to excuse any procedural default.

B. Mr. Crawley's § 924(c) conviction rests on an invalid predicate and the district court erred by holding it could be supported by a dismissed drug trafficking charge.

Turning to the merits, Mr. Crawley pled guilty to Hobbs Act Conspiracy and to one violation of 18 U.S.C. § 924(c), which criminalizes using, carrying, or brandishing a firearm in relation to a crime of violence or drug trafficking crime. At the time of his conviction, Hobbs Act Conspiracy was a "crime of violence" necessary to sustain a § 924(c) conviction. However, after the Supreme Court's ruling in *Davis*, 139 S. Ct. at 2336, and this Court's ruling in *Simms*, 914 F.3d at 236—which invalidated § 924(c)'s residual clause and held that conspiracy to commit Hobbs Act robbery is not a valid predicate—Mr. Crawley's § 924(c) charge no longer rests on a valid predicate and must therefore be vacated. The district court conceded that conspiracy to commit Hobbs Act robbery is no longer a valid predicate for a § 924(c) charge. JA 99.

When the district court nevertheless sustained Mr. Crawley's § 924(c) conviction based on the dismissed drug trafficking charge, it violated at least three lines of precedent from the Supreme Court and this Court. First, the district court sustained Mr. Crawley's § 924(c) conviction by holding he was guilty of a crime

that was not proven beyond a reasonable doubt; indeed, Mr. Crawley pled not guilty to the charge and it was dismissed by the Government. *Alleyne*, 570 U.S. at 114-16. Second, the district court found him guilty of the charge by relying on superfluous facts in the Plea Agreement, a practice which the Supreme Court has forbidden. *Descamps*, 570 U.S. at 270. Third, it transgressed this Court's precedents that make clear that when a defendant pleads guilty to a crime that is charged conjunctively but is statutorily phrased disjunctively, the defendant only pleads guilty to the lesser of the two charges. *Vann*, 660 F.3d at 774-75.

The Government tries to get around the fact that Mr. Crawley's plea rests on an invalid predicate by arguing that he "expressly agreed to plead guilty to the drug-trafficking theory of his conviction under § 924(c)." Appellee's Br. at 29. But that is hardly the most natural reading of the Plea Agreement, does not answer the question of whether the Government proved a valid predicate beyond a reasonable doubt, and is foreclosed by precedent and the statutory text of § 924(c).

First, when a defendant is charged with a § 924 (c) violation based on two potential predicates—one a crime of violence, the other a drug trafficking charge—and then pleads guilty to only the crime of violence, the most natural understanding of the agreement is that the § 924(c) charge is predicated upon the charge to which the defendant pled guilty, not the charge to which he pled not guilty and which was dismissed by the Government. *See United States v. Warner*, 820 F.3d 678, 683 (4th

Cir. 2016) (applying contractual principles in interpreting plea agreements and noting that such agreements warrant greater scrutiny than commercial contracts because they implicate constitutional rights). If there is any doubt as to this point, it must be resolved against the Government. *See United States v. Barefoot*, 754 F.3d 226, 246 (4th Cir. 2014) ("[A]ll ambiguities in the Plea Agreement are to be construed against the government as its drafter.").

Second, the relevant question here is not the Government's "theory" of the charge, but whether the Government proved a drug trafficking predicate beyond a reasonable doubt as necessary to sustain the § 924(c) conviction. As this Court said in *United States v. Crump*, while a defendant does not necessarily have to be convicted of a predicate offense, all of the elements of the predicate offense must be "proved and found beyond a reasonable doubt." 120 F.3d 462, 466 (4th Cir. 1997); *see also United States v. Carter*, 300 F.3d 415, 425 (4th Cir. 2002) (providing that "§ 924(c) convictions do not require a conviction on the predicate," but requiring "that a reasonable jury *could* have convicted on the predicate drug offense").

Third, Mr. Crawley was not convicted of a drug trafficking crime. The district court only found that Mr. Crawley was guilty of a drug trafficking crime by relying on superfluous facts in the Statement of Facts and then drawing its own inferences to state he was guilty of the dismissed charge. To be clear, the Government-crafted

Statement of Facts does not expressly allege drug trafficking activity.[5] And *Alleyne* doesn't allow the district court to draw such inferences and engage in such factfinding. *See Alleyne*, 570 U.S. at 114-16. The district court's error is made even more evident by the Supreme Court's unambiguous statement 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." *Descamps*, 570 U.S. at 270 (emphasis added); *see also Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) (explaining that "at plea hearings, a defendant may have no incentive to contest what does not matter under the law," and that "[s]uch inaccuracies should not come back to haunt the defendant many years down the road").

