IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7369

UNITED STATES OF AMERICA,

Appellee,

v.

MARCUS CRAWLEY,

Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Richmond
The Honorable Robert E. Payne, District Judge

BRIEF OF THE UNITED STATES

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Introduction

After violently invading the home of a suspected drug dealer to steal a half-kilogram of cocaine, pistol-whipping the man in front of a woman and her ten-year-old daughter, and stabbing him twice, defendant Marcus Crawley pleaded guilty to brandishing a firearm in violation of 18 U.S.C. § 924(c). The indictment charged this count as expressly predicated on both a crime of violence and a drug trafficking crime: conspiracy to commit Hobbs Act robbery and an attempt to possess cocaine with intent to distribute. Defendant agreed, both in his plea agreement and under oath in his Rule 11 colloquy, that he was pleading guilty to this charge on both predicate-offense theories of guilt. Moreover, he admitted in his sworn statement of facts that the brandishing was committed in relation to both.

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), defendant moved to vacate his § 924(c) conviction, arguing that the robbery conspiracy predicate was infirm. The government moved to dismiss the motion as barred by the statute of limitations, expressly reserving its other procedural defenses and arguments on the merits. Instead, the district court held that defendant's § 2255 claim failed on the merits because of the second, indisputably still-valid drug predicate, pursuant to this Court's decision in *United States v. Hare*, 820 F.3d 93 (4th Cir. 2016).

This Court has previously granted certificates of appealability on this dual-predicate question, suggesting that this Court should do the same here and take jurisdiction. However, defendant faces two insurmountable hurdles to vacating his conviction: the doctrine of procedural default, which he cannot overcome, and the continuing validity of a conviction predicated on a drug-trafficking crime. Because the express language of the charge, the plea agreement, and the admitted facts all confirm that defendant pleaded guilty to a valid theory of conviction, he is not entitled to escape his favorable plea bargain and vacate a lawful conviction.

Statement of Jurisdiction

A certificate of appealability (COA) is required for this Court to exercise jurisdiction over defendant's appeal of his denied § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B), (c)(3); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners."). A court may grant a COA only if defendant makes a "substantial showing of the denial of a constitutional right," *i.e.*, that "reasonable jurists could debate" the resolution of the issues. *Miller-El*, 537 U.S. at 336.

The district court denied a COA. *See* JA100. Defendant's notice of appeal from the district court's order denying relief constitutes a request for a COA from this Court. *See* Fed. R. App. P. 22(b)(2). Although this Court has not yet granted a

COA in this case, it has previously granted COAs in similar cases, suggesting that the Court views the dual-predicate issue as debatable among reasonable jurists. *See, e.g.*, *United States v. Taylor*, 979 F.3d 203, 205 n.1 (4th Cir. 2020). Accordingly, should the Court have the same view in this case, it should issue a certificate of appealability.

Issues Presented

1. By not raising an argument that his crime of violence predicate was constitutionally infirm before his guilty plea, defendant procedurally defaulted this claim. Given that he pleaded guilty to an equally valid theory of conviction under § 924(c), can he overcome that default by showing either cause and prejudice or actual factual and legal innocence of the offense?

2. When pleading guilty to a charge expressly predicated on both a crime of violence and a drug trafficking offense, defendant not only acknowledged the charge in court but adopted a sworn statement of facts that explicitly stated his brandishing of a firearm was in furtherance of both a crime of violence and a drug trafficking crime. On such facts, can defendant vacate a § 924(c) conviction predicated on an admitted and indisputably still-valid drug trafficking crime?

Statement of the Case

This appeal arises from the district court's denial of a motion to vacate defendant's § 924(c) conviction on the grounds that one of the two predicate

offenses designated in the indictment has been rendered invalid by *Johnson* and this Court's subsequent decision in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019).

A federal grand jury returned a superseding indictment charging defendant with four counts:

- Count 1: conspiring to interfere with commerce by threats and violence, in violation of 18 U.S.C. § 1951(a);
- Count 2: attempting to possess with intent to distribute a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. § 846;
- Count 3: 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); and
- Count 4: possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

JA14–18. Count 3 charged two predicate offenses: (a) conspiring to commit Hobbs Act robbery and (b) attempting to possess cocaine with the intent to distribute. JA16.

Defendant agreed to plead guilty and entered into an agreement with the United States. First, he agreed to plead guilty to Counts 1 and 3 of the superseding indictment. The agreement expressly described Count 3 as charging "Us[ing], Carry[ing] and Brandishing Firearms During and in Relation to a Crime of Violence and a Drug Trafficking Crime." JA23. Second, defendant agreed that he was pleading guilty because he was "in fact guilty of the charged offense." He further

admitted “the facts set forth in the statement of facts filed with this plea agreement” and agreed that “those facts establish guilt of the offense charged beyond a reasonable doubt.” JA24.

In the signed statement of facts, defendant admitted that he “did use, carry and brandish a firearm during and in relation to a crime of violence and a drug trafficking crime.” JA38. Defendant further admitted that he and two co-conspirators “agreed to commit an armed home invasion robbery at the home of an individual who they believed was a drug dealer” with the purpose to “rob the victim of United States currency and narcotics, specifically, half a kilogram or more of cocaine.” JA39. Defendant and his co-conspirators kicked in the door to the victim’s home, each brandishing a firearm (Crawley’s being a Rohm .22-caliber chrome revolver). JA39, 41. During the course of the home invasion, defendant and his co-conspirators violently assaulted the victim—including stabbing him in the leg with a kitchen knife, kicking him in the head, and pistol-whipping him in the face and head—all in view of a female resident of the house and her ten-year-old daughter. JA39–40. In addition, defendant personally forced the female resident to open both the victims’ vehicles at gunpoint and stole a shotgun belonging to her. JA39.

The plea agreement specified that the statutory penalties for Count 1 included a maximum of 20 years’ imprisonment, up to a $250,000 fine, and 3 years’ supervised release. JA23. The penalties for Count 2 included a mandatory, 7-year-

minimum consecutive sentence of imprisonment, up to a $250,000 fine, and 5 years' supervised release. JA23.

Defendant pleaded guilty before a magistrate judge on March 7, 2008, and the district court adopted the guilty plea on March 24, 2008. *See* JA7, 8. During the plea colloquy, the magistrate judge asked defendant whether he understood that Count 3 charged him with "having used, carried, and brandished a firearm or firearms during and in relation to a crime of violence and a drug-trafficking crime," and defendant answered yes. Suppl. App., Tr. at 8. When asked, defendant confirmed that he was pleading guilty "because [he was], in fact, guilty of what they said [he] did in each count." Suppl. App., Tr. at 12. The presentence investigation report prepared following his guilty plea assessed his offense level at 26 and his criminal history category at VI, resulting in a Guidelines range of 120–150 months on Count 1 with an 84-month consecutive sentence on Count 2. *See* JA30.

After a hearing, the district court imposed a sentence of 150 months' imprisonment on Count 1 and 84 months' imprisonment consecutively on Count 3. *See* JA48. Defendant's judgment of conviction was entered on June 3, 2008. JA8. Defendant subsequently filed a series of unsuccessful motions under § 2255 and § 3582(c). *See* JA8–11.

