APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZAVIAN MUNIZE JORDAN,

Defendant-Appellant.

No. 17-4751

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-00145-RJC-2)

Argued: October 29, 2019

Decided: March 3, 2020

Before HARRIS, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Richardson and Judge Quattlebaum joined.

ARGUED: Leigh Schrope, LAW FIRM OF SHEIN & BRANDENBURG, Decatur, Georgia, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Marcia G. Shein, LAW FIRM OF SHEIN & BRANDENBURG, Decatur, Georgia, for Appellant. R. Andrew Murray, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

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PAMELA HARRIS, Circuit Judge:

A jury convicted appellant Zavian Munize Jordan of two violations of 18 U.S.C. § 924(c), for possession of a firearm in furtherance of a drug-trafficking crime, and four other drug-trafficking and firearms-related offenses. The district court sentenced Jordan to a total of 420 months in prison, including a five-year mandatory consecutive sentence for his first § 924(c) conviction and a 25-year mandatory consecutive sentence for the second.

Jordan challenges both his conviction and his sentence, raising four principal arguments on appeal: (1) that under the Fourth Amendment, the district court erred in failing to suppress evidence gathered from the traffic stop that led to his arrest and subsequent incriminating statements; (2) that under the Sixth Amendment's Confrontation Clause, the district court erred in admitting evidence relating to a recorded phone call between Jordan and an informant who did not testify at trial; (3) that the district court erred in failing to merge his two § 924(c) firearms convictions for sentencing purposes;

and (4) that § 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221–22 which was enacted while this appeal was pending, should apply to his case, where it would have the effect of substantially lowering the mandatory minimum sentence for his second § 924(c) conviction.[1]

Finding no error in the district court's rulings and holding that § 403 of the First Step Act does not apply retroactively to cases pending on direct appeal when it was enacted, we affirm both Jordan's conviction and his sentence.

I.

A.

Zavian Munize Jordan was the subject of a weeks-long investigation by the federal Drug Enforcement Administration ("DEA"). Jordan came to the attention of federal agents when another individual, Ricky Grant, was arrested for drug distribution and identified Jordan as his primary and long-standing source of heroin. Agency Task Force Officer Clint Bridges then instructed Grant to phone his heroin supplier, while officers monitored and recorded the

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[1] Jordan also raises an ineffective assistance of counsel claim, contending that his trial counsel performed deficiently by failing to challenge certain search warrants. "[I]t is well settled that a claim of ineffective assistance should be raised in a 28 U.S.C. § 2255 motion in the district court rather than on direct appeal, unless the record conclusively shows ineffective assistance." *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997) (internal quotation marks omitted). Because there is no conclusive evidence of ineffective assistance on the face of this record, Jordan's claim should be raised, if at all, in a § 2255 motion. *See United States v. Faulls*, 821 F.3d 502, 508 (4th Cir. 2016).

call. Though Grant and Jordan did not refer to drugs by name during their conversation, the officers understood them to be using a kind of code describing a drug transaction. *See* S.J.A. 002 (Grant informing Jordan that he is "looking slim" and asking when they would "get back right"; Grant suggesting he might "holler" at someone else and Jordan telling him to "hold up" before he did that); *see also* J.A. 161–62 (officer testimony at trial describing the way in which drug traffickers routinely use code words when speaking on the phone). Based on Grant's statement and the contents of the call, the officers obtained a warrant to track the location of Jordan's phone, and later, a second warrant to place a location-tracking device on Jordan's truck.

The investigation came to a head on May 11, 2016, when federal agents who had Jordan under surveillance watched him enter and depart several locations over a short period of time, sometimes entering with one package and leaving with another. At that point, DEA Special Agent James Billings decided to conduct an investigatory stop of Jordan. He reached out to Detective Christopher Newman of the Charlotte-Mecklenburg Police Department, who had been assisting the DEA in its operation, and asked him to conduct a routine traffic stop. As Agent Billings explained to the district court, the DEA frequently asks local officers to find cause to pull over drug suspects for traffic violations: A suspect who believes he is the subject of a routine traffic stop is less likely to resist and create a danger to the public; and if the stop does not uncover evidence of

criminal activity, the investigation can continue without the suspect having been alerted to it.

Detective Newman followed Jordan until he saw him turn through a red light without stopping, and then pulled him over. When he approached Jordan's truck, Newman found Jordan on the phone and unwilling to engage with him, and saw several other cellphones in the vehicle. Newman asked Jordan to step out of the truck and patted him down, observing a rubber glove – which he knew to be common packaging for drugs – in Jordan's pants pocket. By then, Jordan's brother had arrived on the scene in a separate vehicle, attempting to "interject himself" into the stop. J.A. 132. Newman accordingly waited for about 11 minutes for back-up before walking his drug-detecting dog around the truck. The dog alerted, and Jordan admitted that he had cocaine in his possession.

Detective Newman then found approximately 12 grams of cocaine in the rubber glove from Jordan's pocket, along with roughly $2,000 in cash, also in Jordan's pocket. After a search of the truck revealed six phones, $26,000 in cash, and a handgun, Jordan was arrested.

Jordan was advised of his rights and agreed to talk to the police, admitting that he was involved in cocaine trafficking and giving a detailed statement. After obtaining warrants, police officers conducted several searches. At the home of Jordan's deceased grandmother, which Jordan had identified as the place he used to prepare and package drugs, they recovered 275 grams of heroin, digital scales and drug-packaging materials, and a gun and ammunition. At one of the residences Jordan had

visited on the day he was stopped, at which Jordan admitted he regularly sold drugs, the police recovered about 750 grams of cocaine, marijuana, and another firearm. And at the residence Jordan shared with his girlfriend, the police found $24,000 in cash and more firearms.

B.

Jordan was indicted on six counts of drug- and firearm-related offenses. Count One charged Jordan and others with conspiring to distribute heroin and cocaine. Counts Five and Six – the next counts involving Jordan – charged him with substantive drug offenses: possession with intent to distribute heroin and cocaine, and distribution of cocaine. Counts Eight and Nine each charged Jordan with possessing a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A); Count Eight referred to the drug-trafficking conspiracy set out in Count One, and Count Nine, to the drug-trafficking offense in Count Six. Finally, Count Ten charged Jordan with possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Before trial, Jordan moved to exclude the evidence seized from the traffic stop and his subsequent incriminatory statements, on the ground that Detective Newman violated the Fourth Amendment by unduly prolonging his traffic stop without the requisite reasonable suspicion. The district court denied the motion. Jordan also moved unsuccessfully to exclude from trial his recorded phone call with Ricky Grant, arguing that because Grant would not be testifying at trial, his statements were inadmissible hearsay and their introduction would

violate the Sixth Amendment's Confrontation Clause.

After a three-day trial, the jury found Jordan guilty of all charges against him. Before sentencing, Jordan moved to merge Counts Eight and Nine – the two § 924(c) firearm charges – or to vacate one for sentencing purposes, because "[n]othing in the jury verdict indicates that it found that [he] possessed *different* guns at *different* times." J.A. 465 (emphases added). The district court denied the motion, explaining that Jordan's claim was foreclosed by *United States v. Khan*, 461 F.3d 477, 494 (4th Cir. 2006), in which this court held that a single use or possession of a firearm may be the basis for multiple consecutive § 924(c) sentences.

The district court sentenced Jordan to a total of 420 months, or 35 years, in prison: five years on the drug-conspiracy count, each of the drug-trafficking counts, and the felon-in-possession count (Counts One, Five, Six, and Ten), all to run concurrently; plus the mandatory five-year consecutive term on the first § 924(c) firearm offense (Count Eight) and the mandatory 25-year consecutive term on the second § 924(c) offense (Count Nine).

Jordan filed this timely appeal. While his appeal was pending and after briefs were filed, on December 21, 2018, Congress enacted the First Step Act. Pub. L. No. 115-391, 132 Stat. 5194. Section 403 of the First Step Act amended 18 U.S.C. § 924(c)(1)(C) in a way that is relevant to Jordan's sentence: Under the new § 403, if an individual is convicted of two § 924(c) offenses in the same proceeding, as Jordan was here, the mandatory minimum sentence for the second offense drops from 300 months to 60 months.

§ 403(a), 132 Stat. at 5221–22. Section 403 expressly addresses its "applicability to pending cases," providing that the new penalties apply to offenses committed before its enactment "if a sentence for the offense has not been imposed" as of the date of enactment. § 403(b), 132 Stat. at 5222. In a letter to this court, Jordan argued that under the First Step Act, he no longer was eligible for the mandatory 300-month sentence he is serving on his second § 924(c) conviction. The government disagreed, and both parties filed supplemental briefs on the issue.

II.

Jordan raises four arguments on appeal, two concerning his conviction and two concerning his sentence. We take those arguments in turn, providing additional factual context as necessary.

A.

Jordan first challenges his conviction on the ground that the district court erred in denying his motion to suppress evidence seized from the traffic stop and the incriminatory statements that followed. Jordan does not dispute the validity of Detective Newman's initial stop of his truck for a traffic violation, regardless of the officer's actual motives. *See United States v. Palmer*, 820 F.3d 640, 649 (4th Cir. 2016) ("In assessing the legitimacy of a traffic stop, we do not attempt to discern an officer's subjective intent for stopping the vehicle."). But, Jordan argues, Newman violated the Fourth Amendment when he prolonged that stop for 11 minutes, beyond the time required to complete a traffic stop, without reasonable suspicion of some other offense.

In an oral ruling, the district court rejected that claim. At the time Newman initiated his traffic stop of Jordan, the court concluded, there already was "overwhelming" indicia of reasonable suspicion that Jordan was engaged in drug trafficking: the cooperating witness, Ricky Grant; the preliminary cell phone and GPS tracking devices, based on a magistrate's probable cause determination; and the suspicious activity – the quick stops at various locations, entering and leaving with different packages – on the day of the stop. By itself, the district court held, that was sufficient to justify the length of the detention at issue: Given the safety concerns generated by "this drug trafficking investigation in which guns and large sums of drugs and money had recently been seized from a co-conspirator," Newman was justified in waiting for back-up before proceeding, and "that length of time was a reasonable period" for the stop. J.A. 778. The activity observed during the stop, the court finished – multiple cell phones, the rubber glove that Newman believed to be contraband – "only furthered" the reasonable suspicion with which Newman started. *Id.* at 779.

We agree with the district court. In considering the denial of Jordan's suppression motion, we review the district court's factual findings for clear error, taking the evidence in the light most favorable to the government, and its legal conclusions de novo. *United States v. McBride*, 676 F.3d 385, 391 (4th Cir. 2012). Like the district court, we think that Detective Newman came to his encounter with Jordan with ample reasonable suspicion of drug

distribution, justifying the full length of the stop under the Fourth Amendment.

It is true, as Jordan emphasizes, that when a stop is based solely on probable cause of a traffic violation, it may not be prolonged beyond the time reasonably required to "complete the mission" of a traffic stop – inspecting license and registration, issuing a ticket, and so forth. *United States v. Bowman*, 884 F.3d 200, 209–10 (4th Cir. 2018) (alteration omitted) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)); *see also Rodriguez v. United States*, 575 U.S. 348, 354 (2015). After that time, the stop will become unlawful, unless during the stop the officers obtain consent or develop reasonable suspicion of some ongoing criminal activity. *Bowman*, 884 F.3d at 210.

But this is not that kind of case because, as the district court recognized, Detective Newman *already* had reasonable suspicion of ongoing criminal activity, apart from Jordan's traffic violation, when he stopped Jordan's truck. Under the constructive or collective knowledge doctrine, we impute to Detective Newman knowledge of all the facts known to Agent Billings when he asked Newman to make a traffic stop of Jordan. *See United States v. Massenburg*, 654 F.3d 480, 493 (4th Cir. 2011) (under the collective knowledge doctrine, we "substitute the knowledge of the *instructing officer or officers* for the knowledge of the *acting officer*"). And, indeed, Newman in fact was aware – because he had been told by federal agents – that Jordan was suspected of drug trafficking, and that others involved in the same scheme had been found with firearms or had histories of violent crimes. He also had constructive knowledge, as the

district court described, of Ricky Grant's identification of Jordan as his primary supplier; of the warrants issued, based on probable cause, for the tracking of Jordan's cell phone and truck; and of Jordan's movements earlier in the day, which Agent Billings observed and believed, based on his knowledge and experience, were indicative of drug transactions.

