DOCKET NO. _____

Supreme Court Of The United States

ANTHONY FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Randee J. Golder, Esq.
Counsel of Record
RANDEE J. GOLDER, P.A.
PO Box 243756
Boynton Beach, Florida 33424-3756
(561) 676-2585

QUESTIONS PRESENTED FOR REVIEW

(1) Should the categorical approach be used in a habeas proceeding to evaluate which of several predicate offenses support a jury's general verdict?

(2) After *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) are all *Stromberg* errors subject to harmless error review?

INTERESTED PARTIES

The following is a list of parties to the appellate proceeding before the Eleventh Circuit Court of Appeals who are not parties to this petition:

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

In The
Supreme Court of the United States

No: _____

ANTHONY FOSTER,

Petitioners
v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Foster respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-14771-HH in that court on May 4, 2021, *Anthony Foster v. United States*, which affirmed the order of the United States District Court for the Southern District of Florida denying habeas corpus relief under 28 U.S.C. § 2255.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the order of the United States District Court for the Southern District of Florida, is contained in the Appendix A-1. It is a published opinion found at: *Anthony Foster v. United States*, ___ F.3d ___, No. 19-14771 (11th Cir. May 4, 2021).

A copy of the order of the United States District Court, which denied habeas relief, is contained in Appendix A-2.

A copy of the judgment of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME OF THE UNITED STATES. The decision of the court of appeals was entered on May 4, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and this court's order dated July 19, 2021 extending the time for filing during the COVID pandemic. The district court had jurisdiction because petitioner was convicted of violating federal criminal laws and filed for habeas corpus relief under 28 U.S.C. § 2255. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts. Additionally, the district court issued a Certificate of Appealability as required by 28 U.S.C. § 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

18 U.S.C. § 924(c)(1)(A), which states in pertinent part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the Untied States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> (i) be sentenced to a term of imprisonment of not less than 5 years …

(D)(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carred, or possessed.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

And 18 U.S.C. § 924(o), which states in pertinent part:

A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both …

STATEMENT OF THE CASE

Procedure

On October 2, 2007, a federal grand jury sitting in the Southern District of Florida indicted Foster for numerous violations of federal law. That indictment was superseded on April 8, 2008. The superseding indictment charged Foster with the following offenses:

Count 1: Conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a);

Count 2: Conspiracy to possess with intent to distribute 5 KG or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A);

Count 3: Attempt to possess with intent to distribute 5 KG or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846;

Count 4: Conspiracy to use and carry a firearm in relation to a crime of violence and a drug trafficking crime (counts 1, 2, 3), in violation of 18 U.S.C. § 924(c)(1)(A);

Count 5: Carrying a firearm during and in relation to a crime of violence and a drug trafficking crime (counts 1, 2, 3), in violation of 18 U.S.C. §§ 924(c)(1) and 2; and

Count 6: Possession of firearm and ammunition by convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e).

The charges related to a reverse sting concerning robbery of a drug stash house. The defendants were arrested following a planning meeting before any such robbery occurred.

Foster proceeded to trial and was convicted by a jury on all counts. The trial court initially sentenced Foster on August 29, 2008 to a total of 260 months in prison. That sentence consisted of sentences of 200 months as to Counts 1-4 and 120 months as to Count 6, all running concurrently; and 60 months as to Count 5 running consecutively. A term of 5 years of supervised release was to follow, and special assessments totaled $600.00. On November 20, 2014, Foster's sentence was reduced to a total of 248 months in prison based on a retroactive amendment to the drug sentencing guidelines. The order reducing sentence does not contain a breakdown by count of the newly reduced sentence. The remainder of the sentence remained the same.

After several habeas filings and unsuccessful appeals, Foster was granted permission by the Eleventh Circuit Court of Appeals to file a successive habeas petition based on *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019). He alleged that one of the predicate crimes – conspiracy to commit Hobbs Act robbery – used as the basis of his § 924 convictions no longer qualified as a crime of violence after *Davis*.

The district court treated Foster's motion to allow his successive habeas petition as an actual § 2255 petition and ordered the government to respond. They never did. After counsel was appointed, she filed an actual Motion to Vacate under 28 U.S.C. § 2255, which the district court treated as an amended § 2255 petition. Again, the government filed no response.

