No. ___

In the Supreme Court of the United States

RANDOLPH HARRIS AUSTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the grand jury alleged cocaine base and the jury was instructed that it didn't matter whether it was cocaine base or cocaine and the judgment says cocaine base, does this circumvent the democratic constraints and procedural safeguards guaranteed by the Constitution including the right to a grand jury indictment and Due Process?

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Randolph Harris Austin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2019. The Petition for Rehearing and Rehearing *En Banc* was denied on June 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL, STATUTORY PROVISIONS INVOLVED

The pertinent constitutional, statutory provisions and rules – U.S. Const., Amendments V & VI – are set forth in the appendix. App., *infra*, A9.

STATEMENT

It appears that the trial court wanted to get on with the trial, not realizing that it involved unusual technical issues placing more reliance on expert testimony than the simple question of whether the white powder seized in a typical case was cocaine or whether the white rock seized was cocaine base. And a person in Mr. Austin's position would no doubt feel equally frustrated by the bureaucracy's failure to act diligently in recognizing the need to address the issues concerning the handling and testing of the substances seized on May 12, 2017.

The trial court took this case to trial quicker than most and then proceed to upwardly depart to a sentence more than twice the guideline range. This rush to judgment resulted in an error in denying the motion to continue for the purpose of lining up a defense expert, an error in instructing the jury (which expressed its confusion in a jury note) with an incorrect statement of the law allowing the jury to convict on count three whether the substance was cocaine or cocaine base, an error in not dismissing count three for insufficient evidence of possession of cocaine base and intent to

distribute, and an error in upwardly departing both in offense level and criminal history.

The trial court's determination at sentencing that count three involved cocaine base due to the jury verdict was clearly erroneous given that the trial court allowed the jury to convicted Mr. Austin of count three whether the substance was cocaine or cocaine base. The trial court did a 180 at sentencing and said that the jury verdict established that the substance was cocaine base. Yes, the indictment only alleged cocaine base, but the jury was instructed by the trial court that it could convict even if the substance was cocaine and not cocaine base. The judgment specified that Mr. Austin was convicted of possessing cocaine base with intent to distribute. Thus, Mr. Austin can still be prosecuted for this same conduct only changing the substance to cocaine.

REASONS FOR GRANTING THE PETITION

The Court should consider Petitioner's request for a writ of certiorari because the Opinion conflicts with *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996). The matter is also one of exceptional importance regarding democratic constraints and procedural safeguards

guaranteed by the Constitution to those who face federal prosecution on an ever-expanding list of broad, complex federal crimes.

The Opinion misapprehends *United States v Tillman*, __ F.3d __, No. 17-4648 (4th Cir. Feb. 26, 2019), *United States v. Hall*, 551 F.3d 257 (4th Cir. 2009), *United States v. Malloy*, 68 F.3d 166 (4th Cir. 2009), *United States v. Miltier*, 882 F.3d 81 (4th Cir.), *cert. denied*, 139 S. Ct. 130 (2018), and *United States v. Branch*, 537 F.3d 328 (4th Cir. 2008). In this regard, the Opinion sets an untenable precedent that lowers the government's evidentiary burden in establishing probable cause before the grand jury, and proof beyond a reasonable doubt before the petit jury, and the critical link between the charge of the grand jury and the verdict of the petit jury.

Granting the writ is warranted because the Opinion overlooks factual and legal matters. There was no evidence that the substance was in a solid state or chemical state that fit the definition of cocaine base at the time it was possessed. There is no evidence of a prior conviction or instance of cocaine base distribution that would allow the jury to infer intent to distribute or corroborated by other evidence. There is no evidence that the accused had a reasonable opportunity to marshal a defense expert to testify as to the state of the substance at the time of opportunity and the actions of the government post-seizure that converted the substance into cocaine base.

SUMARY OF ARGUMENT

The misapprehensions and oversights of facts and law in the Opinion are inconsistent with precedent. Under *Burgos*, the type of controlled substance is an element of the drug crime. The indictment and judgment reflect the fact that the type of controlled substance is an element of the drug crime. The need for the same type of controlled substance and substantial evidence of possession of that substance reflect the importance of the type of controlled substance in inferring intent to distribute. The substantial dispute over the nature of the substance and need for more time to retain an expert for the defense reflect the importance of the type of controlled substance in preparing a defense and confronting the government's witnesses. For these reasons, the Court should grant this petition for writ of certiorari.