We think that is enough for reasonable suspicion, which is "simply . . . a particularized and objective basis for suspecting the person stopped of criminal activity." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (internal quotation marks omitted). Jordan insists that his earlier behavior on the day in question, observed by the agents, is as consistent with running errands and visiting friends as it is with drug transactions. But Agent Billings, based on his knowledge and experience, saw it differently, and in any event, those observations must be considered together with the totality of the circumstances, including the credible identification of Jordan as Grant's regular drug supplier. Considering the facts as a whole, and "mindful of the practical experience of officers who observe on a daily basis what transpires on the street," Agent Billings and thus Detective Newman had a "particularized and objective basis," for suspecting Jordan of drug trafficking when Detective Newman initiated the stop. *See Bowman*, 884 F.3d at 213 (internal quotation marks omitted).

We also agree with the district court that this initial reasonable suspicion justified the length of the stop in question, which was extended by roughly 11 minutes when Detective Newman waited for back-up

before completing his investigation. "Investigating officers may take such steps as are reasonably necessary to maintain the status quo and protect their safety during an investigative stop." *United States v. Taylor*, 857 F.2d 210, 213 (4th Cir. 1988). Detective Newman, who had reason to believe that Jordan was working with armed drug dealers and was confronted not only with Jordan but also with his brother, did not unreasonably prolong Jordan's detention by waiting briefly for assistance on the scene.

The district court also determined, as noted above, that Detective Newman's observations during the stop "furthered" the reasonable suspicion showing, and the government relies on some of those observations in its argument for reasonable suspicion. Because we conclude that Newman had reasonable suspicion from the outset, however, we need not consider whether additional information uncovered during the stop may have contributed to that showing. Newman had the requisite reasonable suspicion that Jordan was engaged in illegal drug activity from the start, and that reasonable suspicion was sufficient to justify Jordan's stop under the Fourth Amendment.

B.

Jordan's second challenge to his conviction concerns the admission at trial of parts of the recorded phone call Ricky Grant made to him at police direction. The excerpts were introduced at trial with the testimony of Officer Bridges, who testified that he "instructed Mr. Grant to place a call to his supplier," J.A. 173, and described the way the call was monitored and recorded. The district court

instructed the jury that it should not consider any of Grant's statements on the recording "for the truth of the matter that he's stating," but only to "provid[e] context" for Jordan's responses. J.A. 177. Over Jordan's objection, the jury then heard excerpts of the conversation, along with testimony from Bridges explaining that drug traffickers, when speaking on the phone, commonly use coded terms to avoid referring expressly to drugs.

1.

Before trial, Jordan had moved to exclude the recording. Jordan did not dispute the admissibility of his own statements on the call, instead arguing that Grant's statements were inadmissible: Because Grant would not be testifying at trial, his statements constituted hearsay, and their admission would violate Jordan's rights under the Sixth Amendment's Confrontation Clause. The district court denied Jordan's motion, ruling that so long as Grant's statements were "offered for the limited purpose of providing context for the responses of Mr. Jordan," they were not inadmissible hearsay and their introduction would not violate the Confrontation Clause. J.A. 96.

On appeal, Jordan renews his Confrontation Clause argument against the admission of Grant's side of the recorded call. While we typically review evidentiary decisions for abuse of discretion, we review those that implicate the Confrontation Clause de novo. *United States v. Summers*, 666 F.3d 192, 197 (4th Cir. 2011). We agree with the district court, finding no error in admitting the recorded phone call.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused

shall enjoy the right to . . . be confronted with the witnesses against him . . . ." This constitutional right to confrontation bars the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). The Clause does not, however, "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9. And so we have made clear – along with several other circuits – that recorded statements of non-testifying informants like Grant may be used at trial consistent with the Confrontation Clause so long as they are offered only to provide context for the defendant's own statements, and not for the truth of the matter asserted. *See United States v. Wills*, 346 F.3d 476, 489–90 (4th Cir. 2003); *see also United States v. Barragan*, 871 F.3d 689, 705 (9th Cir. 2017) ("The informant's statements were not admitted for their truth, and the admission of such context evidence does not offend the Confrontation Clause." (internal quotation marks omitted)); *United States v. Occhiuto*, 784 F.3d 862, 866 n.2 (1st Cir. 2015) (same); *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) (same). That is exactly what happened here. The district court admitted Grant's statements only to provide context for Jordan's own statements on the call, and clearly instructed the jury to that effect: "[Y]ou are not to consider the statements of Grant for any purpose other than providing context for the responses that you hear . . . ." J.A. 177. We find no error in the district court's ruling on Jordan's objection.

2.

Jordan now raises an additional Confrontation Clause argument for the first time on appeal. This one focuses not on the contents of the call, but on Officer Bridges' testimony that Grant phoned Jordan after he was instructed to "call . . . his supplier." J.A. 173. Though its precise contours are a bit unclear, Jordan's claim appears to be that when Grant placed a call to Jordan after being told to call his supplier, he engaged in "assertive conduct" – the equivalent of saying verbally "Jordan is my supplier" – that falls within the scope of the Confrontation Clause.

Because Jordan did not object at trial to Officer Bridges' testimony about the call, we review his new argument for plain error only. "To establish plain error, a defendant has the burden of showing: (1) that an error was made; (2) that the error was plain; and (3) that the error affected his substantial rights," and even then, we will exercise our discretion to correct only those errors that would result in a miscarriage of justice or otherwise undermine the "fairness, integrity[,] or public reputation of judicial proceedings." *United States v. Carthorne*, 726 F.3d 503, 510 (4th Cir. 2013) (internal quotation marks omitted). Here, we need focus only on the second requirement. Any error in admitting Officer Bridges' testimony – a matter we need not decide – was not so "clear or obvious" that it amounted to "plain error" for purposes of our review. *United States v. Marcus*, 560 U.S. 258, 262 (2010) (defining "plain error").

The Confrontation Clause applies only to "testimonial statements." *United States v. Washington*, 498 F.3d 225, 229 (4th Cir. 2007). The

jury in Jordan's case never heard testimony that Grant *said* that Jordan was his supplier. But as Jordan explains, a "statement" also may take the form of nonverbal conduct intended as an assertion, often referred to as "assertive conduct." *Id.* at 230 & n.1 (discussing definition of "statement" in Federal Rule of Evidence 801(a) and applying same analysis to Confrontation Clause); *see, e.g.*, *United States v. Caro*, 569 F.2d 411, 416 n.9 (5th Cir. 1978) (treating "pointing" at location of drug source as "assertive conduct" that, "like an oral declaration, is subject to the hearsay rule"). According to Jordan, when Grant phoned him in response to a direction to call his supplier, he engaged in assertive conduct, effectively identifying Jordan as his source just as though he had said the words out loud. Because the jury could infer from Officer Bridges' testimony a "statement" by Grant that was not subject to cross-examination at trial, Jordan finishes, his Confrontation Clause rights were violated.

This court has not addressed whether and under what circumstances compliance with law enforcement instructions might be deemed "assertive conduct," so that testimony about that compliance would be subject to Confrontation Clause limits. But the First Circuit has, and on facts virtually identical to those presented here, it held that when a confidential informant, at the direction of police officers, made a phone call to the intended recipient of intercepted drugs and then drove the officers to a rendezvous with the recipient, she engaged only in *non*-assertive conduct that did not qualify as a "statement" for evidentiary purposes. *See United States v. Bailey*, 270 F.3d 83, 87 (1st Cir. 2001).

Testimony about that compliance, the court explained, "described conduct" rather than introducing statements: The confidential informant "did not orally identify [the defendant]," and "[t]he agent did not testify that [the confidential informant] pointed at [the defendant] or in any way made an out of court declaration regarding his identity." *Id.*

Jordan cites no cases to the contrary, and we have found none. Jordan relies primarily on the Second Circuit's decision in *United States v. Gomez*, 617 F.3d 88 (2nd Cir. 2010), and though that case, too, involves a police-directed phone call by a confidential informant to his supplier, there is an important distinction. In *Gomez*, a police officer testified at trial that he told an informant to call his supplier, and that he himself – the officer – then selected the defendant's phone number from the informant's phone and placed the call, before handing the phone back to the informant. *Id.* at 91. From that testimony, the court held, a jury could infer that the informant must have *told* the officer, in so many words, the identity of his supplier, because otherwise the officer would not have been able to select the defendant's number from the informant's address book. *Id. Gomez*, in other words, involved an actual verbal statement, inferable from the officer's testimony. Here, by contrast, Officer Bridges neither said nor suggested that Grant verbally identified Jordan as his supplier. The only question, again, is whether Grant's act of calling Jordan qualified as a "statement" in the form of assertive conduct – a question to which *Gomez* does not speak, but *Bailey* does. Given *Bailey*'s rejection of Jordan's position, and the absence of case law adopting it, the district

court did not commit plain error when it admitted Bridges' testimony about the call. *See Carthorne*, 726 F.3d at 516 (district court does not commit plain error by following reasoning of another circuit when we have "yet to speak directly on a legal issue").

C.

With respect to his sentence, Jordan argues, first, that the district court erred in sentencing him separately for his two convictions, under Counts Eight and Nine, for possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c). According to Jordan, multiple and consecutive § 924(c) sentences are permissible only where each is supported by a distinct use of a firearm. And here, Jordan finishes, the jury's general verdict could have rested on a finding that Jordan used one gun on one occasion, in furtherance of both the conspiracy to distribute drugs that was the predicate for Count Eight and the substantive drug-distribution offense identified in Count Nine, making separate sentences unlawful.

The district court rejected that claim when Jordan raised it, after his guilty verdict but before sentencing, in a "Motion to Merge/Vacate Counts 8 and 9." J.A. 464. The district court acknowledged that other circuits have adopted the premise of Jordan's argument: that one use of a firearm, in the simultaneous commission of two predicate drug-trafficking offenses, will not support separate § 924(c) convictions and sentences. *See* J.A. 483 n.2. But the Fourth Circuit, the court continued, has squarely rejected that position, holding in *United States v. Khan*, 461 F.3d at 493–94, that the same criminal episode indeed may lead to multiple

sentences under § 924(c), so long as they are based on separate predicate offenses that are not duplicative under a double jeopardy analysis. Here, the jury convicted Jordan of § 924(c) offenses based on separate and non-duplicative predicate offenses – conspiracy under Count Eight and possession with intent to distribute under Count Nine – and that was enough, under circuit case law, to sustain separate § 924(c) sentences. Finally, the district court noted that while Jordan's argument depended on the failure of the jury to specify the findings underlying its convictions on the § 924(c) charges, Jordan had not requested a jury instruction on the issue or a special verdict form.

We review this question of law de novo, *see United States v. Fareed*, 296 F.3d 243, 245 (4th Cir. 2002), and again, we agree with the district court. Under *Khan*, there is no requirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm. Here, as the district court explained, Jordan's two § 924(c) convictions were predicated on different underlying offenses. And because those two offenses – conspiracy to possess with intent to distribute a controlled substance, and possession with the intent to distribute – are not duplicative for double jeopardy purposes, *see United States v. Yearwood*, 518 F.3d 220, 223 (4th Cir. 2008) ("A substantive crime and conspiracy to commit that crime are separate offenses for purposes of the Double Jeopardy Clause . . . ." (internal quotation marks omitted)), they may support two § 924(c) convictions and sentences under *Khan*. Even assuming, in other words, that the jury convicted

Jordan on the two § 924(c) counts because it found that one use of one gun furthered both predicate offenses, separate sentences would be permissible.