On June 1, 2016, this Court granted defendant's motion to file a second or successive motion under § 2255 based on *Johnson v. United States*, 135 S. Ct.

2551 (2015). JA11. In that motion, defendant argued that his § 924(c) conviction on Count 3 was predicated on Hobbs Act conspiracy, which was constitutionally infirm under the residual clause of § 924(c)(1)(A)(ii) and not a force-clause crime of violence. JA70.

On November 8, 2016, the government moved to dismiss defendant's motion as barred by § 2255(f), because *Johnson* addressed only the residual clause of § 924(e)(2)(b)(ii) and therefore the Supreme Court had not yet recognized a right under § 924(c), reopening the statute of limitations. *See* JA81. The government expressly noted that a motion to dismiss on timeliness grounds need not raise all its defenses to the § 2255 motion, explicitly noting that it reserved such arguments as "procedural default," "other defenses," or "merits arguments." JA80, 92.

Between the government's motion to dismiss and the district court's decision below, this Court decided *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019), holding that Hobbs Act conspiracy did not fit within the force clause, and the Supreme Court decided *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that the residual clause in § 924(c) was unconstitutionally vague.

On September 11, 2019, the district court denied defendant's motion. JA95. The district court held that the defendant's motion "plainly lacks merit" and summarily dismissed the motion under Rule 4(b) of the Rules Governing Section 2255 Proceedings. *See* JA96. Specifically, the court concluded:

> The Superseding Indictment clearly indicated that the § 924(c) conviction charged in Count Three was predicated on the conduct as alleged in Count One, conspiracy to commit Hobbs Act robbery, and Count Two, the drug trafficking charge. (Superseding Indictment 3.) In 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 conspiracy to commit Hobbs Act robbery offense charged in Count One *and* the drug trafficking crime charged in Count Two. (Statement of Facts ¶¶ 1–7, 17–20.) Crawley agreed in the plea colloquy that he understood the charges against him. (ECF No. 41, at 2.)
>
> Thus, even though the conspiracy to commit Hobbs Act robbery charged in Count One is no longer a crime of violence after *Simms*, Crawley's § 924(c) conviction remains valid because it also rests on the drug trafficking crime charged in Count Two. *United States v. Hare*, 820 F.3d 93, 105–06 (4th Cir. 2016) (explaining that a § 924(c) conviction predicated on both conspiracy to commit Hobbs Act robbery and in furtherance of a drug trafficking crime not affected by *Johnson* because "[s]ection 924(c) prohibits possession of a firearm in furtherance of a crime of violence *or* a drug trafficking crime.").

JA99–100. The district court also denied a certificate of appealability. JA100, 101.

Defendant filed a notice of appeal on September 24, 2019. *See* JA102–04.

Summary of Argument

Pursuant to *Bousley v. United States*, 523 U.S. 614 (1998), defendant procedurally defaulted his *Davis* claim because he did not challenge the validity of his Hobbs Act conspiracy predicate prior to his guilty plea or on direct appeal. Because he cannot demonstrate either cause and prejudice or actual innocence, he cannot overcome that default and challenge the predicate in a collateral proceeding. Critically, because defendant plainly demonstrated that he would plead factually

and legally guilty to a § 924(c) offense predicated on a drug-trafficking offense, he suffered no prejudice from the inclusion of the crime-of-violence theory of liability, nor can he demonstrate that he is factually and legally innocent of violating § 924(c).

Second, on the merits, defendant's § 924(c) conviction is lawful because it has a valid predicate—attempt to possess cocaine with intent to distribute—that has not been affected by *Davis*. Defendant's arguments contradict the plain, explicit language of his plea agreement, which named the drug-trafficking predicate in the charge, as well as plea colloquy and his statement of facts, which expressly admitted the brandishing occurred during and in relation to the drug offense. This specificity alone renders inapposite this Court's decisions in *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (en banc), and *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012). But moreover, those decisions are inapplicable on their own terms to § 924(c), as there is no "least serious" offense within the statute based on differing predicate offenses.

Argument

Because defendant can neither overcome his procedural default nor demonstrate that his § 924(c) conviction was imposed in violation of law or the Constitution, his motion to vacate should be denied.

Once direct review is completed, "a presumption of finality and legality attaches to the conviction and sentence," *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (citation omitted), and courts are "entitled to presume" that the defendant's conviction and sentence are lawful, *United States v. Frady*, 456 U.S. 152, 164 (1982). This and other courts have therefore agreed that a defendant carries the burden of showing a constitutional violation. *See, e.g.*, *United States v. Pettiford*, 612 F.3d 270, 277 (4th Cir. 2010) ("[T]he district court must determine whether the [§ 2255 movant] has met his burden of showing that this sentence is unlawful on one of the specified grounds."); *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958) ("Because the proceeding under 28 U.S.C. § 2255 is a civil collateral attack upon the judgment of conviction, the burden of proof is upon the petitioner to establish by a preponderance of evidence that he did not intelligently waive his right to assistance of counsel."); *accord United States v. Brown*, 957 F.3d 679, 690 (6th Cir. 2020) ("A petitioner bears the burden of proof in a § 2255 proceeding ….").

Once a defendant receives a certificate of appealability (COA) in an appeal of a denial of a motion under 28 U.S.C. § 2255, this Court reviews a district court's legal interpretations de novo and factual findings for clear error. *See, e.g. United States v. Fulks*, 683 F.3d 512, 516 (4th Cir. 2012) (citing *United States v. Stitt*, 552

F.3d 345, 350 (4th Cir. 2008)). Although a defendant may not expand a COA without satisfying Fed. R. App. P. 22(b) and Local Rule 22(a), the United States may defend a judgment on a ground such as procedural default, even if not relied on by the district court, and does not have to obtain a COA. *See, e.g. United States v. Fugit*, 703 F.3d 248, 257–58 (4th Cir. 2012); Fed. R. App. P. 22(b)(3).

I. Defendant cannot overcome his procedural default.

By not raising the argument that Count 3 was unconstitutionally vague before his conviction became final, the defendant procedurally defaulted it. *Bousley v. United States*, 523 U.S. 614, 621–22 (1998); *United States v. Linder,* 552 F.3d 391, 396-97 (4th Cir. 2009); *United States v. Fugit*, 703 F.3d 248, 253–54 (4th Cir. 2012). That default "may be excused in two circumstances: where a person attacking his conviction can establish (1) that he is 'actually innocent' or (2) 'cause' for the default and 'prejudice resulting therefrom." *Fugit*, 703 F.3d at 253 (quoting *Bousley*, 523 U.S. at 621). The defendant cannot satisfy either standard.