The Opinion misapprehends the binding precedent governing the justice disposition of this case and overlooks the operative facts regarding the substance and motion to continue.

A. Factual Background

a. Allegation and Evidence of Cocaine Base

On October 20, 2016, Mr. Austin was charged by a Charlotte grand jury for the U.S. District Court for the Western District of North Carolina with distribution and possession with intent to distribute cocaine base on

May 12, 2016, in Gaston County. (J.A. 14). On December 15, 2016, the Charlotte grand jury for the U.S. District Court returned a superseding indictment charging Mr. Austin with (1) distribution and possession with intent to distribute cocaine on March 1, 2016, (2) distribution and possession with intent to distribute cocaine on March 21, 2016, and (3) possession with intent to distribute cocaine base on May 12, 2016. (J.A. 75-76).

Mr. Brogdon testified that he used a confidential informant to purchase one ounce of cocaine from Mr. Austin on March 1, 2016. (J.A. 207-227). Mr. Brogdon testified that he used the confidential informant to purchase 1.5 ounces of cocaine from Mr. Austin on March 21, 2016. (J.A. 227-243). Mr. Brogdon testified that he conducted surveillance of Mr. Austin on May 12, 2016 and seized him and the car he was operating as Mr. Austin was pulling in the carport of a residence. (J.A. 243-). Mr. Brogdon observed a white substance and knife with residue in the front seat, a wet white substance in a measuring cup on the rear floorboard, and a strong smell of marijuana coming from the residence. (J.A. 246-247).

Mr. Brogdon testified about hearsay as to what the test lab said he should do to the wet substance before shipping it to the lab. (J.A. 253-254). The lab expert testified that he never talked to anyone. (J.A. 354). Mr. Brogdon set the wet substance on top of the coffee filter and let it sit there in

the special investigations department from Friday to Monday and mailed it to the lab on Monday. (J.A. 254-256). During cross, he admitted that he did not ship it to the lab but only turned it over to another person in the police department on Monday. (J.A. 277). He did not know how long before the substance was tested. Id. At sentencing, Mr. Austin's expert would testify that there was a six-week delay in testing by the government's lab. (J.A. 616).

Mr. Kemp testified that he is a federal probation officer who knows Mr. Austin and participated in the surveillance and arrest of Mr. Austin on May 12, 2016. (J.A. 306-307). He testified that he and federal probation officer Ms. Price searched the car Mr. Austin was driving and located a bag of white substance in the front seat and a "bag containing a liquid substance and a white powdery substance mixed in" on the back-seat floorboard. (J.A. 310-311). He testified that the substance in the front seat was later confirmed to be cocaine. (J.A. 311). Mr. Kemp did testify that he has "not ever personally ever strained cocaine out of water or liquid at any time to package it." (J.A. 324). He also testified that the way they had packaged the wet substance at the time of seizure "was sufficient" to go to the laboratory for testing. (J.A. 326). He admitted that cocaine base "is usually in a hardened state, not in a liquid state" and that "for cocaine powder to be made into

crack cocaine, liquid needs to be added to it and then it's cooked. And then when it's cooked it becomes hard." (J.A. 328-329). He admitted that he is "not saying that Mr. Austin put any heat to any item." (J.A. 328).

Ms. Reagan testified that she is a forensic chemist and special agent for the North Carolina State Crime Lab. (J.A. 330). She testified that she tested the substances seized on March 1st and 21st and concluded that the March 1st substance was cocaine hydrochloride weighing 28.31 plus or minus 0.03 grams and that the March 21st substance was cocaine hydrochloride weighing 41.91 plus or minus 0.03 grams. (J.A. 332-334). Ms. Reagan testified that cocaine hydrochloride is power cocaine and to make cocaine base, powder cocaine is combined with water and some sort of base then heated, cooked, and allowed to cool and form a hard rock like material that is smoked. (J.A. 342).