Jordan emphasizes that our decision in *Khan* conflicts with the rule adopted by several other circuits, prohibiting multiple § 924(c) sentences arising from a single use of a firearm. *See, e.g.*, *United States v. Rentz*, 777 F.3d 1105, 1115 (10th Cir. 2015) (en banc); *United States v. Cureton*, 739 F.3d 1032, 1043 (7th Cir. 2014); *United States v. Phipps*, 319 F.3d 177, 185 (5th Cir. 2003); *United States v. Finley*, 245 F.3d 199, 208 (2d Cir. 2001); *United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998). But as a panel of this circuit, we of course are bound by our own precedent, and may not reconsider *Khan* in this posture. *See McMellon v. United States*, 387 F.3d 329, 332–33 (4th Cir. 2004) (en banc). We note, moreover, that this is not the kind of case that has most troubled some courts, in which the evidence presented at trial makes clear that multiple § 924(c) convictions rest on a single use of a single gun. Here, as the district court explained, the jury was presented with ample evidence of different uses of different guns, all in furtherance of the predicate drug-trafficking offenses. *See* J.A. 484 (describing the handgun recovered from Jordan's grandmother's home, the two different handguns recovered from Jordan's residence, and yet another handgun found in Jordan's truck on the day he was arrested). And as the district court noted, had Jordan nonetheless been concerned that the jury might base its two § 924(c) convictions on a single use of a gun, he could have requested a jury instruction on the issue or a special

verdict form that would have detailed the jury's reasoning, but did neither.

Accordingly, we find the district court did not err in denying Jordan's motion to sentence him on only one of his two § 924(c) convictions.[2]

D.

Jordan's final argument also concerns his § 924(c) sentences. At the time Jordan was sentenced, it was clear that § 924(c)'s sentencing regime mandated a five-year mandatory minimum sentence for a first conviction and a 25-year consecutive mandatory minimum for a second, even when both convictions arose from a single proceeding, *see Deal v. United States*, 508 U.S. 129, 137 (1993), and Jordan was sentenced accordingly, to a five-year prison term on his first § 924(c) conviction and to 25 years on his second. But while Jordan's case was pending on

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[2] In light of our disposition, we need not rule on the government's argument that Jordan's motion should have been construed as a motion to vacate a conviction under Federal Rule of Criminal Procedure 33, which would have meant both that it raised an unpreserved issue connected to his conviction and that it was untimely under Rule 33. We note, however, that the district court construed Jordan's filing as a sentencing motion, requesting merger of the two convictions for sentencing purposes, *see* J.A. 484 (concluding that Jordan "may be sentenced on each of Counts Eight and Nine"), consistent with our case law, *see, e.g.*, *United States v. Dire*, 680 F.3d 446, 476 (4th Cir. 2012) (recognizing challenge to a district court's failure to merge multiple § 924(c) convictions as a sentencing argument). And the government's failure to raise a timeliness objection before the district court ordinarily would preclude its consideration here. *See Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (where the government fails to raise a timeliness defense before a district court rules on a Rule 33 motion, the defense is forfeited).

appeal, Congress enacted the First Step Act, which amends § 924(c) so that the 25-year mandatory minimum for a second or subsequent offense applies only when a prior conviction under § 924(c) already "has become final." Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5222. Under the First Step Act, in other words, the 25-year mandatory minimum is reserved for recidivist offenders, and no longer applies to multiple § 924(c) convictions obtained in a single prosecution. According to Jordan, the First Step Act should apply to him on appeal, which would mean that his second § 924(c) conviction would be subject only to a five-year sentence, not to the 25-year sentence he is serving.

This question is governed by the text of the First Step Act, which provides that § 403(a)'s "amendments" to § 924(c) "shall apply to any offense that was committed before the date of enactment of this Act, *if a sentence for the offense has not been imposed as of such date of enactment*." § 403(b), 132 Stat. at 5222 (emphasis added). [3] Jordan was sentenced by the district court in October of 2017, more than a year before the "date of enactment" of the First Step Act in December of 2018. So the question is whether Jordan's sentence was "imposed" for purposes of § 403(b) when the district court entered his sentence – in which case the First Step Act would not apply to him – or whether, as Jordan argues, it will not be "imposed" until it becomes final

[3] Section 403(b) reads in full: "Applicability to Pending Cases—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."

after direct appeal – in which case he should get the benefit of the First Step Act on this appeal. Like the government, we think Jordan's sentence was "imposed" in the district court, rendering § 403(a) inapplicable to his case.

Circuit court case law uniformly supports that reading. Two other circuits have considered precisely this question, and both have concluded that a sentence is "imposed" under § 403(b) when it is entered by a district court, so that § 403(a) does not apply to cases pending on appeal on the date of enactment. *See United States v. Richardson*, Nos. 17-2157/2183, --- F.3d ----, 2020 WL 413491, at *9–15 (6th Cir. Jan. 27, 2020); *United States v. Hodge*, 948 F.3d 160, 162–64 (3d Cir. 2020).[4] Two additional circuits have considered identical retroactivity language in a different section in the First Step Act, and likewise held that a sentence is "'imposed' in the district court, regardless of later appeals." *United States v. Pierson*, 925 F.3d 913, 927 (7th Cir. 2019); *see also Young v. United States*, 943 F.3d 460, 462 (D.C. Cir. 2019).[5] We agree.

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[4] The Eleventh Circuit reached the same conclusion in an unpublished decision. *See United States v. Garcia*, No. 17-13992, 2019 WL 7503482, at *1 (11th Cir. July 9, 2019).

[5] Those cases involve § 401 of the First Step Act, which provides that its sentence reductions "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence has not been imposed as of such date of enactment." § 401(c), 132 Stat. at 5221. Before ruling directly on the provision before us now, § 403(b), both the Third and Sixth Circuits also had concluded that § 401 likewise does not apply to pre-enactment sentences pending on appeal when the First Step Act became law. *See United States v. Aviles*, 938 F.3d 503,

As those courts have explained, in common usage in federal sentencing law, a sentence is "imposed" when the district court announces it, not when appeals are exhausted. *See Richardson*, 2020 WL 413491, at *11 (citing examples); *Pierson*, 925 F.3d at 927–28 (citing examples); *see also, e.g.*, 18 U.S.C. § 3553(a) (listing "factors to be considered" by a district court "in *imposing* a sentence" (emphasis added)); Fed. R. Crim P. 32(a)(2) ("After *imposing* sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal . . . ." (emphasis added)). That consistent usage reflects the common understanding that "[i]mposing sentences is the business of the district courts, while courts of appeals are tasked with reviewing them." *Aviles*, 938 F.3d at 510 (internal quotation marks omitted).[6] It also is consistent, as the government points out, with the fact that defendants ordinarily begin serving their sentences as soon as they are handed down by a district court, regardless of any appeal. *See* 18 U.S.C. § 3143(b).

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510 (3rd Cir. 2019); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019).

[6] Given the time elapsed between Jordan's district court sentencing in October of 2017 and the enactment of the First Step Act in December of 2018, we need not address today the precise moment at which a district court sentence is "imposed" for purposes of § 403(b) – whether imposition comes when a sentence is announced or when judgment is entered. *Cf. Richardson*, 2020 WL 413491, at *12. Nor, of course, do we have any occasion to address how § 403(b) might apply to a resentencing, rather than an initial sentencing like Jordan's. *Cf. Hodge*, 948 F.3d at 162 (construing § 403(b) in context of a resentencing).

Jordan's contrary reading, on the other hand – that a sentence is not "imposed" until it becomes final after appeal – has no support in the text of § 403(b). Section 403(b) requires, for application of the Act, that a sentence be "imposed" after its enactment, not that it be "finally imposed." § 403(b), 132 Stat. at 5222. And the absence of a textual finality requirement is underscored by the fact that Congress *did* use finality as a marker in the immediately preceding section, § 403(a), amending § 924(c) so that the 25-year mandatory minimum would apply only to offenses that occur after a prior § 924(c) conviction "become[s] *final*." § 403(a), 132 Stat. at 5221 (emphasis added); *see Hodge*, 948 F.3d at 163. Where Congress wanted to make finality a benchmark, in other words, it did so, and we have no warrant for treating the omission of finality language in § 403(b) as an oversight. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and internal quotation marks omitted)).

Jordan points us to the Sixth Circuit's 1997 decision in *United States v. Clark*, in which the court, construing a different sentencing statute and retroactivity provision, held that a sentence is not "imposed" until after a case is decided on appeal. *See* 110 F.3d 15, 17 (6th Cir. 1997), *superseded by regulation on other grounds*, U.S.S.G. § 1B1.10(b)(2)(A). That case does indeed lend support to Jordan's position here. But we can find no other

circuit court decision applying that definition of "imposed" even under the statute at issue in *Clark*, let alone applying it in any other context. *See Pierson*, 925 F.3d at 928. And the Sixth Circuit itself, in joining the consensus that a sentence is "imposed" for purposes of the First Step Act's retroactivity provisions when it is handed down by the district court, declined to apply *Clark* to this different statute, cautioning against giving that decision "broad applicability." *Richardson*, 2020 WL 413491, at *14; *see also Wiseman*, 932 F.3d at 417 (holding that sentence is "imposed" under § 401(c) of First Step Act without applying *Clark*).

Jordan's final argument focuses on the title of § 403 of the First Step Act: "Clarification of Section 924(c) of Title 18, United States Code." According to Jordan, because § 403 is intended only to clarify what always was the proper interpretation of § 924(c), it should apply to cases on direct review. *See Richardson*, 2020 WL 413491, at *9 (describing import of the distinction between a new law and a "clarification" for retroactivity analysis). Moreover, Jordan concludes, this feature is enough to distinguish at least some of the cases deciding when a sentence is "imposed" under the First Step Act because they arise under § 401, which does not refer to "clarification" in its title.

Jordan's argument puts more weight on the word "clarification" than it will bear. Section 403(a) does not "clarify" something that once was ambiguous; it *changes* § 924(c), providing by terms that it is "amend[ing]" that section's text. *See* § 403(a), 132 Stat. at 5221–22; *Richardson*, 2020 WL 413491, at *11 ("That Congress altered the statutory language"

suggests that "the amendment changed the law rather than clarified what the law always meant."). Until the First Step Act, § 924(c) "unambiguous[ly]" imposed a 25-year minimum sentence on a "second" conviction obtained in the same proceeding as the first, *see Deal*, 508 U.S. at 132; now it does not. That is a change in meaning, not an elaboration of existing law. *Richardson*, 2020 WL 413491, at *10. And in any event, of course, "the title of a statute . . . cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528–29 (1947). Section 403(b) expressly addresses the circumstances under which § 403(a) will apply to pre-enactment cases, and by its plain terms, it excludes cases – like Jordan's – in which a defendant is sentenced before the Act's effective date.

Any reduction in criminal penalties will pose "difficult line-drawing" questions when it comes to retroactivity. *See Pierson*, 925 F.3d at 927. Here, Congress decided to extend the more lenient terms of § 403(a) of the First Step Act to some but not all pre-Act offenders, with "the date of sentencing in the district court" drawing the line between those who are covered and those who are not. *Id.* As a result, Jordan may not benefit under the Act.

III.

For the reasons given above, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT COURT OF
NORTH CAROLINA
CHARLOTTE DIVISION

3:16-CR-00145-RJC

USA

v.

ZAVIAN MUNIZE JORDAN

October 20, 2017

ORDER

THIS MATTER is before the Court on the defendant's Motion to Merge/Vacate Counts 8 and 9, (Doc. No. 189), and the government's response, (Doc. No. 191).

I. BACKGROUND

The defendant was convicted by a jury of conspiring to distribute or possess with intent to distribute 100 grams or more of a mixture and substance containing a detectable amount of heroin and 500 grams or more of a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 846 (Count One); possessing with intent to distribute 100 grams or more of a

mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. § 841(a) (Count Five); possessing with intent to distribute a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 841(a) (Count Six); possessing a firearm in furtherance of the drug trafficking crime alleged in Count One, in violation of 18 U.S.C. § 924(c) (Count Eight); possessing a firearm in furtherance of the drug trafficking crime alleged in Count Six, in violation of 18 U.S.C. § 924(c) (Count Nine); and possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). (Doc. No. 130: Verdict).