The Government has no real answer to *Alleyne*. And it contends *Descamps* and *Mathis* are inapposite because those cases unfolded in the context of Sixth Amendment claims. Appellee's Br. at 34. What the Government fails to explain is how this distinction renders *Descamps*'s exhortations that "when a defendant pleads

[5] The Statement of Facts does not specifically allege a drug trafficking crime, which the Government tacitly concedes when it states that it included a certain amount of cocaine in the Statement of Facts in an attempt "to establish that the defendants were after a distribution quantity (half a kilogram or more) of cocaine." Appellee's Br. at 43 n.6. This is further proof that the district court had to make the inferential leap that, based on the Statement of Facts and the quantity of drugs alleged therein, Mr. Crawley intended to distribute drugs. Mr. Crawley did not admit to any allegation that he specifically intended to distribute drugs and was not found in possession of any drugs.

guilty to a crime, he waives his right to a jury determination of only that offense's elements," and that "a defendant . . . has little incentive to contest facts that are not elements of a charged offense" because "during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations" somehow less applicable in the current context. *Descamps*, 570 U.S. at 270. As the *Descamps* Court made plain, superfluous facts accompanying pleas "will often be uncertain" or even "downright wrong." *Id.* These pronouncements apply with equal force here.

Moreover, despite the Government's insistence otherwise, the district court's judicial factfinding is functionally identical to that in *Descamps*. In that case, the judge looked to superfluous facts in a plea colloquy to determine whether the defendant committed a violent felony that could predicate an Armed Career Criminal Act enhanced sentence. *Id.* at 269-70. The Court excoriated the district court's reliance on the plea agreement's factual proffer to apply the enhancement. *Id.* at 270 ("[W]hen the District Court here enhanced [the defendant's] sentence, based on his supposed acquiescence to a prosecutorial statement . . . irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence."). Similarly, the district court in this case looked to superfluous facts to find a predicate that lengthened Mr. Crawley's sentence—otherwise his § 924(c) sentence would have

had to have been vacated. The district court erred by exhuming those superfluous facts to deny Mr. Crawley's meritorious § 2255 motion.

The Government's argument that Mr. Crawley's § 924(c) conviction can be sustained on a drug trafficking predicate rests almost exclusively on the fact that it charged Mr. Crawley with "[u]sing, 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)," and that Mr. Crawley pled guilty to the charge phrased in the conjunctive. JA 15-16 (emphasis added); *see* Appellee's Br. 28, 30-31. However, the indictment lists two predicates for the § 924(c) count, and Mr. Crawley only pled guilty to the Hobbs Act predicate. Moreover, the Government crafted the charge in this way despite the fact 18 U.S.C. § 924(c)(1)(A) punishes conduct with firearms during and in relation to any crime of violence *or* drug trafficking crime. The Government cannot retroactively separate its single conjunctive charge—the only violation of § 924(c) to which Mr. Crawley pled guilty—into two separate violations of § 924(c) in an attempt to create a new conviction for brandishing a firearm in relation to a drug trafficking crime that would remain valid after *Simms* and *Davis*. Put another way, the Government worded the indictment to charge Mr. Crawley with committing two separate crimes in one single charge. Mr. Crawley only pled guilty to one § 924(c) charge and one predicate—Hobbs Act Conspiracy.

The Government claims *United States v. Hare*, 820 F.3d 93 (4th Cir. 2016) stands for the proposition that "when a § 924(c) conviction has two predicate offenses—one crime of violence and one drug-trafficking crime—the validity of the drug-trafficking predicate is sufficient to sustain the conviction, even if the crime of violence were invalid." Appellee's Br. at 26. *Hare* is hardly that broad. 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 the predicate drug trafficking crime that it had also convicted them of committing. 820 F.3d at 106. There is no such special jury verdict here. In fact, being most generous to the Government, the conjunctive wording of the charge makes Mr. Crawley's guilty plea similar to a general verdict rendering the predicate unclear, and therefore presenting a situation "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 (quoting *United States v. Najjar*, 300 F.3d 466, 480 n.3 (4th Cir. 2002)). And as this Court affirmed recently, "if one predicate offense does not qualify, [this Court is] required to vacate the conviction." *Runyon*, __ F.3d __, 2020 WL 7635761, at *4.

The Government's reliance on *United States v. Mitchell*, 104 F.3d 649 (4th Cir. 1997), as demonstrating how to apply the logic of *Hare* in the context of pleas is similarly misplaced. *See* Appellee's Br. 26-27. Unlike the defendant in Mitchell,

Mr. Crawley is not arguing that there was an insufficient factual basis for his plea when it was entered. *Mitchell*, 104 F.3d at 651. As this Court explained, "[i]n order to prove a violation of § 924(c)(1), the Government must show two elements: (1) the defendant used or carried a firearm, and (2) the defendant did so during and in relation to a drug trafficking offense *or* crime of violence." *Id.* at 652 (emphasis added). To accept a guilty plea, a district court "need only be subjectively satisfied that there is a sufficient factual basis for a conclusion that the defendant committed all of the elements of the offense." *Id.* When Mr. Crawley entered his plea in 2008, the Hobbs Act Conspiracy charge to which he pled guilty could serve as a valid predicate for the § 924(c) charge under the statute's recently invalidated residual clause. *See Davis*, 139 S. Ct. at 2336. The second element of a § 924(c) violation was satisfied by that Hobbs Act Conspiracy conviction; proof of the dismissed drug trafficking charge was not a necessary element of the § 924(c) conviction. *Mitchell* does not pertain to cases like this one where changes in the law have rendered convictions that once had a sufficient basis constitutionally infirm.