A. The defendant cannot demonstrate actual innocence.

To begin, the defendant is not actually innocent of violating § 924(c). "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (internal quotation marks omitted). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Id.* at 623–24

(citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

The defendant cannot make this showing. Even acknowledging that conspiracy to commit Hobbs Act robbery is now an invalid predicate under *Simms*, the plea agreement, statement of facts, presentence report, and the plea hearing colloquy make clear that defendant brandished his 0.22-caliber revolver during and in relation to an attempt to possess cocaine with intent to distribute, which violates § 924(c)(3). In particular, defendant's affirmation of his plea agreement and the statement of facts adopted during his Rule 11 colloquy are "sworn statements" that are "conclusively established" and cannot be contradicted on collateral review. *United States v. Lemaster*, 403 F.3d 216, 221–22 (4th Cir. 2005) (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)).

As established throughout defendant's plea agreement, sworn statement of facts, and plea colloquy, the purpose of the home invasion was to obtain the more than half-kilogram of cocaine and cash that defendant and his co-conspirators believed their victim had. *See* JA39, 42, at ¶¶ 4–6, 19; *see also* Suppl. App., Tr. at 17–18. As described in the indictment and plea agreement, Count 3 specified that defendant had brandished his firearm during and in relation to an attempt to possess cocaine with the intent to distribute (JA16, 23), and defendant admitted the same in his statement of facts (JA38, ¶ 1). During the Rule 11 plea colloquy, the court asked defendant if he understood that Count 3 charged him with both a crime

of violence predicate and a drug-trafficking predicate and if he was pleading guilty because he had committed the crimes as alleged in the indictment; defendant answered yes both times. *See* Suppl. App., Tr. at 8, 12. Moreover, defendant admitted in his statement of facts that he "committ[ed] the acts set forth in Counts One and Three of the pending superseding indictment … knowingly, intentionally, and unlawfully, without legal justification or excuse, and with the specific intent to do that which the law forbids, and not by mistake, accident, or any other reasons." JA42, ¶ 20. Defendant repeatedly confirmed that these admitted facts could have been proven at trial beyond a reasonable doubt and "establish guilt of the offense charged beyond a reasonable doubt." JA24, 38, 42.

In short, defendant knowingly and voluntarily admitted under oath that he brandished a firearm during and in furtherance of an attempt to possess cocaine with the intent to distribute, that he did so with specific intent, and that those facts were true and could be proven beyond a reasonable doubt.

In *United States v. Mitchell*, 104 F.3d 649 (4th Cir. 1997), this Court indicated that a plea, predicated on multiple theories of liability, remains valid so long as one of the theories remains valid. *See id.* at 652. While *Mitchell* arose in the context of a direct-appeal challenge to the factual basis supporting a guilty plea, its reasoning applies equally to an actual-innocence inquiry. *See, e.g.*, *Long v. United States*, No. 97-3609, 1998 WL 887272, at *1–2 (6th Cir. Dec. 10, 1998) (holding

that a defendant could not show actual innocence to overcome a procedural default, and thereby challenge his guilty plea post-*Bailey*, where he could not establish his factual innocence as to both using and carrying the firearm); *United States v. Stubbs*, No. 99-5230, 2000 WL 1174656, at *2 (10th Cir. Aug. 18, 2000) (same).

Here, the plea record established that the defendant is liable for brandishing a firearm during and in relation to a drug-trafficking crime. Because the plea record "is sufficient to demonstrate that the defendant committed the elements of the charged offense," *Mitchell*, 104 F.3d at 654, the defendant cannot show that he is actually innocent of violating § 924(c)(3).

B. The defendant cannot show cause-and-prejudice sufficient to overcome procedural default.

A defendant may alternately overcome the procedural default of a claim if he shows "cause"—such as ineffective assistance of counsel or a previously unknown, novel legal basis for the challenge—and "actual prejudice" resulting from the default. *Bousley*, 523 U.S. at 622; *see also Murray v. Carrier*, 477 U.S. 478, 485–86 (1986). Defendant cannot establish either prong here.

1. Cause

One way to establish cause would be to argue that the Supreme Court's *Johnson* jurisprudence (culminating in *Davis*) was so novel that no reasonable litigant would have thought to challenge a § 924(c) conviction on vagueness grounds. But the Supreme Court has already explained that "futility cannot constitute cause

if it means 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)). To the extent that an exception to this rule exists for truly novel claims, *see Reed v. Ross*, 468 U.S. 1, 16–17 (1984), that exception is too narrow to accommodate the defendant's case.

In determining whether a claim is novel enough to establish cause for a procedural default, the relevant inquiry is not "whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." *Smith v. Murray*, 477 U.S. 527, 537 (1986). Any novelty argument here is incompatible with both *Bousley* and binding Circuit precedent. In *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001), for example, the Fourth Circuit concluded that an *Apprendi* claim was not novel enough to excuse a procedural default, favorably citing a Seventh Circuit case reaching the same conclusion as to a defendant sentenced in 1992, a full eight years before *Apprendi* was decided. *Id.* at 145–46 (citing *United States v. Smith*, 241 F.3d 546 (7th Cir. 2001)). *Sanders* cautioned that liberally construing arguments as novel enough to satisfy the cause-and-prejudice exception to procedural default would threaten to a create a world in which "[c]ollateral review would come … to serve as an all-purposive receptacle for claims which in hindsight appear more promising than they did at the time of trial." *Id.* at 146.

The same reasoning applies here. Indeed, as Justice Gorsuch pointed out in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), courts have been striking down or refusing to apply criminal statutes on vagueness grounds since the early 1800s. *See id.* at 1225–27 (Gorsuch, J., concurring). Had the defendant wanted to raise such a claim about his § 924(c) conviction, he was entirely capable of doing so—just like a defendant who wanted to raise an *Apprendi*-style claim in 1992 and just like the successful *Johnson* or *Davis* defendants eventually did. *Accord Dugger v. Adams*, 489 U.S. 401, 409–10 (1989) (concluding that a claim was not novel where "the legal basis for a challenge was plainly available"); *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996) ("If the tools were available for a petitioner to construct the legal argument at the time of the state appeals process, then the claim cannot be said to be so novel as to constitute cause for failing to raise it earlier." (citation and internal quotation marks omitted)). Consistent with *Sanders*, the defendant's failure to raise such a claim earlier is not excusable on novelty grounds. *But see United States v. Bennerman*, 785 F. App'x 958, 963 (4th Cir. 2019) (stating that a *Johnson* challenge to a sentence under the Armed Career Criminal Act was not "reasonably available" before *Johnson*); *United States v. Crawford*, 932 F. Supp. 748, 751 (E.D. Va. 1996) (finding cause for defaulting a post-*Bailey* challenge to a guilty plea "because the *Bailey* decision was issued well after defendant's sentencing").

Another way to establish cause for a procedural default would be to show that defense counsel performed deficiently by failing to raise a particular claim. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). To the extent defendant intends to contend that his counsel was ineffective for not raising a *Davis*-like challenge to Count 3, the government notes that doing so in an attempt to overcome his procedural default would be unavailing. The general rule is that "an attorney's failure to anticipate a new rule of law [is] not constitutionally deficient." *United States v. McNamara*, 74 F.3d 514, 516 (4th Cir. 1996); *see also United States v. Dyess*, 730 F.3d 354, 363 (4th Cir. 2013) (holding that a defense attorney's failure to anticipate *Apprendi* did not constitute deficient performance). That principle applies equally to *Johnson* or *Davis* claims. *See, e.g.*, *Smith v. United States*, 930 F.3d 978, 982 (8th Cir.), *cert. denied*, 140 S. Ct. 547 (2019) (holding that defense counsel did not render deficient performance by failing to anticipate *Johnson*).