The evidence adduced at trial, in light most favorable to the government, tended to show that in April 2016 federal and local law enforcement agents were investigating the distribution of "China White" heroin in this district. (Doc. No. 148: Tr. at 75). They arrested Ricky Grant after he sold heroin to a confidential source. (Id. at 78). Grant then agreed to call his supplier, later identified as the defendant, whom police began to surveil with the assistance of a court-approved tracking device. (Id. at 81, 89).

On May 11, 2016, at approximately 10 a.m., they established surveillance at the defendant's residence on Cullingford Lane. (Id. at 93). He traveled to a parking garage in downtown Charlotte, then drove to a house on Lyles Court around noon. (Id. at 94, 164-165). From there, he went to a residence on Ravencroft Drive and appeared to make an exchange by taking a white plastic bag from the house and returning with a smaller item from his pick-up truck. (Id. at 140). At approximately 2 p.m., a police officer stopped the truck. (Id. at 34-35). He found 7.73

grams of cocaine and $2,000 cash in the defendant's pockets, a Taurus .45 caliber pistol underneath the truck's center console, and $26,000 cash in a white bag. (Id. at 42-43, 46).

The defendant was arrested and waived his Miranda rights. (Id. at 94, 142). He admitted going to his deceased grandmother's residence on Lyles Court, where he packaged and prepared cocaine before delivering it to the Ravencroft residence. (Id. at 95). A search of the house on Lyles Court later in the evening revealed approximately 275.54 grams of heroin, kilogram-sized drug packaging materials, drug purity testing kits, a respirator, digital scales, and a Glock .40 caliber handgun. (Id. at 98-102). When police searched the Ravencroft residence, they found 753.81 grams of cocaine, along with marijuana and methamphetamine, and a Springfield Armory handgun for which a co-conspirator claimed responsibility. (Id. at 174-176). At the defendant's Cullingford Lane residence, police found an FN 5.7 x 28 mm caliber pistol, a .223 caliber pistol with a high capacity drum magazine, bulletproof vests, and $24,400 in currency. (Id. at 271, 276-280, 283). Co-conspirators detailed their history of purchasing cocaine and heroin from the defendant dating back to 2013, including the $26,000 cocaine transaction at the Ravencroft residence on May 11. (Id. at 192-200, 241-249). The defendant had shown one of them the FN pistol when they were in a vehicle together. (Id. at 253).

II. DISCUSSION

Now that the defendant is pending sentencing, he argues that his convictions for § 924(c) offenses in Counts Eight and Nine must merge because the

jury's general verdict could have resulted from a finding that the defendant used one gun on one occasion.[1] (Doc. No. 189: Motion at 1-2). Thus, he may not be punished twice for what may have been one crime.[2] (Id. at 8-9). Such a claim about multiple § 924(c) convictions "sounds in Double Jeopardy." United States v. Camps, 32 F.3d 102, 106 (4th Cir. 1994).

"A substantive crime and conspiracy to commit that crime are 'separate offenses' for purposes of the Double Jeopardy Clause, even if they are based on the same underlying incidents." United States v. Yearwood, 518 F.3d 220, 227 (4th Cir. 2008). Thus, the Fourth Circuit has recognized that conspiracy to distribute cocaine base and distribution of cocaine base are distinct offenses not based on the same elements. Id. "'As long as the underlying crimes are not identical under the Blockburger analysis, then consecutive § 924(c) sentences are permissible,'" and a court need not count "uses" or "align the use of a particular firearm with a particular predicate offense." United States v. Kahn, 461 F.3d 477, 494 (4th Cir. 2006) (quoting Camps, 32 F.3d at 106).

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[1] The defendant faults the indictment for failing to identify the place, time, and gun at issue in each count, (Doc. No. 189: Motion at 1), but did not challenge the alleged defect prior to trial as required by Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure. During the trial, he also did not request a jury instruction on this issue or object to the verdict form. (Doc. No. 178: Tr. at 9-10, 12-14).

[2] The defendant's reliance on cases from the Sixth, Seventh, and Tenth Circuits, (Doc. No. 189: Motion at 4-6), is unavailing because the Fourth Circuit has specifically rejected their approach to multiple § 924(c) punishments. United States v. Camps, 32 F.3d 102, 106 (4th Cir. 1994).

Here, the jury found in Count Eight that the defendant possessed a firearm in furtherance of the predicate drug trafficking crime alleged in Count One of conspiracy to distribute or possess with intent to distribute 100 grams or more of a mixture and substance containing a detectable amount of heroin and 500 grams or more of a mixture and substance containing a detectable amount of cocaine. (Doc. No. 130: Verdict at 1-2). As detailed above, in light most favorable to the government, a Glock pistol was found in proximity to over 275 grams of heroin and drug packaging materials at the Lyles Court residence where the defendant admitted processing the more than 753 grams of cocaine he delivered to the Ravencroft residence. Additionally, two handguns, along with bullet proof vests and over $24,000 currency, were found at the defendant's residence. The jury further found in Count Nine that the defendant possessed a firearm in furtherance of the predicate drug trafficking crime alleged in Count Six of possession with intent to distribute cocaine. (Id. at 2). Police found a Taurus handgun underneath the center console of the defendant's truck when he possessed more than 7 grams of cocaine in his pocket. Accordingly, the evidence amply supports the jury's verdict that the defendant violated § 924(c) in relation to two predicate crimes; therefore, the defendant may be sentenced on each of Counts Eight and Nine.

III. CONCLUSION

IT IS, THEREFORE ORDERED that the defendant's Motion to Merge/Vacate Counts 8 and 9, (Doc. No. 189), is **DENIED**.

Signed: October 20, 2017

/s/ Robert J. Conrad, Jr.

Robert J. Conrad, Jr.
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZAVIAN MUNIZE JORDAN

Defendant-Appellant.

No. 17-4751
(3:16-cr-00145-RJC-2)

FILED: March 31, 2020

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Harris, Judge Richardson, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

v.

ZAVIAN MUNIZE JORDAN,

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed
On or After November 1, 1987)

Case Number: DNCW316CR000145-002
USM Number: 19593-058

A. Patrick Roberts, Marcia Shein
Defendant's Attorney

THE DEFENDANT:

☐ Pleaded guilty to count(s).

☐ Pleaded nolo contendere to count(s)_which was accepted by the court.

☒ Was found guilty on count(s) 1sss, 5sss, 6sss, 8sss-9sss, 10sss after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
21:846, 841(a)(1) & (b)(1)(B)	Conspiracy to Distribute and to Possess with Intent to Distribute at least 100 g of Heroin and 500 g of Cocaine	1/12/2017	1sss
21:841(a)(1) & (b)(1)(B)	Possession with Intent to Distribute at least 100 g of Heroin	5/11/2016	5sss
21:841(a)(1) & (b)(1)(C)	Possession with Intent to Distribute Cocaine	5/11/2016	6sss
18:924(c)(1)(A)	Possession of a Firearm During and in Relation to a Drug Trafficking Crime	5/11/2016	8sss
18:924(c)(1)(A)	Possession of a Firearm During and in Relation to a Drug Trafficking Crime	5/11/2016	9sss

18:922(g)(1)	Possession of a Firearm by a Convicted Felon	5/11/2016	10sss

The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).

☒ Count(s) 1, 1s, 1ss, 5, 5s, 5ss, 6, 6s, 6ss, 8-9, 8s-9s, 8ss-9ss, 10, 10s, 10ss (is)(are) dismissed on the motion of the United States, (Doc. No. 212).

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 10/23/2017

Signed: November 9, 2017

/s/ Robert J. Conrad, Jr.

Robert J. Conrad, Jr.
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS on each of Counts 1, 5, 6 and 10 to be served concurrently; PLUS, SIXTY (60) MONTHS on Count 8 to be served consecutively to all other counts; PLUS, THREE HUNDRED (300) MONTHS on Count 9 to be served consecutively to all other counts for a total term of FOUR HUNDRED TWENTY (420) MONTHS.

☒ The Court makes the following recommendations to the Bureau of Prisons:

1. Placed in a facility capable of meeting his medical needs as close to Charlotte, NC as possible, consistent with the needs of BOP.
2. Participation in any available educational and vocational opportunities.
3. Participation in the Federal Inmate Financial Responsibility Program.
4. Participation in any available mental health treatment programs as may be recommended by a Mental Health Professional.
5. Participation in any available substance abuse treatment program and if eligible, receive benefits of 18:3621(e)(2).
6. Defendant shall support all dependents from prison earnings.

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

☐ As notified by the United States Marshal.

☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ As notified by the United States Marshal.

☐ Before 2 p.m. on _.

☐ As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By:_____

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FOUR (4) YEARS, which consists of 4 years on each of Counts 1, 5, 8, and 9, and 3 years on each of Counts 6 and 10 to run concurrently.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court (unless omitted by the Court).
4. ☐ The defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives).
6. The defendant shall allow the probation officer to visit him/her at any time at his/her home or elsewhere, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
7. The defendant shall work full time (at least 30 hours per week) at lawful employment, unless excused by the probation officer. The defendant

shall notify the probation officer within 72 hours of any change regarding employment.

8. The defendant shall not communicate or interact with any persons engaged in criminal activity, and shall not communicate or interact with any person convicted of a felony unless granted permission to do so by the probation officer.
9. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without the permission of the Court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk. The probation officer may contact the person and make such notifications or confirm that the defendant has notified the person about the risk.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any

psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.

14. The defendant shall participate in a program of testing for substance abuse if directed to do so by the probation officer. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. If warranted, the defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).

15. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.

16. The defendant shall submit his/her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer and such other law enforcement personnel as the probation officer may deem advisable,

without a warrant. The defendant shall warn any other occupants that such premises may be subject to searches pursuant to this condition.

17. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.

18. The defendant shall provide access to any financial information as requested by the probation officer and shall authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

19. The defendant shall not seek any extension of credit (including, but not limited to, credit card account, bank loan, personal loan) unless authorized to do so in advance by the probation officer.

20. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.

21. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not

limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.

22. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL CONDITIONS:

23. The defendant shall participate in a mental health evaluation and treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program (including, but not limited to provider, location, modality, duration, and intensity). The defendant shall take all mental health medications as prescribed by a licensed health care practitioner.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$600.00	$0.00	$0.00

☐ The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $0.00 due immediately, balance due

☐ Not later than

☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to begin immediately (may be combined with ☐ (C), ☒ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D ☒ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order (Doc. No. 202) entered 10/11/2017:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____ months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/
Designated Witness

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA

v.

(1) RICKY CARLOS GRANT, (2) ZAVIAN MUNIZE JORDAN,
(4) AUDWIN HAWATHA TAYLOR AKA "BIG WAT"

Docket No. 3:16CR145-RJC

THIRD SUPERSEDING BILL OF INDICTMENT

Violations: 21 U.S.C. § 846
21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(A)
21 U.S.C. § 841(b)(1)(B)
21 U.S.C. § 841(b)(1)(C)
18 U.S.C. § 924(c)
18 U.S.C. § 922(g)(1)

FILED: JAN. 18, 2017

THE GRAND JURY CHARGES:

COUNT ONE

(Conspiracy to Possess with Intent to Distribute Heroin and Cocaine)

From at least as early as in or about 2013 to on or about January 12, 2017, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, the defendants,

(1) RICKY CARLOS GRANT,

(2) ZAVIAN MUNIZE JORDAN, and

(4) AUDWIN HAWATHA TAYLOR AKA "BIG WAT"

did knowingly and intentionally conspire and agree with each other and with other persons, known and unknown to the Grand Jury, to distribute and to possess with intent to distribute one or more controlled substances, to include, a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, and a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

Quantity of Heroin Involved in the Conspiracy

It is further alleged that, with respect to the conspiracy offense charged in Count One, one (1) kilogram or more of a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, is attributable to, and was

reasonably foreseeable by defendants **(1) RICKY CARLOS GRANT, and (2) ZAVIAN MUNIZE JORDAN**, so Title 21, United States Code, Section 841(b)(1)(A) is applicable to them.