Mr. Perron testified that he is a forensic chemist with the North Carolina State Crime Laboratory. (J.A. 342). Mr. Perron analyzed substances from the May 12, 216, seizure and concluded that Exhibit 17 was cocaine base weighing 15.15 plus or minus 0.02 grams, (J.A. 345-346), Exhibit 16 was a liquid containing cocaine base weighing 240.33 plus or minus 0.02 grams, (J.A. 347), and Exhibit 18 was cocaine weighing 1.68 plus or minus 0.02 grams. (J.A. 347-348). He testified that dissolving

cocaine powder in water and then adding baking soda is enough to convert the substance to cocaine base. (J.A. 348-349). Removing the water "gets into a form in which it can be smoked." (J.A. 349).

The trial court instructed the jury on the elements of the three crimes, including the element of a "Schedule II controlled substances," even though all three counts of the indictment by the grand jury specify what the alleged controlled substance is. (J.A. 421-427). The jury asked the trial court, "Is the term 'cocaine base' interchangeable with the term 'cocaine hydrochloride' as it pertains to Count Three as a Schedule II controlled substance? Does it matter if it was cocaine hydrochloride or cocaine base for Count Three?" (J.A. 431). The trial proposed to instruct the jury that they can convict Mr. Austin whether the substance was cocaine or cocaine base. Id. Mr. Austin objected. (J.A. 432). Mr. Austin added that the jury was "trying to figure out whether it would matter" and the trial court is giving the jury the impression that Mr. Austin's arguments were irrelevant. Id. The trial court overruled the objection. (J.A. 432-433). The jury returned a verdict that 21 U.S.C. § 841(a) was violated. (J.A. 440).

At sentencing, defense expert Mr. Brown testified that by heating a solution of cocaine hydrochloride, baking soda, and water to boiling, the cocaine hydrochloride is converted to cocaine base. (J.A. 613). Mr. Austin

asked if a solution of cocaine hydrochloride, baking soda, and water could be defined as cocaine base without heating the solution. (J.A. 614). Mr. Edwards said, "No, I would not define that as crack." Id. As to the 15.15 grams from the coffee filter used to strain the unheated solution seized on May 12, 2016, Mr. Edwards concluded that the same was true of the substance on the coffee filter. (J.A. 615-616). What was strained was cocaine hydrochloride at the time of the seizure. Id.

Mr. Perron had testified at trial that he used the microcrystalline test and infrared spectrum test for this substance. (J.A. 346-347). Mr. Edwards testified that the infrared spectrum test was not good for the substance in question because "it chemically changed the substance, I believe, by heating it." (J.A. 620). Mr. Edwards, testifying about the procedure used by Mr. Perron, said, "In this circumstance I believe that that wet gum, item two I believe it was, that that substance had cocaine hydrochloride in it as well as cocaine base, due to the time that it had sat at room temperature… by heating that wet mixture in the hotplate for five minutes he would have ended up finishing the cook…. What he saw was the cocaine base form at that point by FTIR." (J.A 621).

Mr. Edwards testified that a reasonable testing protocol is to first do a solubility extraction test to see if the substance is a salt and then to do a

confirmatory test using a GS/MS or direct inject mass spectrometer. (J.A. 618-619). Mr. Austin asked about Mr. Brogdon opening the evidence bag containing the liquid and straining it using a coffee filter, and Mr. Edwards testified that, "In the over 20 years that I've been helping as a consultant in chemistry for drug related chemical processes, I've never seen any detective or police officer ever do that with evidence before. So to me it was very unusual." (J.A. 623).

The judgment of conviction states that the court has adjudicated the defendant guilty of three counts including count three "21:841(a)(1)&(b)(1)(C) Possession with Intent to Distribute Cocaine Base 5/12/2016." (J.A. 710).

Asking for Time to Obtain an Expert

By Letter dated January 8, 2017, Mr. Austin requested a speedy trial and a copy of the docket because the government was not going to make any reasonable plea offer. (J.A. 77-78). The trial court denied this motion without prejudice. (J.A. 88).

The government filed notice under Rule 16 of its intention to offer the testimony of Nathan Perron and Elizabeth Reagan as experts offering the opinion that the substance seized on May 12, 2016, was cocaine base. (J.A. 84-85).