2. Prejudice

The government recognizes 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. *See*, *e.g.*, *United States v. Grogans*, No. 7:11-cr-21 (MFU), 2017 WL 946312, at *5 (W.D. Va. Mar. 9, 2017) (describing these cases as a "bolt of lightning from the clear blue sky"). Even if the

defendant could establish cause for his procedural default based on *Johnson*'s purported novelty, however, he still cannot show prejudice.

Given that the defendant procedurally defaulted his *Davis* claim, the doctrinal starting point for the prejudice analysis should be how an appellate court would assess an unpreserved claim of *Davis* error on direct appeal. When a defendant has "not attempt[ed] to withdraw his guilty plea in the district court, [the Fourth Circuit] review[s] his plea challenge for plain error." *United States v. Lockhart*, 947 F.3d 187, 191 (4th Cir. 2020) (en banc) (citing *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018)). A defendant satisfies the plain-error standard by demonstrating "(1) an error was made; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Harris*, 890 F.3d 480, 491 (4th Cir. 2018).

When raising a forfeited attack on a guilty plea, a defendant can only demonstrate that an error affected his substantial rights by "show[ing] a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). A defendant must satisfy this standard even if he establishes that an error occurred in his plea colloquy. *See, e.g.*, *United States v. Cannady*, 283 F.3d 641, 647–48 (4th Cir. 2002) (stating that the

defendant had failed to show prejudice on plain-error review arising from an *Apprendi* error in his plea colloquy where the defendant did not "contend that he would not have pleaded guilty if he had known that his sentence could not have exceeded twenty years," and instead "simply point[ed] out the error and suggest[ed] that the existence of the error entitle[d] him to relief").

Accordingly, the prejudice inquiry in the context of a challenge to a guilty plea asks, "Would this error have affected the defendant's decision to plead guilty at all?" The analysis takes into account the entire decisional calculus facing the defendant at the time he entered his guilty plea. Under this standard, the defendant could not establish prejudice, even on direct appeal. Like the defendant in *Cannady*, this defendant has not suggested that, but for inclusion of conspiracy to commit Hobbs Act robbery as one of Count 3's underlying predicates, he would not have pleaded guilty.

The Second Circuit's recent opinion in *United States v. Dussard*, 967 F.3d 149 (2d Cir. 2020), is helpful on this point. *Dussard* involved a forfeited claim of *Davis* error raised for the first time on direct appeal following a guilty plea. The defendant was indicted on a Hobbs Act conspiracy charge, a drug conspiracy charge, and a § 924(c) count predicated on both conspiracy offenses. *Id.* at 151–52. The defendant pleaded guilty to the Hobbs Act conspiracy count and the § 924(c) count. The plea agreement, however, only listed the robbery conspiracy as a

§ 924(c) predicate, omitting any reference to the drug charge. *Id.* at 152. After the Second Circuit held, as the Fourth Circuit did in *Simms*, that a Hobbs Act conspiracy is not a valid crime of violence under 18 U.S.C. § 924(c)(3)(A), the defendant raised a claim on direct appeal that his plea to the § 924(c) count was invalid. *Id.* at 154–55. Reviewing the forfeited claim for plain error, the Second Circuit rejected the defendant's attack on his guilty plea, even though he had pleaded guilty to an invalid § 924(c) count. It did so by concluding that the defendant could not show the error affected his substantial rights because he would have pleaded guilty irrespective of the error.

The Second Circuit began by surveying the record evidence from the plea colloquy and Presentence Investigation Report, which supported the conclusion that the defendant wanted to plead guilty and was in fact guilty of using a firearm in relation to the drug-trafficking conspiracy. *Id.* at 156–57. The Second Circuit then assessed what would have occurred had the defendant raised him claim of *Davis* error earlier:

> [I]f Dussard and the government had anticipated the *Davis* decision making the predication of Count Three on the Hobbs Act conspiracy invalid, they could have avoided the invalidity in Dussard's Count Three plea of guilty just by changing the two lines of the Agreement's Count Three description that referred to a crime of violence and Hobbs Act conspiracy, to have that description refer instead to the allegation of firearm possession "during and in relation to a drug trafficking crime ..., namely, the narcotics conspiracy charged in Count Two of this Indictment" (Indictment ¶ 5).

Id. at 157–58. Because Dussard "pointed to nothing in the record to indicate that he would not have agreed to" a revised plea, *id.* at 158, the Second Circuit upheld his guilty plea on plain-error review even though he technically pleaded guilty to a count with an invalid conspiracy predicate. Notwithstanding *Dussard*, in this case, the defendant pled guilty to a §924(c) count that incorporated and detailed *both* the Hobbs Act conspiracy and a valid drug-trafficking crime.

Furthermore, the cause-and-prejudice standard applicable in habeas is stricter than the standard on direct appeal. The Supreme Court was clear on this point in *United States v. Frady*, 456 U.S. 152 (1982), where it rejected "use of the 'plain error' standard to review [a] § 2255 motion" and stated "that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *Id.* at 166. The Fourth Circuit has also expressly held "that the *Frady* cause and prejudice standard applies to … collateral challenges to unappealed guilty pleas." *United States v. Maybeck*, 23 F.3d 888, 891 (4th Cir. 1994).

Here, the defendant cannot overcome *Frady*'s heightened prejudice standard. He has pointed to nothing in the record indicating that he would not have pleaded guilty to Count 3 if the invalid conspiracy predicate were excised from the

indictment and Count 3 rested solely on the drug-trafficking charge.[1] Nor could he. In his statement of facts, he admitted all of the circumstances surrounding the drug-trafficking crime underlying Count 3.

The Second Circuit's opinion in *Dussard* is also consistent with analogous authority in this Court addressing prejudice on collateral review. In *United States v. Dyess*, 730 F.3d 354 (4th Cir. 2013), for example, the Court held that the defendant could not show prejudice arising from the purportedly ineffective assistance of his counsel in failing to raise an *Apprendi* claim based on the absence of required drug weights in an indictment. It reasoned that "Dyess … [could not] show that any (assumed) deficient performance by trial counsel prejudiced him," because "if Dyess had raised [an *Apprendi* objection to his indictment], the Government could have simply issued a superseding indictment with drug weights or proceeded under a criminal information." *Id.* at 363–64.

This Court considered a similar issue in *United States v. Garcia*, No. 97-6175, 1998 WL 101767 (4th Cir. Mar. 9, 1998) (per curiam), where it rejected a post-*Bailey* collateral attack on the knowingness and voluntariness of a guilty plea.

[1] The defendant bears the burden of making such a showing. That is true on direct appeal, *see Lockhart*, 947 F.3d at 192, and it is true on collateral review, *see Parke v. Raley*, 506 U.S. 20, 31 (1992); *Hawk v. Olson*, 326 U.S. 271, 279 (1945) (explaining that a prisoner necessarily "carries the burden in a collateral attack on a judgment").