Quantity of Cocaine Involved in the Conspiracy

It is further alleged that, with respect to the conspiracy offense charged in Count One, five hundred (500) grams or more of a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, is attributable to, and was reasonably foreseeable by defendant **(2) ZAVIAN MUNIZE JORDAN, and (4) AUDWIN HAWATHA TAYLOR,** so Title 21, United States Code, Section 841(b)(1)(B) is otherwise applicable to them.

COUNT TWO

(Distribution and Possession with Intent to Distribute Heroin)

On or about April 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(1) RICKY CARLOS GRANT

knowingly and intentionally distributed and possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT THREE

(Distribution and Possession with Intent to Distribute Heroin)

On or about April 18, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(1) RICKY CARLOS GRANT

knowingly and intentionally distributed and possessed with intent to distribute a controlled substance, that is, a mixture and substance, containing a detectable amount of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT FOUR

(Possession with Intent to Distribute Heroin)

On or about April 21, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(1) **RICKY CARLOS GRANT**

knowingly and intentionally possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C).

COUNT FIVE

(Possession with Intent to Distribute Heroin)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(2) ZAVIAN MUNIZE JORDAN

knowingly and intentionally possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

Said offense involved one hundred (100) grams or more of a mixture and substance containing a detectable amount of heroin, a Schedule I controlled substance.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

COUNT SIX

(Distribution and Possession with Intent to Distribute Cocaine)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(2) ZAVIAN MUNIZE JORDAN

knowingly and intentionally distributed and possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of Title

21, United States Code, Section 841(a)(1) and 841(b)(1)(C).

COUNT SEVEN

(Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about April 21, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(1) RICKY CARLOS GRANT

did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, that is, conspiracy to possess with intent to distribute a controlled substance, a violation of Title 21, United States Code, Sections 841(a)(1) and 846, as set forth in Count One of this Third Superseding Indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT EIGHT

(Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(2) ZAVIAN MUNIZE JORDAN

did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United

States, that is, conspiracy to possess with intent to distribute a controlled substance, a violation of Title 21, United States Code, Sections 841(a)(1) and 846, as set forth in Count One of this Third Superseding Indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT NINE

(Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(2) ZAVIAN MUNIZE JORDAN

did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, that is, possession with intent to distribute a controlled substance, a violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C), as set forth in Count Six of this Third Superseding Indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

COUNT TEN

(Possession of a Firearm by a Convicted Felon)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(2) ZAVIAN MUNIZE JORDAN

having been previously convicted of at least one crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess one or more firearms and ammunition, that is,

- a Taurus, Model PT 145 Millennium, .45 caliber semiautomatic pistol, and ammunition; and
- a Glock, Model 22, .40 caliber semiautomatic pistol, and ammunition; and
- a FNH, Model Five-Seven, 5.7x28 caliber semiautomatic pistol, and ammunition,

in and affecting commerce, in violation of Title, 18 United States Code, Section 922(g)(1).

COUNT ELEVEN

(Possession with Intent to Distribute Cocaine)

On or about January 12, 2017, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(4) AUDWIN HAWATHA TAYLOR

AKA "BIG WAT"

knowingly and intentionally possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C).

COUNT TWELVE

(Possession with Intent to Distribute Marijuana)

On or about January 12, 2017, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(4) AUDWIN HAWATHA TAYLOR

AKA "BIG WAT"

knowingly and intentionally possessed with intent to distribute a controlled substance, that is, a mixture and substance containing a detectable amount of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C).

COUNT THIRTEEN

(Possession of Ammunition by a Convicted Felon)

On or about January 12, 2017, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(4) AUDWIN HAWATHA TAYLOR

AKA "BIG WAT"

having been previously convicted of at least one crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess ammunition, that is, Hornday .380 caliber ammunition, in and affecting commerce, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT FOURTEEN

(Possession of Firearm by a Convicted Felon)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(4) AUDWIN HAWATHA TAYLOR

AKA "BIG WAT"

having been previously convicted of at least one crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess a firearm, that is, a Springfield Armory USA, Model XDS, .45 caliber semiautomatic pistol, in and affecting commerce, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT FIFTEEN

(Possession of a Firearm in Furtherance of a Drug Trafficking Crime)

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant,

(4) AUDWIN HAWATHA TAYLOR

AKA "BIG WAT"

did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, that is, conspiracy to possess with intent to distribute, a controlled substance, a violation of 'title 21, United States Code, Sections 841(a)(1) and 846, as set forth in Count One of this Third Superseding Indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

NOTICE OF FORFEITURE AND FINDING OF PROBABLE CAUSE

Notice is hereby given of 21 U.S.C. § 853, 18 U.S.C. §§ 924 and 982, and 28 U.S.C. § 2461(c). Under Section 2461(c), criminal forfeiture is applicable to any offenses for which forfeiture is authorized by any other statute, including but not limited to 18 U.S.C. § 981 and all specified unlawful activities listed or referenced in 18 U.S.C. § 1956(c)(7), which are incorporated as to proceeds by Section 981(a)(1)(C). The following property is subject to forfeiture in accordance with Section 853, 924, 982, and/or 2461(c):

a. All property which constitutes or is derived from proceeds of the violations set forth in this bill of indictment;

b. All property used or intended to be used in any manner or part to commit or facilitate such violations;

c. All property involved in such violations or traceable to property involved in such violations;

d. All firearms or ammunition involved or used in such violations; and

e. If, as set forth in 21 U.S.C. § 853(p), any property described in (a), (b), (c) and (d) cannot be located upon the exercise of due diligence, has been transferred or sold to, or deposited with, a third party, has been placed beyond

the jurisdiction of the court, has been substantially diminished in value, or has been commingled with other property which cannot be divided without difficulty, all other property of the defendant(s) to the extent of the value of the property described in (a), (b), (c), and (d).

The Grand Jury finds probable cause to believe that the following property is subject to forfeiture on one or more of the grounds stated above:

- approximately $6,980 in United States currency seized on or about April 21, 2016;
- a S.W.D. Cobray Mac 11, 9mm pistol, and ammunition;
- a Hi Point model CD, 9mm pistol, and ammunition;
- a Ivar Johnson model Trails man 66s, .38 caliber revolver, and ammunition;
- a Taurus, Model PT 145 Millennium, .45 caliber semiautomatic pistol;
- a Springfield Armory USA**,** Model XDS, .45 caliber semiautomatic pistol, and ammunition;
- a FNH Model Five-Seven, 5.7x28 caliber semiautomatic pistol, and ammunition;
- two .223 caliber semi-automatic pistols with no markings, serial number, or manufacturer information, and one 100-round, loaded .223 caliber drum magazine, and one 30-round, loaded .223 caliber magazine;
- a Glock Model 22, .40 caliber semiautomatic pistol, and ammunition;

- approximately $28,220 in United States currency seized on or about May 11, 2016;
- approximately $24,200 in United States currency seized on or about May 11, 2016;
- approximately $7,030 in United States currency seized on or about May 12, 2016;
- a Mossberg 500c, pistol grip, 20-gauge shotgun; and
- Hornday .380 caliber ammunition.

A TRUE BILL:

[REDACTED]
FOREPERSON

JILL WESTMORELAND ROSE
UNITED STATES ATTORNEY

/s/ Sanjeev Bhasker
SANJEEV BHASKER
ASSISTANT UNITED STATES ATTORNEY

U.S. DISTRICT COURT

NEW CRIMINAL CASE COVER SHEET

Docket Number: 3:16CR145-RJC

UNITED STATES OF AMERICA

v.

RICKY CARLOS GRANT, ET AL.

CASE SEALED: ☐ YES ☒ NO

*If case is to be sealed, a Motion to Seal and proposed Order **must** be attached.)*

CASE NAME: US vs	Ricky Carlos Grant, et al,
COUNTY OF OFFENSE:	Mecklenburg
RELATED CASE INFORMATION:	
Magistrate Judge Case Number:	
Search Warrant Case Number:	
Miscellaneous Case Number:	
Rule 20b:	

SERVICE OF PROCESS:	1 – Arrest Warrant
U.S.C. CITATIONS *(Mark offense carrying greatest weight):*	☐ Petty ☐ Misdemeanor ☒ Felony
Title 21 & 18 Section(s) 846, 841(a)(1) and 924(c), 922(g)(1)	

JUVENILE: ☐ **Yes** ☒ **No**

ASSISTANT U.S. ATTORNEY:	Sanjeev Bhasker
VICTIM/WITNESS COORDINATORS:	Rutledge, Shirley
INTERPRETER NEEDED:	
LIST LANGUAGE AND/OR DIALECT:	
REMARKS AND SPECIAL INSTRUCTIONS:	

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT COURT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES,

v.

ZAVIAN MUNIZE JORDAN

Docket No. 3:16-cr-145-2

TRANSCRIPT OF TESTIMONY

BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.

UNITED STATES DISTRICT COURT JUDGE

APRIL 4, 2017

APPEARANCES:

On Behalf of the Government:

SANJEEV BHASKER, ESQ.,
MATTHEW THOMAS WARREN, ESQ.,
Assistant United States Attorneys
227 West Trade Street, Suite 1700
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On Behalf of the Defendant:

A. PATRICK ROBERTS, ESQ.,
BENJAMIN JAMES LANKFORD, ESQ.,
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Raleigh, North Carolina 27609

LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

P R O C E E D I N G S

* * *

[Testimony of Detective Christopher Newman,
pp. 41:24-42:22]

* * *

Q. All right. Sir, you mentioned the cameras. Did you know the cameras were on?

A. Yes, I did. I know the cameras -- that's the reason I lay it up there for the camera and everything. The camera's an evidence collection tool. So I lay it there for it to collect what's going on that day.

Q. You placed this evidence where now?

A. On the hood of my patrol vehicle.

Q. Do you remember how much currency you recovered from his pocket?

A. Approximately $2,000.

Q. All right. Moving on now to what has been marked and admitted as Government's Exhibit 6C, continuing the traffic stop.

What's happening here, sir?

A. I've initiated the search of the vehicle, and I found a gun under the center console of the center bench seat, underneath in the truck, and I recovered a Taurus .45 caliber handgun.

Q. Where, again, was that gun located specifically in the car?

A. Underneath the center -- it's a bench seat in a truck. It was underneath, like, a center console area that popped open.

* * *

[Testimony of Miller Bridges, pp. 78:4-25, 81:9-21, 87:14-91:12, 93:6-94:12]

* * *

Q. And on the third incident, which was April 21st, 2016, correct?

A. That is correct.

Q. What happened that day?

A. On the third incident, April 21st, what we did is establish surveillance on Mr. Grant. We learned a lot about him through electronic surveillance and other matters. We established surveillance on him prior to the confidential source contacting him and say, "Hey, I need heroin today." So we already had eyes on him. We had the confidential source at our instruction place a phone call to him and they procured a deal to meet at Bojangles off of -- over in

east Charlotte off of -- I think it's West Mallard Creek Church Road.

About the time they were supposed to meet, surveillance watched Ricky Grant as he drove toward that location. He got really close to that location at about the time he was supposed to meet our informant. He stopped at a gas station right next door, and because we were really confident he had the heroin on him he was going to supply our informant, we went ahead and approached Mr. Grant.

Q. Was he arrested?

A. He was arrested.

* * *

Q. All right. Going back to the 21st of April 2016, what is the next step in the OCDETF investigation for law enforcement?

A. Definitely we're going after who's supplying the heroin to Mr. Grant.

Q. And he agreed -- strike that. He -- was there a phone call made by Mr. Grant? Was a phone call made by Mr. Grant, sir?