On February 5, 2017, the new defense counsel moved to continue the trial to the next available term for several good reasons. (J.A. 89). Counsel had only been in the case for two months. Id. They had insufficient time to review the video and audio surveillance footage and contents of data extracted from a cell phone. Id. There were communication issues between Mr. Austin and his new counsel to resolve. Id. An expert was needed to assist in evaluating the seized substance. Id. And, new counsel developed a severe nose bleed that required emergency room care and follow-up with a specialist. Id. Counsel explained that he was in trial when appointed, resulting in a two-week delay in his first consultation with Mr. Austin. (J.A. 153). Counsel had attempted unsuccessfully on two occasions to have a contact visits with Mr. Austin to review the recordings of the alleged transactions. (J.A. 154). There was a disagreement between Mr. Austin and counsel as to the need for a motion in limine as to the authenticity of the alleged seized substance, both as to chain of custody and chemical analysis**, which required an expert**. (J.A. 155). There was a disagreement as to the efforts made by new counsel to negotiate a plea and to adequately address with the government the criminal history level calculation. (J.A. 156-157).

New counsel conceded fault for not getting discovery information to Mr. Austin. (J.A. 157). The government conceded that the discovery was

not produced until 20 days after new counsel was appointed, which would be after counsel first meet with Mr. Austin, about six weeks before trial. (J.A. 158). The government conceded that the lab reports and expert opinions were not provided until three weeks before trial. Id. And, the government conceded that the cell phone data was not provided to counsel but was available for review when discovery was produced. Id. Mr. Austin pointed out that like the federal defenders, new counsel was unable to explain the criminal history calculation and the government had not provided any guidance. (J.A. 159). Mr. Austin explained the **need for an expert** to weigh and test the seized substances and to testify as an expert on the chain of custody issues affecting the authenticity of the evidence tendered by the government. (J.A. 160). Mr. Austin stated, "we are extremely unprepared to move forward with trial today and to allow us to get a continuance …" (J.A. 161). The trial court denied the motion to continue. (J.A. 6, 161).

> **The Opinion misapprehends *Tillmon*, *Hall*, *Malloy*, *Miltier* and *Branch* and does not address the dispositive binding *en banc* precedence of Burgos regarding elements of the crime in the indictment of the grand jury and the verdict of the petit jury.**

Tillmon, *Hall*, *Malloy*, *Miltier* and *Branch* were not cited nor discussed by the parties in their briefs. As in the cases that were cited and discussed, the facts in these cases are inconsistent with the proposition that

cocaine and cocaine base are interchangeable. In *Tillmon*, *Hall*, and *Branch*, the grand jury indictment alleged the type of controlled substance and the petit jury returned a verdict on that specified controlled substance. This is consistent with *Apprendi* and this Court's decisions in *Burgos*.

The Opinion does not address *Burgos*, even though it was briefed by the Appellant and lays down the law governing disposition in this case.

> The elements necessary to prove a conviction for possession with intent to distribute cocaine base are: (1) possession of the cocaine base; (2) knowledge of this possession; and (3) intention to distribute the cocaine base. See United States v. Nelson, 6 F.3d 1049, 1053 (4th Cir. 1993), cert. denied, 128 L. Ed. 2d 870, 114 S. Ct. 2142 (1994). *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir. 1996)(en banc).

The Opinion does cite *Hall* for the proposition that the elements "are (1) possession of the controlled substance; (2) knowledge of the possession; and (3) intent to distribute." This comes from footnote 10 of *Hall*, which cites *United States Crockett*, 813 F.3d 1310 1316 (4th Cir. 1987). *Crockett* does not explicitly or implicitly state the alleged definition. In fact, *Crockett* only says that "possession with intent to distribute, requires the government to prove knowing possession of the drug with intent to distribute it." In both *Crockett* and *Hall*, the indictment alleged the type of controlled substance and the jury rendered a verdict on that type of controlled substance.

The Opinion applies *Malloy* and *Miltier*, sex crime cases unrelated to the instant charges, without taking into consideration *Burgos*, which defines the crime as possession of cocaine base. Applying *Burgos*, possession of cocaine base is an element and allowing the jury to treat this interchangeable with cocaine is a fatal variance from the indictment.