The Government cannot point to a case in which this Court has upheld a § 924(c) conviction predicated on an invalid crime of violence and a drug trafficking crime in the absence of a special jury verdict finding the defendant guilty of using a firearm in furtherance of a drug trafficking crime. *See Hare*, 820 F.3d at 106. The recent unpublished cases from this Court that the Government relies on all concern

§ 924(c) convictions for which the government provided more than one crime of violence as the predicate offense.[6] Appellee's Br. at 27-28. Where the Government sets forth multiple crimes of violence to support a conviction of a single § 924(c) offense, all of the evidence may perhaps be considered as proof of an element of that offense: the commission of a crime of violence. But here, the commission of a predicate drug trafficking crime was not *necessarily* an element of Mr. Crawley's § 924(c) conviction. Mr. Crawley could have been convicted of violating § 924(c) based on a predicate "crime of violence"—the then-valid predicate Hobbs Act Conspiracy charge to which he plead guilty—rendering the drug trafficking crime wholly irrelevant.

Moreover, in *Vann*, this Court clarified that when a defendant pleads guilty, he only admits to the elements of "the least serious of the disjunctive statutory

[6] Seven of the eight cases the Government cites from district courts within this Circuit also concern challenges to § 924(c) convictions with multiple crime of violence predicates and are thus similarly inapposite. *See* Appellee's Br. at 28. In the lone cited case that concerns a § 924(c) conviction for using, carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, *Suttles-Barden v. United States*, the defendant had pled guilty to two predicates, Hobbs Act conspiracy and a drug trafficking conspiracy, and to a § 924(c) charge predicated on both predicates. No. 3:12-cr-146 (FDW), 2020 WL 1061222, at *4-*5 (W.D.N.C. Mar. 4, 2020), *appeal docketed*, No. 20-6663 (4th Cir. May 8, 2020). Though the charge in *Suttles-Barden* suffered from the same infirmities as Mr. Crawley's charge, the defendant's plea to the drug trafficking charge likely eliminated the concerns about proof beyond a reasonable doubt of commission of the predicate crime that are present here.

conduct, not the entirety of the conduct alleged in the conjunctive." 660 F.3d at 774-75. Here, Hobbs Act Conspiracy is the least serious conduct and thus the only conduct to which Mr. Crawley admitted. 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, while the dismissed drug trafficking crime in Count Two would have required the Government to establish that he intended to commit the 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 intent and a substantial act, Hobbs Act Conspiracy is the least serious conduct. Furthermore, even though the Government chose not to allege a specific quantity of drugs in the indictment to trigger a mandatory minimum, Appellee's Brief at 39, Congress's penalties reflect its view that attempts to possess certain quantities of drugs with the intent to distribute them are more serious than Hobbs Act Conspiracies.

The Government asserts that *Vann* and *Chapman* are inapposite because Mr. Crawley "knowingly and voluntarily agreed to plead guilty on both predicate-offense theories." Appellee's Br. at 39. The Government supports this assertion by

repeatedly pointing out that the charge was worded conjunctively. Appellee's Br. 28, 30-31. But this is precisely a situation where Mr. Crawley would have had no incentive to quibble with the "and" versus "or" wording of the charge and this Court accordingly cannot put much stock in the argument. *See Mathis*, 136 S. Ct. at 2253. Because "there [was] no clear difference in the sentencing range for the various forms of the offense, [Mr. Crawley] ha[d] no reason to clarify the nature of his admission." *United States v. Kennedy*, 881 F.3d 14, 23 (1st Cir. 2018). And again, the question is whether the Government *proved* a valid predicate offense. Here, like in *Vann*, Mr. Crawley pled guilty to a conjunctively worded charge, even though the statute phrases the crime disjunctively. *See Vann*, 660 F.3d at 774. The *Vann* Court rejected the Government's assertion that a defendant who pleads guilty to a charge that uses 'and' in place of the statutory phrase 'or' necessarily admits to all allegations charged conjunctively. *Id.*; *see also United States v. Chapman*, 666 F.3d 220, 228 (4th Cir. 2012) ("[W]hen 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."). And thus *Vann* and *Chapman* squarely apply. Under *Vann* and *Chapman*, the less serious charge, Hobbs Act Conspiracy, is not a valid predicate for Mr. Crawley's § 924(c) conviction.