A. Yes, at my instruction.

Q. And what did you instruct him?

A. I instructed Mr. Grant to place a call to his supplier.

Q. Why did you instruct him that?

A. To preserve the integrity of the investigation, keep moving up the food chain to the source of supply.

* * *

Q. I am showing you now what has been marked for identification as Government's Exhibit 3B.

All right. Mr. Bridges, based on your investigation, whose voices do you hear in the phone call?

A. Mr. Grant and Mr. Jordan.

Q. All right. After this phone call took place on April 24th, what's the next step in your investigation?

A. The next step in the investigation, the following day on the 25th, law enforcement applied and obtained a federal search warrant for the location of that phone that Mr. Grant contacted.

Q. Let me show you what has been marked and admitted as Government's Exhibit 4. What are we looking at here, sir?

A. That is a United States District Court search and seizure warrant.

Q. Here in the Western District of North Carolina?

A. That's correct.

Q. What phone number is this for?

A. 980-406-1700.

Q. Was that the same phone number Ricky Grant called with your guidance?

A. It was.

Q. And this search warrant was executed when?

A. That day at 4:30 p.m. approximately.

Q. Is that the day after the phone call was made, correct?

A. That's correct.

Q. What day would that be?

A. The 25th -- the phone call was made on the 24th of April, 25th is when we obtained and executed the warrant to locate the phone.

Q. Are you familiar with the term "geo tracking" of phones?

A. I am.

Q. Explain to the jury what a geo tracking search warrant is and does?

A. Basically it orders the phone company to give us information regarding the location of that phone. Every phone company is different, some are very, very accurate, some are just general area, and some are, you know, mediocre accuracy.

Basically, it narrows where that phone is down to a specific area, specific neighborhood, and in some cases a, you know, specific block, maybe even a house.

Q. And practically speaking, based on your expertise, what role do drug phone search warrant pings or geo tracking location provide for law enforcement?

A. It definitely helps us locate the user of that phone that is involved in drug trafficking that otherwise we may not know anything about or where they live.

Q. Is that also known as GPS for the phone?

A. That's correct. It does operate off of the phone.

Q. All right. I want to show you now what's been marked for identification purposes as Government's Exhibit 5. Do you recognize this, sir?

A. It's also a Western District federal tracking warrant.

Q. This is a search warrant, correct?

A. It's a search warrant, yes. That's correct.

Q. What is the search warrant for?

A. It's a tracking warrant. It gives us, basically, 45 days to put a tracker on a vehicle. In this case it was a 2004 Dodge Ram, and it gives a North Carolina tag number of Young William Paul 8755.

Q. What color was it?

A. It was white in color.

Q. What role -- first of all, how did you get that information regarding the vehicle and what did you do?

A. Basically, what we did is we coupled the phone information we received along with cooperating defendants' statements --

MR. ROBERTS: Objection.

A. -- and we actually --

THE COURT: I'll sustain the objection to "cooperating defendant statements" and ask the jury to disregard that.

Q. Go ahead, sir. Without mentioning statements, what else did you do?

THE COURT: You can correct the question.

Q. Yes, sir.

After you were able to identify the GPS position of the phone, did you do any surveillance of Mr. Jordan?

A. We did. We did surveillance in the area that the phone was located.

Q. Was that on April 25, 2016?

A. It was.

Q. Were you able to determine the type of vehicle he drove?

A. We were.

Q. All right. And that resulted in this search warrant?

A. Actually, I'm sorry. Let me correct. That was on the 26th that we conducted surveillance, April 26th.

Q. All right. Let me ask you this: You use the term "we." There was many agents involved in this investigation, correct?

A. That's correct. I mean law enforcement in general when I say "we."

Q. All right. Once the search -- let me rephrase the question.

Drawing your attention to the bottom of Government's Exhibit 5 of the tracking warrant, when was this tracking warrant for his vehicle, Mr. Jordan's vehicle, obtained?

A. April 26th.

Q. Of what year?

A. 2016.

* * *

Q. All right, sir, I will show you now what's been marked for identification purposes and admitted as Government's Exhibit 7. Do you recognize this, sir?

A. I do.

Q. What are we looking at here?

A. That's the map with several addresses noted on it of the Charlotte area.

Q. Briefly are these -- what significance do these addresses have?

A. They're all addresses that were significant events occurred on the day of May 11, 2016.

Q. I want to take you now to May 11, 2016. What were you doing that morning, sir?

A. That morning around 10:00 a.m. we began we established surveillance on Mr. Jordan at his residence at 8435 Cullingford Lane.

Q. And did you make what did you specifically do that day in the morning?

A. I was a member of the surveillance team just like everyone else. You know, it takes multiple people to follow someone, and I was part of that team.

Q. All right. I'm going to ask you to adjust your microphone again.

Did you see anything of note prior to Mr. Jordan's traffic stop earlier that morning?

A. I did. I personally observed his vehicle parked at a residence that was later identified as 501 Lyles Court. I observed him exit the vehicle and walk in the direction of the front door.

Q. Do you remember what time of day that happened?

A. Real close to lunchtime. It's going to be a ballpark figure, 12:00.

* * *

[Testimony of James Billings, pp. 137:7-141:22, 156:7-20]

* * *

Q. And did you yourself surveil Mr. Jordan at any particular residence that day?

A. I did.

Q. What was the address of that residence?

A. 2909 Ravencroft Avenue.

Q. Mr. Billings, I'm going to show you what's been marked and admitted as Government's Exhibit 11. Do you recognize what's in this photo?

A. I do.

Q. What is it?

A. This is the residence located at 2909 Ravencroft.

Q. Special Agent Billings, did you surveil Mr. Jordan at this residence --

A. I did.

Q. -- on May 11, 2016?

A. I did.

Q. Please describe what you saw upon your arrival in surveillance at this residence.

A. What was happening was, we were following Mr. Jordan in the white Dodge Ram 1500. I was the closest vehicle to him. When the vehicle turned down Ravencroft Avenue, this street, initially I wasn't going to go right down the street. I wanted to give him a little bit of space. I didn't want him to see me.

And as I was getting ready to pass by Ravencroft, I come back around, the person that was monitoring the tracker on the vehicle said, "Hey, he stopped at a house on Ravencroft and he's been at this house before." Meaning, we've monitored that vehicle at this house multiple times before.

When I heard that come over the radio I went ahead and turned down Ravencroft. I arrived -- I drove passed this residence, probably, approximately 30 seconds after he had arrived at that residence, and I saw his vehicle parked in the driveway.

Q. Approximately what time do you believe you arrived at the residence?

A. I would have to refer to the report to know what time it was in the day, but it was earlier in the day at some point.

Q. When you arrived at the residence, what did you see?

A. I saw the white Dodge Ram 1500 parked in the driveway, which you can see to the left here a little bit. And then I saw up on -- I guess I call it a porch, where it's got the sun shade three quarters of the way down, I saw the legs of – and the feet of two individuals, but I couldn't tell who they were. But I saw two different individuals up on that porch section of the residence.

Q. With respect to the vehicle you saw, can you mark on the image in front of you where you saw the white Dodge Ram?

A. Sure. Approximately, right there.

Q. Thank you for marking that for the record.

Just to be clear, you say you saw two individuals on the porch at that residence; is that correct?

A. That's correct.

Q. Can you circle on this image where you saw two individuals at the time you arrived?

A. (Indicating.)

Q. Thank you. What happened next?

A. I went in and I turned down a street that T's into Ravencroft that actually T's in real close to this residence. And I got out my binoculars and I established surveillance on the residence.

Q. And what did you see happen next?

A. The individuals that were on the porch had gone inside, and then I stayed there for total -- probably between 20 and 30 minutes. But eventually I saw Mr. Zavian Jordan come out of the residence and go to his truck.

Q. When he came out of the residence was Mr. Jordan carrying anything in his hands?

A. He was.

Q. What was he carrying in his hands?

A. He was carrying a white bag, it appeared to be a white plastic bag.

Q. And what did he do with that plastic bag?

A. He went to the passenger side of the Dodge Ram 1500 and he leaned into the vehicle, and apparently he left it in the vehicle. Because when he came out of the vehicle he didn't have that same white bag with him. It was -- I couldn't tell what was in it, but I could see it was something about the size of a shoebox. It was something sizeable.

Q. A different package?

A. No, that's what he put in the car. When he came back out of the vehicle he had a smaller -- a much smaller package that he was holding close to him, but it wasn't the same white bag because that white bag couldn't be held like that. Then I watched him walk back up into the residence.

Q. So he took one package out of the residence at 2909 Ravencroft, and brought a different package from the vehicle, the Dodge Ram, and brought it to 2909 Ravencroft; is that correct?

A. That's correct.

Q. How long -- did Mr. Jordan enter the house with this second package?

A. He did.

Q - How long did Mr. Jordan spend in the house with the second package?

A. He was just in there a matter of a couple minutes. He wasn't in there long at all.

Q. Then what happened next?

A. Then I saw him exit the residence with nothing in his hands. He went to the driver's side door of the vehicle, got in the vehicle and departed from the area.

Q. Based on your perception of Mr. Jordan's movements with respect to this residence, what do you think had occurred?

MR. ROBERTS: Objection.

THE COURT: Overruled.

THE WITNESS: Based on my observance, my training and experience, I believe that a drug

transaction had occurred with him taking one package in coming -- I'm sorry -- with him bringing one package out and then taking a different package back in. I wasn't sure if money had come out and drugs went back in or vice versa, but I believe that there was a transaction of some sort -- some type of drug transaction that had occurred.

Q. Thank you. Was Mr. Jordan ultimately arrested on May 11, 2016?

A. He was.

* * *

Q. And in the course of your conversation with Mr. Jordan, you referenced the Lyles residence as being his grandmother's house?

A. Well, I didn't reference it. He referenced it. He indicated that was his grandmother's house who passed away, who was no longer living. That's why he had the key to the house.

Q. Do you have any idea how many grandkids are part of the family?

A. No, I have no idea how many grandkids.

Q. Any idea if other grandkids or other members of the family have keys to that home?

A. Other than Mr. Jordan, no, I don't know how many kids have keys to that house.

* * *

[Testimony of Alan Plotz, pp. 272:1-279:8]

* * *

Q. What time did you first arrive to 8435 Cullingford Lane in Charlotte, North Carolina?

A. I arrived at the residence at approximately 5:00 p.m. and engaged Mrs. Evans, who was outside, and was actually looking for consent for the home -- a consent search for the home -- which she denied. And at that point we just established kind of an outer perimeter of the home to prevent any evidence coming in or out of the home that someone may be --

Q. Why do you do that, sir?

A. Just kind of standard protocol, again, to prevent evidence leaving the home that may be there that we can preserve.

Q. All right. Did there come a point in time where you and groups of law enforcement entered the residence?

A. I did. At approximately 8:25 I had received a phone call, I believe from Jim Billings who testified earlier, that stated he had in fact obtained a federal search warrant for the home. At that time I told Ms. Evans that the search warrant had been signed and we were going to go ahead and execute the search warrant at her home.

Q. All right. And what happens next?

A. Again, around 8:25 we make entry into the home. It's myself, five other CMPD officers, Officer Conger, Newman, Howard, Big Nosco, and Little, along with TFOs McGuirt and Paul Foushee.

So we make entry into the home where I kind of secured a couch for Mrs. Evans to sit on. We sat her, and I believe the mother of Zavian Jordan, on the couch. And then we did a security sweep of the home and then initiated a search of the home.

Q. What is a security sweep for the jury?

A. Yeah, at that point we're just looking for anyone that may be armed or just in the home, in general.

Q. Just going to ask you to put the microphone a little bit further from your face, if you don't mind.

What did you say specifically to Ms. Evans?

A. Yes. So after we searched the home and Mrs. Evans was on the couch, I asked her specifically if there were any weapons and currency -- and perhaps I should back up a little bit.

I received a call from TFO Bridges earlier, as we're standing outside, that he was made aware during an interview with Mr. Jordan that the residence was likely to contain United States currency and weapons as well. So I asked her that before we started a search of the home.

Q. What did Ms. Evans say to you?

A. She stated she was not aware of any currency at the home, but she was aware of two weapons in a safe that she had in her master bedroom.