The indictment alleged possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C), the jury returned a verdict of guilty of violation of 21 U.S.C. § 841(a)(1), and the court adjudicated the defendant guilty of violating 21 U.S.C. § 841(a)(1)&(b)(1)(C) Possession of Cocaine Base With Intent to Distribute on 5/12/2016. The verdict does not match what came before it, the indictment, nor the judgment, which came after it. It excludes any reference to § 841(b)(1)(C), which was a fatal variance of the charge, to the prejudice of the accused. The accused would still face the possibility of a charge for possession of cocaine with intent to distribute on May 12, 2016.

The Opinion applies *Branch*, which involved charges of possession of cocaine base with intent to distribute and the use of a prior conviction for possession of cocaine base with intent to distribute. The Opinion misapprehends *Branch* and erroneously treats cocaine and cocaine base

interchangeably, just as the jury was erroneously instructed to do in the instant case.

Unlike *Branch*, the evidence in the instant case of intent were the two prior cocaine transactions in counts one and two. The jury was allowed to infer intent to distribute cocaine base based on the prior two cocaine transactions. The Opinion erroneously embraces this concept of interchangeability to find sufficient evidence to establish intent beyond a reasonable doubt.

The Opinion overlooks the fact that *Branch* also requires more than prior transactions. It requires "considerable evidence of [the defendant's] distribution of cocaine base." The Opinion cites no such corroborating evidence and exists.

We would also point out that the indictment in *Branch* alleged possession with intent to distribute cocaine base and the jury returned a verdict on that charge, unlike the instant case.

The Opinion overlooks the record of circumstances leading to the motion to continue and the condition of the substance seized, perhaps because it misapprehends the elements of the charge. The Opinion does not mention the state of the alleged cocaine base when possessed by the accused. It was in a liquid state, neither powder cocaine consumable by contact with

the membranes of the body, nor a cocaine base rock consumable by smoking. It had not undergone the chemical reaction necessary to convert cocaine and other ingredients into cocaine base. This heat was applied only after the liquid was seized by the government and resulted in 15.15 grams of cocaine base.

The Opinion states that "forensic tests of the substance in the plastic bag revealed that Austin had successfully produced 15.15 grams of cocaine base." The Opinion overlooks the fact that the tests applied heat to successfully produce the cocaine base. As stated by the defense expert at sentencing and not rebutted by the government, "In this circumstance I believe that that wet gum, item two I believe it was, that that substance had cocaine hydrochloride in it as well as cocaine base, due to the time that it had sat at room temperature… by heating that wet mixture in the hotplate for five minutes he would have ended up finishing the cook…. What he saw was the cocaine base form at that point by FTIR." (J.A 621).

The Opinion overlooks the defense argument that the Sixth Amendment right to confront includes the right to an expert to effectuate that defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

> [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him. Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929), quoted in Little v.Armontrout, 835

> F.2d 1240, 1244-45 (8th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988).

In criminal cases, the court has authority under Fed. R. Crim. P. 28, to appoint an expert to be paid for by the government. Section 3006a provides the statutory authority for funding this fundamental part of the defendant's defense. 18 U.S.C. § 3000a(a). The Opinion overlooks this important matter, perhaps because it erroneously considers cocaine and cocaine base interchangeable.

The Opinion overlooks the specific circumstances stated in the motion for a speedy trial, which was denied, and the circumstances stated in the motion to continue and overlooks the impact of the court first saying there will be no speedy trial and then saying we are going to trial. The stated reason for a speedy trial was that the government was not going to offer a plea deal so would it be possible to have a trial as soon as possible? On January 26, 2017, the motion was denied, in effect giving the defense and the public the impression that there would be no trial in February. But less than a week later, the court changes direction, and says we have a jury and we are going to trial.