The defendant there argued that he did not "use" a firearm within the meaning of *Bailey*, but the Court reviewed the plea record and concluded that the defendant did "carry" a firearm within the meaning of § 924(c). *See id.* at *1 (citing *Mitchell*, 104 F.3d at 652). Without addressing procedural default or actual innocence, *Garcia* analyzed the collateral attack on the plea this way:

> [T]his is not a case where the petitioner pled guilty to conduct which was not criminal. Had someone been able to correctly explain to Garcia the meaning of "use" under § 924(c) at the time he pled guilty, it would have been clear that his conduct was criminal. Garcia's plea was therefore entered knowingly and voluntarily. Moreover, we find that the district court did not abuse its discretion in finding a sufficient factual basis for Garcia's plea. Hence, Garcia fails to establish any violation, much less a prejudicial violation, of Federal Rule of Criminal Procedure 11.

Id. (internal citations omitted).[2]

The logic underpinning *Dyess* and *Garcia* applies here. Had the defendant raised his claim of *Davis* and *Simms* error—that is, had he argued that conspiracy to commit Hobbs Act robbery was not a crime of violence—the government would simply have obtained a second superseding indictment (or filed a criminal information) revising Count 3 so that it only rested on the drug-trafficking predicate.

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[2] Several other courts approached post-*Bailey* challenges to guilty pleas in the same way. *See United States v. Merkeley*, No. 99-4169, 2000 WL 745347 (10th Cir. May 25, 2000); *United States v. Anzaldo-Casillas*, No. 96-36201, 1997 WL 415337 (9th Cir. July 24, 1997); *United States v. Harold*, No. 96-11288, 1997 WL 256687 (5th Cir. Apr. 4, 1997); *Malgeri v. United States*, No. 95-2136, 1996 WL 343049 (1st Cir. June 4, 1996) (per curiam).

Given such a change would not have altered the sentencing scheme defendant faced in any way, his decision to plead guilty could not have been different. He therefore suffered no "actual prejudice" within the meaning of *Bousley* from the inclusion of a second, later-declared-invalid theory of liability and cannot overcome the default.

II. Defendant's brandishing conviction is lawful because he pleaded guilty to the charge containing a still-valid predicate offense.

A defendant may only set aside a conviction or sentence on collateral review if it was "not authorized by law," involved "such a denial of infringement of the constitutional rights of the [defendant] as to render the judgment subject to collateral attack," or "otherwise open to collateral attack," *i.e.*, involved "a claim of error of fact or law of the fundamental character that renders the entire proceeding irregular and invalid." *United States v. Pettiford*, 612 F.3d 270, 277–78 (4th Cir. 2010) (quoting § 2255(b)).

Defendant's conviction under § 924(c)(3) is lawful because it has a valid predicate drug-trafficking crime, which he expressly affirmed in his plea agreement. Defendant therefore fails to meet his burden for obtaining relief under § 2255(h)(2).

A. *Davis* did not affect drug-trafficking predicates like attempt to possess cocaine with intent to distribute.

Section § 924(c)(1)(A) prohibits a defendant from using, carrying, brandishing, or discharging a firearm "during and in relation to any crime of violence or drug trafficking crime." Section § 924(c)(2) defines a drug trafficking crime as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." Section 924(c)(3) defines a "crime of violence" as any felony:

> (A) [that] 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.

Subsection (A) is commonly referred to as the "force clause," whereas subsection (B) is commonly referred to as the "residual clause."

The Supreme Court recently invalidated the residual clause (§ 924(c)(3)(B)) as unconstitutionally vague (*United States v. Davis*, 139 S. Ct. 2319, 2339 (2019)), and this Court has held that conspiracy to commit Hobbs Act robbery does not fall within the force-clause (*United States v. Simms*, 914 F.3d 229 (4th Cir. 2019)). But because drug-trafficking crimes are an independent category of predicate offenses for a § 924(c) violation, none of the residual- or force-clause cases like *Davis* or

Simms affect the validity of those predicates. *See In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019) (stating that a "§ 924(c) conviction [may be] fully supported by [a defendant's] drug-trafficking crimes," since *Davis* "invalidated only § 924(c)(3)(B)'s residual clause relating to crimes of violence"); *Thomas v. United States*, No. 03-cr-189 (ELH), 2020 WL 1491395, at *4 (D. Md. Mar. 26, 2020) (holding that a defendant is "ineligible for relief" under *Davis* where the predicate offense supporting a § 924(c) conviction was a drug-trafficking crime).

Notably, in *United States v. Hare*, 820 F.3d 93 (4th Cir. 2016), this Court held 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. *See id.* at 105–06. In *Hare*, because the jury had returned a special verdict convicting the defendant as to each charged predicate, the Court concluded it could sustain the conviction. *Id.* at 106.

Another Fourth Circuit case, *United States v. Mitchell*, 104 F.3d 649 (4th Cir. 1997), demonstrates how to apply *Hare*'s logic in the context of guilty pleas. There, this Court considered the effect of *Bailey v. United States*, 516 U.S. 137 (1995), where the Supreme Court narrowed the meaning of "using" a firearm under § 924(c), on the validity of a guilty plea. More specifically, the defendant in *Mitchell* challenged his guilty plea on direct appeal, arguing that his plea was invalid

because it lacked an adequate factual basis to establish that he "used" a firearm in the manner required by *Bailey*. In resolving that claim, *Mitchell* observed that § 924(c) criminalizes both using *and carrying* a firearm during and in relation to a drug-trafficking crime. Then, *Mitchell* simply reviewed the plea record to determine if the defendant had both used and carried a firearm. It explained the applicable legal standards this way:

> In order to comply with Rule 11(f), a district court need not replicate the trial that the parties sought to avoid. Rather, it 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. The district court possesses wide discretion in determining whether a sufficient factual basis exists, and its acceptance of a guilty plea will be reversed only for an abuse of that discretion. And, if the evidence presented is sufficient to demonstrate that the defendant committed the elements of the charged offense, acceptance of the plea clearly does not constitute an abuse of discretion.

Id. at 652 (internal citations omitted). Under these rules, the plea in *Mitchell* was valid. As the Court put it, "the record developed before the district court was adequate to support a conclusion that Mitchell 'carried' the firearm," since "[h]e knowingly possessed and transported the firearm in his automobile." *Id.* at 654.

This Court has repeatedly ruled in keeping with *Hare* and *Mitchell*. *See, e.g.*, *United States v. Steward*, 793 F. App'x 188, 190 (4th Cir. 2019) (upholding § 924(c) conviction under plain-error review where jury found both conspiracy to commit Hobbs Act robbery and aiding and abetting Hobbs Act robbery as predicates), *cert. denied*, — S. Ct. —, No. 19-8043, 2020 WL 3492695 (June 29, 2020);

United States v. Cannon, 778 F. App'x 259, 260–61 (4th Cir. 2019) ("The § 924(c) count to which [the defendant] pled guilty was predicated not only on conspiracy but also on substantive Hobbs Act robbery that Cannon committed on April 27, 2015; and his stipulated statement of facts established he committed that substantive offense."); *United States v. Villegas*, 777 F. App'x 660, 661 (4th Cir. 2019) (upholding § 924(c) conviction with two predicates, one valid and the other not).