Q. Who -- based on your investigation, did you learn who else resided or lived in the master bedroom?

A. Mr. Jordan did.

Q. All right. Your understanding is they were boyfriend/girlfriend.

A. That was my understanding.

Q. Did you ask her about the weapons?

A. I did. She --

THE COURT: No. The question is, did you ask her.

You said, yes?

THE WITNESS: I'm sorry?

THE COURT: You said, yes, to the question, "Did you ask her about the weapons?"

THE WITNESS: I did.

THE COURT: All right. Ask your next question.

Q. What did you learn based on your communication with her?

A. I learned that there were two weapons that she was aware of in the home in a safe, and she told me that she was the sole, like, owner of the keys to have access to the safe.

Q. Did she speak of either weapon in the safe?

A. I'm sorry?

Q. Did she speak about either weapon in the safe?

A. No, not at that time.

Q. I'm going to show you now what's been marked for identification and admitted now as Government's Exhibit 18A. There's a screen in front of you there, sir. First of all, who took these photos?

A. A combination of TFOs McGuirt and Foushee.

Q. All right. Are you familiar with Government's Exhibit 18A?

A. I am.

Q. What are we looking at here?

A. That's a safe. As you walk into the master bedroom there was a master bed, kind of, directly in front of you, down to the right side of the bed on the back wall was that safe and it was tethered to the post of the master bed.

Q. Agent Plotz, looking at a zoomed in perspective of Government's Exhibit 18A, first of all, can you tell what color the safe is?

A. I believe it was black.

Q. All right. And is there some type of -- something in the front or a keyboard in the front?

A. Appears to be a numerical key entry.

Q. You were able to gain entry into that safe, correct?

A. Yes, with the key.

Q. I'm going to show you now what has been admitted as Government's Exhibit 18B. Do you recognize this here?

A. I recognize that as the contents of the safe. In the lower right hand corner is a .380 pistol, which Mrs. Evans stated was hers. She provided me paperwork that satisfied my belief as to whether or not the firearm belonged to her.

Q. And if you could circle the other firearm. If you touch the screen – there's a touch screen there. What firearm is that what did you learn?

A. That's an FNH 57. I questioned her once the safe was opened I asked her, I said, "What's the story with the other weapon?" I'm not super familiar with that type of weapon at the time. She said she had just acquired this weapon and was going to the courthouse the following day to obtain a permit to lawfully own this weapon.

Q. Did she provide you any such paperwork?

A. She did not.

Q. Subsequently you would learn through law enforcement investigation that weapon was in fact stolen, correct?

A. I did.

Q. All right. Showing you now what's been marked for identification and admitted as Government's Exhibit 18C, as in Charlie, what do we see here?

A. That's a bulletproof vest.

Q. If you could explain to the jury, where was the safe located?

A. The safe was located upstairs in the master bedroom, kind of the first floor.

Q. And the firearms were within the safe, correct?

A. Those two firearms that we previously viewed were in the safe.

Q. Where are we looking at now in Government's Exhibit 18C?

A. So as you go downstairs, there's a downstairs, almost like a basement style part of the home, which led out to a garage. This item was contained in the garage. When you entered the garage from the home, on the left hand side there was a cabinet that contained this item.

Q. What is this again?

A. This is a bulletproof vest.

Q. Do you know who is holding this bulletproof vest here?

A. That was one of the officers, it's either Officer Howard or Officer Oprysko. Unfortunately, I'm not sure.

Q. All right. Showing you now what's been identified and admitted as Government's Exhibit 18D. What do you recognize here, sir?

A. I recognize 223 style high capacity drum magazine.

Q. And where was this located?

A. This was located in the same location as the bulletproof vest.

Q. Is there ammunition in the magazine, sir?

A. Yes.

Q. All right. I'm going to show you also what's been identified and admitted as Government's Exhibit 18E. Do you recognize this, sir?

A. I do.

Q. All right. What are we looking at here?

A. Can I circle --

Q. Yes.

A. In the lower right hand corner there is a stack or a stack of United States currency.

Q. Okay. Had you asked Ms. Evans and the house occupants about this currency?

A. I did ask Ms. Evans, again, at 8:25, if she was aware of any United States currency in the home or weapons. She was aware of the two weapons upstairs in the safe, but she denied knowledge of any United States currency.

And later Jim Billings came in and asked her and stated what the warrant was for, she again denied

any knowledge of any United States currency in the home.

Q. All right. So, if you can explain this perspective, where is -- where is Government's Exhibit 18A – I'm sorry, 18E located?

A. So I'll draw again on the screen if you guys can see. This is the doorway as you enter into the garage from the downstairs. So as soon as you walk through that doorway to the left hand side was that cabinet and it's kind of about head level.

Q. So it's fair to say, head level is an elevated cabinet, correct?

A. That's correct.

Q. Did you locate this currency?

A. I did not, TFO Paul Foushee did.

Q. You were eventually able to see it?

A. He directed my attention, it was very shortly after we located the bulletproof vests and that magazine.

Q. Do you know how much currency, as we sit today, was located and found in that cabinet?

A. I do, it was $24,200.

Q. That would be United States currency?

A. That's correct.

* * *

APPENDIX G

UNITED STATES DISTICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,

v.

ZAVIAN MUNIZE JORDAN,

Defendant.

Docket No. 3:16-cr-145-2

TRANSCRIPT OF JURY INSTRUCTIONS AND VERDICT

BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES DISTRICT COURT JUDGE

APRIL 5, 2017

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LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

[Transcript of Jury Instructions and Verdict,
pp. 2:13-24, 18:14-19:8, 26:9-28:16]

P R O C E E D I N G S

* * *

THE COURT: Members of the jury, now that you have heard the evidence and soon you will hear the arguments of the attorneys, I will instruct you as to the general principles of law that apply to this case. After the attorneys have made their closing arguments, I will discuss the specific offenses charged in the indictment, give you the elements of those offenses and follow with directions to guide your deliberations.

As I told you in the preliminary instructions, it is your duty and your responsibility in this trial to find

the facts. You may find those facts only from the evidence which has been presented during the trial.

* * *

Possession, as that term is used in this case, may be of two kinds: Actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

The defendant's mere presence in, or proximity to, an area where an item is found does not necessarily establish proof that the defendant possessed the item.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

* * *

Count Eight reads:

On or about May 11, 2016, within Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant, Zavian Munize

Jordan did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, that is, conspiracy to possess with intent to distribute a controlled substance, a violation of Title 21, United States Code, Sections 841(a)(1) and 846, as set forth in Count One of this indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

Title 18, United States Code, Section 924(c) reads in pertinent part:

Any person who, in furtherance of a drug trafficking crime for which the person may be prosecuted in a court of the United States, possesses a firearm commits an offense.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt: that on or about the date alleged, within the Western District of North Carolina:

1. That the defendant committed a drug trafficking crime, that is, conspiracy to distribute or possess with intent to distribute a controlled substance; and

2. That the defendant knowingly possessed a firearm in furtherance of such crime.

A "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion, includes any handgun, shotgun, or rifle.

I have previously defined the term "possess" with regard to Count One, and you are to apply that definition here.

To prove the defendant possessed a firearm "in furtherance" of a drug trafficking crime, the government must prove that the defendant possessed a firearm that furthers, advances, or helps forward the crime charged.

I have previously defined the term "knowingly" and you are to apply that definition to this count.

Count Nine reads:

On or about May 11, 2016, in Mecklenburg County, within the Western District of North Carolina, and elsewhere, defendant, Zavian Munize Jordan did knowingly possess one or more firearms in furtherance of a drug trafficking crime for which the defendant may be prosecuted in a court of the United States, that is, possession with intent to distribute a controlled substance, a violation of Title 21, United States Code, Section 841(a)(1) and 841(b)(1)(C), as set forth in Count Six of this indictment.

All in violation of Title 18, United States Code, Section 924(c)(1)(A).

Again, I previously read that statute to you and instructed you on its elements and definitions with regard to Count Eight, the previous count. You are to apply those instructions here to Count Nine, except that the underlying offense is possession with intent to distribute a controlled substance alleged in Count Six. And you are to consider each count, and the evidence pertaining to it, separately.

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,

v.

ZAVIAN MUNIZE JORDAN,

3:16-cr-145

April 5, 2017

VERDICT FORM

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1. As to Count One, charging the defendant with a violation of 21 U.S.C. § 846, we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

1(a). If guilty, was one (1) kilogram or more a mixture and substance containing a detectable amount of heroin a reasonably foreseeable consequence of the conspiracy to the defendant?

Yes: _____ No: ✓

1(b). If answer to 1(a) is "no," was one hundred (100) grams or more a mixture and substance

containing a detectable amount of heroin a reasonably foreseeable consequence of the conspiracy to the defendant?

Yes: ✓ No: _____

1(c). If answer to 1 is "guilty," was five hundred (500) grams or more a mixture and substance containing a detectable amount of cocaine a reasonably foreseeable consequence of the conspiracy to the defendant?

Yes: ✓ No: _____

2. As to Count Five, charging the defendant with a violation of 21 U.S.C. § 841(a) regarding heroin, we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

2(a). If guilty, was one hundred (100) grams or more a mixture and substance containing a detectable amount of her n involved in the offense?

Yes: ✓ No: _____

3. As to Count Six, charging the defendant with a violation of 21 U.S.C. § 841(a) regarding cocaine, we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

4. As to Count Eight, charging the defendant with a violation of 18 U.S.C. § 924(c) in relation to Count One, we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

5. As to Count Nine, charging the defendant with a violation of 18 U.S.C. § 924(c), in relation to Count Six, we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

6. As to Count Ten, charging the defendant with a violation of 18 U.S.C. § 922(g)(1), we, the jury, unanimously find the defendant:

Guilty: ✓ Not Guilty: _____

Signed: [REDACTED]
FOREPERSON

Dated: 4/5/17

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

(2) ZAVIAN MUNIZE JORDAN

Defendant.

Docket No. 3:16-cr-00145-RJC-DCK-2

DEFENDANT'S MOTION TO MERGE/VACATE COUNTS 8 AND 9

August 4, 2017

In the third superseding indictment Mr. Jordan was charged in Counts 8 and 9 with two counts of violating 18 U.S.C. § 924(c)(1)(A). Mr. Jordan was convicted on both counts. These counts are alleged to have taken place on the same day, but rely on different underlying offenses. [1] Further, there is

[1] Mr. Jordan states that even though the underlying offenses, Count I and VI, charge different offenses (Count 1 charges a conspiracy to possess with intent to distribute heroin

nothing in the indictment identifying a different place, time or gun. Therefore, these counts must be merged and one of them must be vacated.

Contrary to the Government's argument in its response to Mr. Jordan's objections to the PSR, Mr. Jordan is not arguing an error in the indictment itself. Rather, given the plain language in the indictment, Petitioner was put on notice that he was defending against carrying a firearm on the same day in relation to two interrelated crimes. Nothing in the jury verdict indicates that it found that Petitioner possessed different guns at different times. The Government's biased interpretation of the evidence and what the jury must have found cannot overcome the fact that these counts are alleged to have taken place on the same day and it is entirely possible the jury only found Mr. Jordan possessed one of the recovered guns on a single occasion as not a single gun was recovered from his actual person and others were involved in the conspiracy. Further, there is nothing in the indictment identifying a different place, time or gun. Therefore, these counts must be merged and one of them must be vacated.

Again, the uncertainty is regarding whether the jury found the possession of more than one firearm on more than one occasion. Therefore, the Fourth Circuit's decision in *United States v. Khan*, 461 F.3d

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and cocaine and Count 6 charges possession with intent to distribute cocaine), this does not mean that the jury verdict could not have relied on the same gun at the exact same time. *Cf. United States v. Walker*, 796 F.3d 43, 46 (4th Cir. 1986). In fact, even under the Government's one-sided interpretation of the facts, both counts relied on, at least in part, the sale of cocaine to Audwin Taylor.