Defense counsel and the government acknowledged delays in discovery and there is no question that the case was going to trial sooner

than most cases. The Opinion overlooks these details. The Opinion states that there was an inconsistency between the motion for a speedy trial and the motion to continue, but that alone is insufficient, and it overlooks the polar opposite inconsistency between saying there will be no trial next week and when that week arrives saying we are going to trial. This is not due process. It was an unreasoning and arbitrary insistence upon expeditiousness in the face of justifiable request for delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 2019

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4429

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RANDOLPH HARRIS AUSTIN,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:16-cr-00277-RJC-DCK-1)

Submitted: March 27, 2019 Decided: April 3, 2019

Before WILKINSON, WYNN, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Aaron E. Michel, Charlotte, North Carolina, for Appellant. R. Andrew Murray, United States Attorney, Charlotte, North Carolina, Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Randolph Harris Austin appeals his convictions and 120-month sentence imposed after a jury found him guilty of distribution and possession with intent to distribute cocaine (Counts 1 and 2), as well as possession with intent to distribute cocaine base (Count 3), each in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (2012). On appeal, Austin argues that the district court should have granted him a longer trial continuance so that he could retain an expert witness. He also disputes the denial of his Fed. R. Crim. P. 29 motion for a judgment of acquittal on Count 3. Next, Austin contends that the court's jury instructions constructively amended the indictment as to Count 3. Finally, Austin challenges the procedural and substantive reasonableness of his sentence. For the reasons that follow, we affirm.

"We review . . . [a district court's ruling on] a motion for a continuance for abuse of discretion." *United States v. Copeland*, 707 F.3d 522, 531 (4th Cir. 2013). "A district court abuses its discretion when its . . . [decision] is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Id.* (internal quotation marks omitted).

Here, Austin moved for a continuance on the day before trial, seeking more time to review evidence with counsel and indicating his desire to find a chemist who could testify about the drug weight and a chain of custody issue. Noting the inconsistency between Austin's motion to continue and a previously filed speedy

trial motion, as well as the fact that a jury pool had already been assembled, the court granted the motion but provided only a one-day continuance for counsel and Austin to confer. Based on our review of these events, we discern no abuse of discretion in the district court's handling of Austin's eve-of-trial motion for a continuance.

Central to Austin's next two points—the sufficiency challenge and the jury instruction claim—is his contention that a controlled substance's identity is an element of a § 841(a)(1) offense. However, we have previously held that "a defendant need not know the exact nature of a drug in his possession to violate § 841(a)(1); it is sufficient that he . . . be aware that he . . . possesses *some controlled substance.*" *United States v. Ali*, 735 F.3d 176, 186 (4th Cir. 2013) (internal quotation marks omitted); *see United States v. Dowdell*, 595 F.3d 50, 68 (1st Cir. 2010) ("Because [the defendant] was prosecuted under § 841(a)(1), which prohibits distribution of *any* controlled substance regardless of type, drug identity had no bearing on the substance of the charge."). Accordingly, we conclude that the particular identity of the controlled substance Austin possessed was not integral to the charge in Count 3. *See United States v. Tillman*, __ F.3d __, __, No. 17-4648, 2019 WL 921534, at *7 (4th Cir. Feb. 26, 2019) (discussing proof required for baseline § 841 offense).

Turning to the sufficiency challenge, "[w]e review de novo a district court's denial of a Rule 29 motion." *United States v. Burfoot*, 899 F.3d 326, 334 (4th Cir. 2018). "We must sustain a guilty verdict if, viewing the evidence in the light most favorable to the prosecution, the verdict is supported by substantial evidence." *Id.* "Substantial evidence is that which a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (internal quotation marks omitted).

"The essential elements of . . . a [§ 841(a)(1)] distribution offense are (1) possession of the controlled substance; (2) knowledge of the possession; and (3) intent to distribute." *United States v. Hall*, 551 F.3d 257, 267 n.10 (4th Cir. 2009). At trial, the Government produced evidence that, incident to Austin's arrest, law enforcement recovered from his vehicle a baggie of cocaine and a leaking plastic bag containing an unknown substance. Austin told officers that the cocaine was for personal use and that the substance in the plastic bag was the result of a failed attempt to convert cocaine into cocaine base. However, subsequent forensic tests of the substance in the plastic bag revealed that Austin had successfully produced 15.15 grams of cocaine base.

We conclude that the Government provided the jury with ample evidence to find that Austin knowingly possessed an illicit substance—regardless of whether he thought the substance was cocaine or cocaine base. And, in light of the

Government's evidence establishing that Austin previously trafficked cocaine,* as well as the absence of any contemporaneous claim that the substance in the plastic bag, unlike the baggie of cocaine, was for personal use, we reject Austin's argument that the evidence was insufficient to establish his intent to distribute. *See United States v. Branch*, 537 F.3d 328, 341-42 (4th Cir. 2008) (finding that prior conviction for possession with intent to distribute cocaine base was relevant to establish, in subsequent trial, defendant's intent to distribute cocaine base). Accordingly, we affirm the district court's denial of Austin's Rule 29 motion.