Consistent with these authorities, several jurists in this Circuit have concluded that a defendant's guilty plea to a § 924(c) count with multiple predicates is valid so long as one predicate remains valid. *See, e.g.*, *Richardson v. United States*, No. 2:17-cr-146 (RAJ), 2020 WL 2129566, at *2 (E.D. Va. May 5, 2020); *Van Bui v. United States*, No. 1:05-cr-300 (LMB), 2020 WL 1979330, at *7 (E.D. Va. Apr. 24, 2020); *Wynn v. United States*, No. 3:16-cr-74 (MOC), 2020 WL 1875646, at *4–5 (W.D.N.C. Apr. 15, 2020); *Suttles-Barden v. United States*, No. 3:12-cr-146 (FDW), 2020 WL 1061222, at *4–5 (W.D.N.C. Mar. 4, 2020); *Ferone v. United States*, No. 5:12-cr-37 (KDB), 2020 WL 520945, at *5–6 (W.D.N.C. Jan. 31, 2020); *Castellon v. United States*, No. 3:08-cr-134 (RJC), 2020 WL 400634, at *3–5 (W.D.N.C. Jan. 23, 2020); *Adams v. United States*, No. 12-cr-300 (DKC), 2019 WL 4735407, at *2 (D. Md. Sept. 27, 2019); *United States v. Taylor*, No. 3:08-cr-326 (MHL), 2019 WL 4018340, at *4–5 (E.D. Va. Aug. 26, 2019).

As explained more fully below, and as the district court concluded in its Memorandum Opinion (Docket 155), the application of *Hare* and *Mitchell* forecloses the defendant's habeas claim. Because the drug-trafficking predicate was charged in the indictment and expressly acknowledged and admitted in the plea agreement, statement of facts, and plea colloquy, defendant's admissions function identically to the special verdict form in *Hare*, and his conviction remains lawful.

B. Defendant expressly agreed to plead guilty to the drug-trafficking theory of his conviction under § 924(c).

At their core, defendant's arguments that his conviction is unlawful all rest on the premise that he pleaded guilty to the § 924(c) offense solely on the conspiracy predicate and not both—whether as a matter of historical fact or by operation of legal rules governing interpretation of the conviction. But under either a factual or legal analysis, that premise fails.

Defendant begins his argument by asserting the district court committed *Apprendi* error by engaging in fact-finding to sustain the conviction. *See* Def. Br. 17–18. But defendant confuses purported fact-finding on the dismissed Count 2 with the actual inquiry the district court conducted: whether, as a matter of historical fact, defendant's guilty plea to Count 3 included a plea that he had brandished a firearm during and in furtherance of the drug-trafficking crime as well as the crime of violence. *See* JA99 ("Crawley's § 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." (first emphasis added)).

The district court's conclusion that defendant pleaded guilty to Count 3 by admitting both the crime-of-violence predicate and the drug-trafficking predicate is well supported—indeed, compelled—by the record. The plea agreement was explicit that defendant pleaded guilty on both predicate theories of guilt:

> The defendant agrees to plead guilty to Counts One and Three of the superseding indictment. … Count Three charges the defendant with Use, Carry and Brandishing Firearms During and in Relation to a Crime of Violence *and a Drug Trafficking Crime*.

JA23 (emphasis added). Likewise, at the plea colloquy, the magistrate judge invoked both charged predicates when asking defendant about his guilty plea:

> Q Now, count three, do you understand that you are charged with having used, carried, and brandished a firearm or firearms during and in relation to a crime of violence *and a drug-trafficking crime*?
>
> A Yes, sir.
>
> …
>
> Q Are you intending to plead guilty to these two charges, Mr. Crawley, because *you are, in fact, guilty of what they say you did in each count*?
>
> A Yes, sir.

Suppl. App., Tr. at 8, 12 (emphases added).

The plain language of the agreement and defendant's sworn answers during his plea colloquy establish conclusively that defendant knowingly and voluntarily

pleaded to violating § 924(c) on *both* theories of a crime-of-violence predicate *and* a drug-trafficking predicate. *See Lemaster*, 403 F.3d at 221–22. As further confirmation, defendant expressly stipulated that he "did use, carry and brandish a firearm during and in relation to a crime of violence and a drug trafficking crime" in his Statement of Facts, thus demonstrating that the parties, including defendant, knew he was pleading guilty to a § 924(c) conviction on both predicate-offense theories of guilt. JA38. As *Mitchell* confirms, the existence of a factual basis for a valid theory of conviction sustains the conviction on that theory. *See* 104 F.3d at 652–54.

In short, the plea agreement, the plea colloquy, and the defendant's explicit admissions in the statement of facts function identically to the jury's special verdict in *Hare*, confirming that defendant pleaded guilty on both theories of guilt charged in his § 924(c) count. *See* 820 F.3d at 105–06.

None of defendant's attempts to escape his binding agreement or admissions have merit.

First, defendant appears to assert that because the government dismissed Count 2 as part of the plea bargain, the underlying drug-trafficking crime could no longer serve as a predicate offense to Count 3. *See* JA21. This is simply wrong as a matter of law. It is well established that a defendant may be convicted of a § 924(c) offense without being separately charged or convicted on the underlying predicate.

See, e.g., *See, e.g.*, *United States v. Crump*, 120 F.3d 462, 466 (4th Cir. 1997) ("[A] defendant's conviction under § 924(c)(1) does not depend on his being convicted—either previously or contemporaneously—of the predicate offense, as long as all of the elements of that offense are proved and found beyond a reasonable doubt."); *see also United States v. Carter*, 300 F.3d 415, 424 (4th Cir. 2002) (holding that "§ 924(c) convictions do not require a conviction on the predicate … offense"). Thus, the dismissal of Count 2 has no bearing on whether, as a matter of fact, defendant pleaded guilty to violating § 924(c) on both predicate-offense theories or only one. Imposing a mandatory minimum sentence on the basis of defendant's factual admissions when pleading guilty is, of course, consistent with *Apprendi* and *Alleyne*. *See, e.g.*, *United States v. Cohen*, 888 F.3d 667, 682 n.9 (4th Cir. 2018); *see also Blakely v. Washington*, 542 U.S. 296, 310 (2004) ("When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact-finding.").