477, 494 (4th Cir. 2006), relied upon by the Government in its Response to Mr. Jordan's objections, is inapposite because that case was addressing a situation where it was clear that the jury found the use of separate guns and separate offenses, but just did not line each gun with each offense. Here, we cannot determine if the jury found possession of a different gun at a different time for the second conviction. This is something a special verdict form might have fixed, but the jury returned a general verdict without any specificity and, therefore, we are left to guess whether the jury found the possession of more than one firearm on more than one occasion. *Cf. United States v. Hare*, 820 F.3d 93, 105-06 (4th Cir. 2016) ("Section 924(c) prohibits the possession of a firearm in furtherance of a crime of violence *or* a drug trafficking crime. As the district court explained to the jury, Appellants could be found liable if they possessed a gun either in furtherance of the crime of violence charged in Count 1 or in furtherance of the drug trafficking crime charged in Count 2. The special verdict form clearly shows that the jury found Appellants guilty of possessing a firearm in furtherance of both crimes. Thus, even assuming that a Hobbs Act robbery is not a crime of violence, Appellants' verdicts may be sustained because the jury found Appellants guilty of possessing, and conspiring to possess, a firearm in furtherance of the drug trafficking crime of which they were convicted in Count 2."); *United States v. Crandle*, 274 Fed. Appx. 324, 328 (4th Cir. 2008) ("The special verdict form directly addressed the jury's difficulty in assessing the defendants' guilt as to Count One, as the form clearly delineated the two grounds for a finding of guilt on the conspiracy

charge and instructed the jury to indicate the basis for their determination.").

The Fourth Circuit's decision in *United States v. Rhynes,* 206 F.3d 349 (4th Cir.1999), *rev'd on other grounds* 218 F.3d 310 (4th Cir.2000) (en banc) is instructive on what this Court should do because of the lack of clarity with the jury verdict. In *Rhynes*, the jury failed to specify which drug it found was involved in the conspiracy - heroin, cocaine, cocaine base or marijuana. The sentence imposed in *Rhynes* was above the statutory maximum for a marijuana conspiracy. In finding that this was in error, the *Rhynes* Court explained that "[t]he Government did not request a special verdict form, as was its obligation." Therefore, because it was "impossible to determine on which statutory object or objects—sale of heroin, cocaine, cocaine base, or marijuana—the conspiracy conviction was based" the district court was prohibited from "imposing a sentence in excess of the statutory maximum for the least-punished object on which the conspiracy conviction could have been based." *Id.* at 238.

Here, the Government failed to seek a specific verdict and, therefore, as in *Rhynes*, this Court must assume that the jury found only the use of one gun on one occasion. Therefore, as is discussed below, these counts must merge.

The Seventh Circuit's decision in *United States v. Cureton,* 739 F.3d 1032 (7th Cir. 2014), is instructive in this matter. In that case, the Seventh Circuit addressed "whether a defendant may receive multiple 18 U.S.C. § 924(c) convictions for a single firearm use when the predicate offenses are also committed simultaneously and without any

distinction in conduct." *Id.* at 1040. In analyzing this question as a statutory interpretation question, the Seventh Circuit examined the unit of prosecution - the minimum activity that will constitute a crime. After examining Supreme Court precedent and precedent from other circuits, the Seventh Circuit ultimately held "[b]ecause Cureton only used a firearm once, in the simultaneous commission of two predicate offenses, we agree with him that he may only stand convicted of one violation of § 924(c)." It reached this decision reasoning that "there was only one choice to use a gun in committing a crime[]" should still apply. *Id.* at 1043-44.

Similarly, in *United States v. Rentz,* 777 F.3d 1105 (10th Cir. 2015), the Tenth Circuit analyzed, as a statutory interpretation question and rule of lenity question, "whether, as a matter of statutory interpretation, § 924(c)(1)(A) authorizes multiple charges when everyone admits there's only a single use, carry, or possession." *Id.* at 1108. In ultimately agreeing with the Seventh Circuit, the Tenth Circuit reasoned "if a second conviction doesn't require a second blameworthy choice to use, carry, or possess a firearm in aid of a predicate act, the logic behind the leap in punishment becomes less apparent." *Id.* at 1111. The Tenth Circuit felt that its decision was supported by the other Circuits and explained that "Most other circuits to have come this way before us have reached the same destination we do. …. Neither does the one circuit that most apparently seems to have gone a different way (the Eighth) cause us to doubt our path. In fact, it's not even clear that court would disagree with anything we've said. In *Sandstrom,* the Eighth Circuit did allow multiple

charges premised on a single gun use to proceed under § 924(c)(1)(A). But it did so only after relying on our own panel decisions rejecting *Blockburger*-type double jeopardy challenges to multiple § 924(c)(1)(A) convictions. As we've seen, those cases do not directly answer the question what, as a matter of statutory interpretation, the government must prove for each successive charge under a single statute." *Id.* at 1114. Those cases also do not answer what the jury must find for each successive charge under a single statute.

Likewise, in *United States v. Vichitvongsa,* 819 F.3d 260 (6th Cir. 2016), in agreeing with the Tenth Circuit in *Rentz,* the Sixth Circuit explained that "[i]n order for the government to convict a defendant of more than one § 924(c) charge, the defendant must use, carry, or possess a firearm—even if it is the same one—more than once." *Id.* at 268-69. The Sixth Circuit also held "[w]hether a criminal episode contains more than one unique and independent use, carry, or possession depends at least in part on whether the defendant made more than one choice to use, carry, or possess a firearm." *Id.* at 270.[2]

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[2] Mr. Jordan recognized in his objections that this Circuit has held, in conflict with every other Circuit except the Eighth, based on double jeopardy grounds, that there can be a conviction for each firearm even if there is only one underlying crime because "[i]f multiple uses of ... weapons ... could not be punished with multiple consecutive sentences, there would be little deterrence against armed drug dealers using those weapons repeatedly during a lengthy drug conspiracy." *United States v. Diaz,* 592 F.3d 467, 471-75 (3d Cir. 2010). What the Government overlooks in arguing that this applies in the instant matter, however, is that the indictment here did not identify different firearms or separate use to support Counts 8

Therefore, because Counts 8 and 9 must merge; one of them must be vacated. The proper procedure when there is a duplicative conviction, or when two counts in an indictment allege only one offense, is to merge/vacate the two counts. For example, in *United States v. Shorter,* 328 F.3d 167, 173 (4th Cir. 2003), two counts in the indictment alleged a single offense and so the judgment recognized he was found guilty of both counts but that those counts merged for sentencing purposes. In finding that this was proper, the Fourth Circuit explained that "there is no duplicative conviction to be vacated because the district court merged the duplicative counts into a single conviction. ... the judgment reflects the imposition of only a single special assessment for a § 922(g) offense."

Likewise, in *United States v. Norman*, 628 Fed. Appx. 876 (D.C. Cir. 2015) the Circuit Court for the District of Columbia addressed a case where "[a]t the

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and 9. Therefore, the reasoning in the Fourth Circuit supporting separate convictions for each firearm is inapposite because it is based on the presumption that Congress intended to prevent the repeated use of weapons. *See e.g., United States v. Camps,* 32 F.3d 102 (4th Cir. 1994) ("there would be little deterrence against armed drug dealers using those weapons repeatedly during a lengthy drug conspiracy."). Therefore, this precedent is inapposite here where there is no distinguishing between the gun or number of uses. Further, as an aside because Mr. Jordan was charged with different underlying offenses, Mr. Jordan believes that these cases were wrongly decided under the language and intent of the statute and the holding of the majority of other Circuits - that "a defendant who uses multiple firearms in relation to a single drug-trafficking crime may be charged with only one violation of § 924(c)(1)[]" - is the correct statement of the law. *United States v. Diaz,* 592 F.3d 467, 471-75 (3d Cir. 2010).

sentencing hearing, the district court imposed concurrent 252-month prison terms on each count and special assessments of $100 per count under 18 U.S.C. § 3013. Norman objected to the two sentences on the ground that 'the ammunition and gun count merge.'" The Court ultimately agreed and "instructed] the district court to dismiss one of the two convictions at the government's election and resentence on the remaining conviction." *See also United States v. Medina-Mendoza,* 528 Fed. Appx. 658, 661 (7th Cir. 2013) ("In the district court Medina-Mendoza did not challenge his two convictions as multiplicitous. But it was plain error for the district court to sentence him more than once—even to concurrent sentences—because the § 922(g) counts are based on his single possession of the same gun, and the second conviction is presumed to have collateral consequences"); *United States v. Nirenberg,* 242 F.2d 632, 634 (2d Cir. 1957) ("Although the appellant does not raise this point, it is clear that the sentence on Count 2 must be vacated since the conviction on Count 2 became merged in the conviction of the offense in a higher degree as charged in Count 3.").

As is discussed herein, the jury made no finding of Mr. Jordan's possession use or carrying of two separate firearms or one firearm on two separate occasions. The two vague charges in the indictment refer to the same day without any other information regarding separate guns or times. Under these facts, there can only be one conviction.

Accordingly, Petitioner respectfully requests that this Court GRANT his Motion to Merge/Vacate Counts 8 and 9.

This 4th day of August, 2017.

Respectfully submitted,

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APPENDIX J

UNITED STATES DISTICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,

v.

ZAVIAN MUNIZE JORDAN,

Defendant.

Docket No. 3:16-cr-145-2

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE
ROBERT J. CONRAD, JR.
UNITED STATES DISTRICT COURT JUDGE

OCTOBER 23, 2017

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LAURA ANDERSEN, RMR
Official Court Reporter
United States District Court
Charlotte, North Carolina

[Transcript of Sentencing Hearing, pp. 2:8-4:13]

* * *

P R O C E E D I N G S

* * *

THE COURT: We're here in the matter of United States v Zavian Munize Jordan for sentencing. Mr. Jordan was found guilty by a jury on April 10th of this year.

And Mr. Jordan, if you would please stand, I have a couple of questions to ask you about the presentence report.

I've received and reviewed the presentence report. Have you had a chance to read the presentence report?

THE DEFENDANT: Not yet. Do you have a copy?

THE COURT: Well, let me ask you if you've been able to go over that presentence report with your attorneys?

THE DEFENDANT: Yes, briefly.

THE COURT: All right. And do you believe you understand it?

THE DEFENDANT: I have a couple issues with it.

THE COURT: Well, we're going to go through a sentencing hearing, and I'm going to ask your attorneys to raise any objections to the presentence report that they have and we will talk about that and I will make rulings on that. I represent to you that I'll give you an opportunity to talk to the Court before any sentence is imposed.

You're nodding your head that you understand all of that.

THE DEFENDANT: Yeah.

THE COURT: All right. Well, you may have a seat at this time. And Ms. Shein or Mr. Roberts, I'll be glad to hear from you on any objections to the presentence report.

MS. SHEIN: Thank you, Your Honor. I'm going to go ahead at this point and make a presentation to the objections. And if Mr. Roberts has any objections, we've been working together, he may do so.

THE COURT: All right.

MS. SHEIN: There is one objection that is now mute as a result of the Court's order on Friday.

THE COURT: Yeah, on the consecutive -

MS. SHEIN: Correct.

THE COURT: -- 924(c). It just seems to me -- I understand your objection, and if you were in other circuits it might be better received but it seems to me that the Fourth Circuit has spoken. They may speak again --

MS. SHEIN: Well, we preserved it for this reason --

THE COURT: All right.

MS. SHEIN: -- that it is a conflict. As you know, many times in conflict cases people change their mind or the Supreme Court might entertain something in the future. And so I felt it was necessary for us to put that together for this jurisdiction even though we have that problem with the Fourth Circuit.

But the first objection as a result of the decision of course is no longer valid so we withdraw that objection.

THE COURT: All right. Well --

MS. SHEIN: Other than to the premise of it.

THE COURT: Right. You're going to pursue it at --

MS. SHEIN: I should say moot, not withdrawn.

THE COURT: -- some other forum.

MS. SHEIN: Yes. It is not withdrawn, it's moot. Thank you.

* * *