We review de novo whether the district court's jury instructions constructively amended the defendant's indictment. *United States v. Miltier*, 882 F.3d 81, 92 (4th Cir.), *cert. denied*, 139 S. Ct. 130 (2018). A constructive amendment—also called a fatal variance—occurs when the jury instructions "broaden[] the bases for conviction beyond those charged in the indictment" or "change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *Id.* at 93 (internal quotation marks omitted). By contrast, when the jury instructions differ from the indictment's allegations without "alter[ing] the crime charged . . . , a mere variance occurs." *United States v. Malloy*, 568 F.3d 166, 178 (4th Cir. 2009); *see Miltier*,

* In his opening statement, Austin admitted the conduct charged in Counts 1 and 2, and the Government corroborated this admission by presenting evidence that Austin sold cocaine to a confidential informant on two separate occasions before his arrest.

882 F.3d at 93. "Such a variance does not violate a defendant's constitutional rights unless it prejudices the defendant either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for the same offense." *Miltier*, 882 F.3d at 93 (internal quotation marks omitted).

While Count 3 of the superseding indictment charged Austin with possession with intent to distribute cocaine base, the district court instructed the jury that a unanimous finding that Austin intended to distribute either cocaine base or cocaine would suffice to sustain a guilty verdict. But because drug identity is not an element of a § 841(a)(1) offense, the court's instruction did not "alter the crime charged," *Malloy*, 568 F.3d at 178, but rather departed from the indictment in a manner "nonessential to the conclusion that the [§ 841(a)(1)] crime must have been committed," *Miltier*, 882 F.3d at 93 (internal quotation marks omitted). And because Austin has not demonstrated any prejudice resulting from this variance, we conclude that the court did not commit reversible error. *See id.*; *Dowdell*, 595 F.3d at 57, 68-69 (holding that jury verdict convicting defendant of cocaine base distribution would, at most, harmlessly vary from indictment charging cocaine distribution).

Finally, Austin assigns several procedural errors to the district court's Sentencing Guidelines calculation. However, we need not consider these

arguments because, even if Austin is correct, the record establishes that any error is harmless. *See United States v. Savillon-Matute*, 636 F.3d 119, 123 (4th Cir. 2011). Under the "assumed error harmlessness inquiry," a procedural error is harmless—and, thus, does not warrant reversal—if "(1) the district court would have reached the same result even if it had decided the [G]uidelines issue the other way, and (2) the sentence would be reasonable even if the [G]uidelines issue had been decided in the defendant's favor." *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (internal quotation marks omitted). Here, "the district court made it abundantly clear that it would have imposed the same sentence . . . regardless of the advice of the Guidelines," *id.*, thus satisfying the first prong of the assumed error harmlessness inquiry, *id.* at 383.

As to the second prong, "[w]hen reviewing the substantive reasonableness of a sentence, we examine the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C.] § 3553(a) [2012]." *Id.* (internal quotation marks omitted). When assessing the reasonableness of an above-Guidelines-range sentence, we "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Gall v. United States*, 552 U.S. 38, 51 (2007).

In 2008, the district court sentenced Austin to life imprisonment for two cocaine distribution offenses. However, during a 2014 resentencing hearing, at which Austin asserted that he had finally learned the difference between right and wrong, the court reduced his sentence to 132 months. Nevertheless, at Austin's sentencing for the instant offenses, the Government produced unrebutted evidence that, shortly after his release in 2015, Austin began looking for a new source of supply. In other words, despite being granted a second lease on life, Austin promptly abandoned his newfound rectitude in favor of his old criminal proclivities. Thus, in view of Austin's significant criminal history and the compelling need to deter Austin from further criminal acts and to protect the public, *see* 18 U.S.C. § 3553(a)(1), (2)(B), (C), we discern no abuse of discretion in the district court's decision to impose a substantial upward variance sentence.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

U.S. Const., Amends. V & VI

Amend. V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be
taken for public use, without just compensation.

Amend. VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.