Defendant suggests, for the first time on appeal, that Count 3 is duplicitous because each predicate creates a separate § 924(c) offense. *See* Def. Br. 20–21; *see also United States v. Burfoot*, 899 F.3d 326, 337 (4th Cir. 2018) ("An indictment is duplicitous if it charges two offenses in one count."). It is true that this Circuit's precedent permits the government to charge separate § 924(c) offenses for each

predicate, even if only a single use of a firearm is involved. *See United States v. Jordan*, 952 F.3d 160, 170–71 (4th Cir. 2020). But this argument is unavailing for several reasons. First, the count is not duplicitous because "two or more acts, each of which would constitute an offense standing alone[,] may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme." *Burfoot*, 899 F.3d at 337. Here, defendant's attempt to possess cocaine with intent to distribute was part of the same scheme as his conspiracy to rob a drug dealer to obtain that cocaine. Second, defendant's guilty plea waived any defect in the indictment, including a claim of a duplicitous count. *See, e.g.*, *United States v. Nunez-Sanchez*, 453 F. App'x 319, 321 (4th Cir. 2011) (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Third, defendant could have suffered no prejudice in this situation, when—as in *Hare*—a court can determine which predicate the jury relied on. *See also Jordan*, 952 F.3d at 170–71 (noting that defendants may request special verdict forms to ensure unanimous jury findings).[3]

Defendant cites *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), to argue that a court may not guess on which of multiple predicates a jury returning a general verdict has rested its determination of guilty. True enough—but case law addressing

[3] Moreover, defendant's assertion of duplicity was not raised in his informal opening brief. *See* 4th Cir. R. 34(b); *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief.").

general verdicts after a trial is inapposite in the guilty plea context, where a defendant's plea agreement, plea colloquy, and admissions function as a special verdict. The government agrees there was no need to guess which predicate or predicates on which defendant's guilty plea rested because defendant explicitly agreed, in both his agreement with the government and under oath at the plea colloquy, that he was pleading guilty to both predicate-offense theories of guilt.

Defendant attempts to argue that it was improper for the district court to consider his sworn admissions in his Statement of Facts. *See* Def. Br. 20–25. *But cf. Lemaster*, 403 F.3d at 221–22. First, the Court need not even address this argument, since the explicit language of the plea agreement and defendant's sworn answers during the plea colloquy—to which defendant has not objected—alone establish that he pleaded guilty to Count 3 on both predicate-offense theories of guilt. But defendant's argument is also wrong on its own terms.

Defendant cites authority—*Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016)—that is wholly inapposite. In those cases, the Supreme Court addressed the categorical approach in light of the Sixth Amendment limitations on what a sentencing judge *in a subsequent prosecution* may consider when applying a recidivism enhancement based on prior convictions. *See, e.g.*, *Mathis*, 136 S. Ct. at 2252 (noting a sentencing judge may find only "the simple fact of a prior conviction" and "can do no more, consistent

with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of"); *Descamps*, 570 U.S. at 270 ("Whatever [a defendant] says, or fails to say, about superfluous facts cannot license a *later sentencing court* to impose extra punishment." (emphasis added)).[4] This case presents an entirely different circumstance: a court considering a § 2255 motion to vacate a conviction is not "a later sentencing court" and indeed is not imposing any extra punishment.[5] The court's sole concern is discerning, as a matter of historical fact and law, whether the defendant's conviction under consideration is unlawful within the meaning of § 2255. *See Pettiford*, 612 F.3d at 277. Defendant's assertion that the district court's determination "increased Mr. Crawley's sentence" because "his § 924(c) sentence would have otherwise been vacated" is erroneous. Def. Br. 23. The district court did not "increase" defendant's sentence; it concluded that the sentence was lawful because defendant had, as a matter of fact, pleaded guilty under a still-valid theory of guilt on Count 3.

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[4] Under both *Descamps* and *Mathis*, of course, "the terms of a plea agreement" or "transcript of colloquy between judge and defendant" are permissible sources on which a court may rely to determine on what offense defendant was convicted. *See Shepard v. United States*, 544 U.S. 13, 26 (2005).

[5] Indeed, as discussed above, the Sixth Amendment unequivocally permits a sentencing court to increase punishment based on defendant's factual admissions *in that case*. *See Blakely*, 542 U.S. at 310 ("When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial fact finding.").

Lastly, defendant asserts that this Court's decisions in *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (en banc), and *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012), combine to create a legal rule that limits this Court to considering the conviction as premised solely on the Hobbs Act conspiracy predicate. But that is not what those cases say, nor do they otherwise aid him here.

In *Vann*, this Court applied the modified categorical approach to a defendant's guilty plea to a North Carolina indecent liberties statute to determine whether he had committed three violent felonies under the Armed Career Criminal Act. *See* 660 F.3d at 772. The North Carolina statute has two prongs, only one of which qualified as a violent felony, and the charging instruments did not specify which prong the defendant allegedly violated. *Vann* concluded that an enhancement was improper because nothing in the record the government could not show that the defendant had pleaded guilty to violating the prong of the statute constituting a violent felony. It reasoned that, even though the relevant charging instruments listed both prongs conjunctively, "a guilty plea admits all the elements of a formal criminal charge," and "[t]he formal criminal charge ... is nothing more than the least serious of the disjunctive statutory conduct, not the entirety of the conduct alleged in the conjunctive." *Id.* at 775 (internal quotation marks omitted).

Then, in *Chapman*, this Court applied *Vann* in a different context. *Chapman* involved a Second Amendment challenge to a conviction under 18 U.S.C.

§ 922(g)(8). In evaluating that claim, this Court confronted the fact that § 922(g)(8) had two subsections, and it was not clear from the defendant's guilty plea which he had violated. *Chapman* resolved the issue by looking to *Vann*. It stated that, "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." 666 F.3d at 228. This Court then decided which of § 922(g)(8)'s prongs was "less serious" and evaluated the defendant's constitutional claim as an attack on that prong alone.

Invoking *Vann* and *Chapman*, the defendant appears to make the following argument:

- Under *Vann* and *Chapman*, I only admitted in my guilty plea to violating § 924(c) in relation to the least serious predicate offense.
- Hobbs Act conspiracy carries no mandatory minimum and a statutory maximum of 20 years.
- Attempting to possess cocaine with intent to distribute carries a mandatory minimum of 10 years and a statutory maximum of life.
- Hobbs Act conspiracy is the least serious of the two predicates and is invalid; therefore, the whole offense is also invalid.

But *Vann* and *Chapman* are inapposite for several reasons.

First, *Vann* and *Chapman* are inapposite on their face because there is no

"least serious" offense contained in § 924(c). The statute describes the same crime, whether the predicate offense is a crime of violence or a drug-trafficking crime, and there is no difference in statutory penalty when the offense is based on different predicates. In other words, a defendant who pleads guilty to violating § 924(c) is guilty of the same offense and subject to the same penalty, irrespective of the predicate supporting the conviction. Defendant's argument that the defendant pleads guilty only to the least serious *predicate* in § 924(c) is unsupported by *Vann* and *Chapman*'s holdings or reasoning. Moreover, neither *Vann* nor *Chapman* address a situation where a court considering a § 2255 motion must examine the record and make a finding as to the basis on which a defendant pleaded guilty in order to determine whether that basis remains legally valid.