The Government also cursorily asserts the argument regarding its duplicitous framing of the § 924(c) charge was raised "for the first time on appeal." Appellee's Br. at 32. The Government raises the specter of waiver but does not develop it, and therefore forfeits any waiver-type argument. *See Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012) (explaining that an argument is waived when a party "fails to develop [the] argument to any extent in its brief"). In any event, Mr. Crawley is not arguing that the district court erred in accepting a guilty plea under this indictment back in 2008. Rather, the duplicitous framing of the indictment is relevant now that the Hobbs Act Conspiracy predicate cannot constitutionally support the conviction because such framing rendered the drug trafficking predicate non-essential for the conviction.[7]

[7] The Government again raises the specter of waiver by mentioning the duplicitous charging argument was not in Mr. Crawley's informal brief, and cites *Jackson v. Lightsey*, where this Court held that its "review is limited to issues preserved in [the informal] brief." 775 F.3d 170, 177 (4th Cir. 2014); *see* Appellee's Br. at 33 n.3. A quick glance at Mr. Crawley's informal brief, which must be "liberally construed" and "held to less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)) (quotation marks omitted), reveals that it is singularly focused on the fact that the § 924(c) conviction must be vacated because it rested on an invalid predicate. In fact, Mr. Crawley expressly argued that the "district court [could] not rely upon the dismissed [drug trafficking] count to support a basis for [his] section 924(c) conviction." Informal Opening Br. at 2. Every argument made on appeal by appointed counsel develops this very argument. The issue is preserved, and when it is considered on its merits, Mr. Crawley's sentence for his § 924(c) conviction must be vacated.

At bottom, the Government cannot constitutionally support Mr. Crawley's § 924(c) conviction following the invalidation of the Hobbs Act Conspiracy predicate. Despite the Government's assertion that "[t]he district court's conclusion . . . is well supported—indeed, compelled—by the record," Appellee's Brief at 30, neither the Government nor the district court have explained how the record provides proof beyond a reasonable doubt of all of the elements of a drug trafficking predicate.

But even if the Government or district court could explain how the Statement of Facts made out the elements of the dismissed drug trafficking charge, Mr. Crawley's guilty plea did not *necessarily* rest on the non-elemental drug trafficking crime. As a result, it must be presumed that the § 924(c) conviction rests on the invalid Hobbs Act Conspiracy predicate. *See United States v. Horse Looking*, 828 F.3d 744, 749 (8th Cir. 2016) (holding that a prior conviction could not necessarily qualify as a predicate for a gun charge). When the record establishes that a defendant "*could have been* convicted" under a valid predicate, but "*does not exclude* the possibility that [he] was convicted [under the invalid predicate]," a court cannot proceed as if there was a valid predicate. *Id.* at 748-49 (second emphasis added). Any other outcome would not satisfy the Supreme Court's requirement of certainty. *Id.* at 748.

The Government closes by arguing that even if Mr. Crawley's § 924(c) conviction rests on an invalid predicate, this Court should deny Mr. Crawley relief

based on its speculation about what would have happened had it known that Hobbs Act Conspiracy was an invalid predicate. The Government says there is no harm here because if the challenge to the Hobbs Act conspiracy predicate had somehow been raised years before the *Johnson* decision, "the government would have simply proceeded on the drug-trafficking predicate" and Mr. Crawley "would have undoubtedly made the same choice to plead guilty on valid theories." Appellee's Br. at 43. This line of argument is wildly speculative and fatally flawed. It is not clear at all that the Government would have "simply proceeded on the drug-trafficking predicate" considering that the Government-crafted Statement of Facts provides far weaker proof of drug trafficking than proof of the Hobbs Act charge—again, the Government-friendly Statement of Facts makes no direct mention of drug trafficking activity and Mr. Crawley was not in possession of any drugs. And because the proof of drug trafficking was far weaker, it is not at all clear that Mr. Crawley would have pled guilty to the drug trafficking charge; Mr. Crawley may well have taken that case to trial. This Court should avoid the speculation the Government invites.

Regardless of what could have happened, the reality is that Mr. Crawley has already been incarcerated for more than 12.5 years and is currently in prison during a deadly pandemic serving a 7-year sentence for a constitutionally infirm § 924(c) conviction. Because the district court erred by resting the § 924(c) conviction on the

dismissed drug trafficking charge, Mr. Crawley's seven-year sentence for his § 924(c) conviction must be vacated.

CONCLUSION

This Court should reverse the decision below denying Mr. Crawley's § 2255 motion and vacate Mr. Crawley's sentence for the § 924(c) conviction.

Respectfully submitted,

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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 6,491 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 6,500 words.

Daniel S. Harawa (Counsel of Record)

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, 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.

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