Second, *Vann* and *Chapman* are inapposite because in both, this Court was applying an interpretive rule in the absence of any evidence that established to what a defendant had actually pleaded guilty. For example, *Vann* compared the situation to trials by jury where "it has been established that a defendant convicted under a conjunctively charged indictment cannot be sentenced—*in the absence of a special verdict identifying the factual bases for conviction*—to a term of imprisonment exceeding the statutory maximum for the 'least-punished' of the disjunctive statutory conduct." 660 F.3d at 774. Likewise, *Chapman*, the defendant pleaded

guilty to a single count that charged him with violating § 922(g)(8), without specifying the subsection under which his conduct fell. *See* 666 F.3d at 223. In other words, what was at issue *Vann* was whether a guilty plea "*necessarily*" admitted to "all allegations charged conjunctively." 660 F.3d at 774 (emphasis added). By contrast, because here the plea agreement, plea colloquy, and statement of facts all confirm that defendant knowingly and voluntarily agreed to plead guilty on both predicate-offense theories, it is improper to invoke *Vann*'s rule about ambiguous records.

Third, even if the Court disregarded the plea agreement, colloquy, and statement of facts and extended *Vann* and *Chapman* to predicate offenses in § 924(c), defendant's assertion that the drug-trafficking predicate offense is the more serious of the two predicates is simply incorrect. The drug-trafficking crime as charged in Count 2, and as referenced in Count 3, of the superseding indictment did not allege a specific drug quantity at all. *See* JA15–16. Thus, none of the mandatory minimums or increased statutory maximums found in § 841 would have applied. *See United States v. Promise*, 255 F.3d 150, 160 (4th Cir. 2001) (en banc) (holding that an indictment alleging unspecified quantity of drugs has no mandatory minimum and sets a maximum sentence of 20 years). Accordingly, the drug-trafficking offense described in Counts 2 and 3 carried the same exact penalty range as the Hobbs Act conspiracy described in Counts 1 and 3: up to 20 years' incarceration

followed by 3 years of supervised release. *See* 18 U.S.C. § 1951(a); 21 U.S.C. §§ 841(a)(1), (b)(1)(c).

As discussed, the defendant's argument that he is guilty of the least punished means that he is still guilty, as both punishments have the same penalty. Further, cases like *Vann* and the authority that it cites do not address a scenario where the defendant expressly admits, in his plea agreement, plea colloquy, and an accompanying statement of facts, that his guilty plea is supported by two distinct theories of guilt. To take a simple example, if a defendant expressly admitted to conspiring to distribute a kilogram of crack *and* a kilogram of marijuana, the defendant would have, under *Vann*, made factual admissions that are the equivalent of a special verdict, establishing the defendant's guilt for the higher statutory penalty range for the crack cocaine. In short, *Vann* did not address a scenario where a defendant expressly acknowledged in an agreement and during the Rule 11 colloquy that he was pleading guilty on both theories in a specified charge and admitted the same in a stipulation of facts.

To use another example, a defendant who pleads guilty to conspiring to rob and murder a person and then enters a guilty plea where he admits that he agreed to both rob and murder someone cannot claim that his guilty plea must be limited to a conspiracy to rob on the theory that the robbery object is less serious. It is not impossible to plead guilty to a multiple-object conspiracy, and guilty pleas to

multiple-object conspiracies are not automatically, by operation of law, reduced to the least serious object when a defendant admits all of the objects.

A defendant who signs a plea agreement and then swears under oath that he committed an offense on both theories charged in the indictment cannot and should not receive a greater benefit on collateral review than a defendant who went to trial and had both predicates submitted to the jury for special findings. *See, e.g.*, *United States v. Locke*, 932 F.3d 196, 200 (4th Cir. 2019) ("[W]hen it comes to guilty pleas, the principle of finality 'bears extra weight' and 'carries special force'." (alterations omitted) (quoting *Custis v. United States*, 511 U.S. 485, 497 (1994), and *United States v. Timmereck*, 441 U.S. 780, 784 (1979)). Had defendant here gone to trial, as the defendant did in *Hare*, this Court would not grant relief from his conviction. Under Supreme Court precedent, an "alternative-theory error is subject to ordinary harmlessness review, and the relevant appellate inquiry is whether the error was harmless beyond a reasonable doubt." *United States v. Jefferson*, 674 F.3d 332, 361 (4th Cir. 2012) (citing *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam)). As this Court's opinion in *Steward* demonstrated, when the record establishes that the jury would have validly convicted a defendant under § 924(c) even absent a challenged predicate offense—as is established by defendant's express admissions here—this Court has affirmed.

III. Any *Davis* error was harmless.

In addition, any *Davis* error here was harmless.

An error is harmless on collateral review unless it had a "substantial and injurious effect" on the defendant's conviction. *United States v. Smith*, 723 F.3d 510, 517 (4th Cir. 2013); *accord Barnes v. Thomas*, 938 F.3d 526, 533 n.3 (4th Cir. 2019) (explaining that the *Brecht* standard is a "'less onerous harmless-error standard' than the requirement on direct appeal that an error be proven 'harmless beyond a reasonable doubt'" (quoting *Brecht*, 507 U.S. at 623)); *cf. Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) ("In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" (quoting *Brecht*, 507 U.S. at 637; *United States v. Lane*, 474 U.S. 438, 449 (1986))).

The defendant here cannot meet his burden to show that any *Davis* error had a "substantial and injurious effect" on his proceedings. As noted, contrary to defendant's claim that he faced a ten-year mandatory minimum sentence for the drug trafficking crime, *See* Def. Br. at 27, there was no quantity of cocaine set forth in

the superseding indictment that would trigger a mandatory minimum term of incarceration.[6] Pursuant to 21 U.S.C. § 841(a)(1) and (b)(1)(c), defendant faced the same sentence for the drug trafficking offense and for conspiring to commit a Hobbs Act robbery: a statutory range of 0 to 20 years' imprisonment, followed by three years' supervised release. Had defendant challenged the constitutionality of the Hobbs Act conspiracy predicate during his initial proceeding, the government would simply have proceeded on the drug-trafficking predicate. And because defendant would have faced the exact same exposure in such an indictment, he would have undoubtedly made the same choice to plead guilty on valid theories.

Because defendant cannot show that any *Davis* error here would have resulted in actual prejudice, he cannot demonstrate an entitlement to relief from the conviction on habeas review.

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[6] While it is true that the defendant agreed in the Statement of Facts that he was attempting to locate half of a kilogram or more of cocaine as well as the proceeds of the victim's drug trafficking activity, the amount of cocaine referenced in the Statement of Facts was to establish that the defendants were after a distribution quantity (half a kilogram or more) of cocaine.

Conclusion

For the foregoing reasons, this Court should affirm defendant's convictions and sentence. If the Court concludes to the contrary, this Court should remand for the district court to determine the appropriate remedy. *See, e.g., United States v. Hadden*, 475 F.3d 652, 661 (4th Cir. 2007).

Respectfully submitted,

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/s/
____
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Statement Regarding Oral Argument

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

Certificate of Compliance

I certify that this brief was written using 14-point Times New Roman typeface and Microsoft Word 2016.

I further certify that this brief does not exceed 13,000 words (and is specifically 11,773 words) as counted by Microsoft Word, excluding the table of contents, table of authorities, statement regarding oral argument, this certificate, the certificate of service, and any addendum.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

/s/

Angela Mastandrea-Miller
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