On November 18, 2019, the district judge held a hearing on the petition. The court ultimately entered an order denying the petition on the merits finding that the drug trafficking

predicates were so intertwined with the Hobbs Act conspiracy (a crime that no longer qualifies as a crime of violence) that a jury could not have convicted without basing its decision on the drug trafficking crimes.

Despite repeated objections by Foster's attorney to any judicial factfinding, the district judge nonetheless embarked on judicial factfinding to decide the matter.

On November 26, 2019, the district judge entered a "Final Judgment and Order Denying Motion to Vacate." That same day, the judge entered a corresponding "Final Judgment for Respondent: Order Granting Certificate of Appealability."

The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with offenses against the laws of the United States.

A Notice of Appeal was filed by Foster on November 30, 2019. On May 4, 2021, the Eleventh Circuit issued a published opinion relegating Foster's issue to one about a jury instruction and finding the categorical approach did not apply to its analysis. *Foster v. United States*, ___ F.3d ___, No. 19-14771 (11th Cir. May 4, 2021).

On appeal to the Circuit Court of Appeals for the Eleventh Circuit, Petitioners' brief was served on January 27, 2020. The issue on appeal before the Eleventh Circuit alleged the same issues presented to this court. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742 which gives the court of appeals jurisdiction over all final decisions and sentences of the district courts of the United States.

The issues have been raised before each lower court and have been fully preserved for review.

Summary of the Facts

The charges stemmed from discussions about a reverse-sting home invasion armed robbery of a cocaine stash house. An undercover agent claimed to be a disgruntled drug courier who wanted

to rob the stash house of his employer. He had several meetings with the co-defendants during which he claimed there would be at least 15 kilograms of cocaine present. Foster only appeared at the final meeting with his three co-defendants and the undercover agent. He was not present at earlier meetings where the plan was formulated. Foster arrived at the meeting in a separate car. This meeting with the agent was the final planning stage, after which they were to commit the robbery. The defendants were to be paid in cocaine. Because this was a reverse-sting, there never was an actual stash house to rob, and there never was any cocaine to be taken. The conspirators were arrested at the end of this last meeting. At the time of arrest, Foster was in possession of a loaded firearm.

Opinion of the Appellate Court

The Eleventh Circuit Court of Appeals found the government had waived any claim of procedural default. Its merits decision was based on a finding that the Hobbs Act conspiracy and the attempt to possess with intent to distribute cocaine were inextricably intertwined. Therefore, the inclusion in the indictment and jury instructions of Hobbs Act conspiracy, which the court recognized was not a valid predicate, was harmless error. Essential to the court's conclusion was its factual analysis used to determine that the valid and invalid predicate crimes were intertwined, and its requirement that Foster must prove his challenged convictions rested *solely* on the Hobbs Act conspiracy.

ARGUMENT FOR GRANTING THE WRIT

QUESTION 1: Should the categorical approach be used in a habeas proceeding to evaluate which of several predicate offenses support a jury's general verdict?

The evolution of law on this issue in the Eleventh Circuit has been quick. In just three months, the Eleventh Circuit eliminated the categorical approach from analysis of any habeas

petition that may require a finding of prejudice and has placed an insurmountable burden on habeas petitioners. So far, the only other circuit counsel has found to have addressed this issue is the Second Circuit.

In all of the Eleventh Circuit cases, the habeas petitioner was convicted by general jury verdict of possessing a firearm during or in relation to a crime of violence or drug crime. All of the cases involved a reverse-sting[1] plan to rob a drug stash house. In all cases, the indictment alleged multiple possible predicate crimes to support the firearm charge, and in all cases one of the charged predicate crimes no longer qualifies as a valid predicate crime of violence after *Johnson v. United States*, 576 U.S. 591 (2015)[2] and *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319 (2019)[3]. In each case, the jury's verdict form gave no indication of what predicate crimes were found to support the convictions, and the petitioner has no mechanism to parse the jury's verdict.

In the first case, *United States v. Lance Cannon*, 987 F.3d 924 (11th Cir. 2021), the Eleventh Circuit held that conspiracy to commit Hobbs Act robbery and conspiracy to possess with intent to distribute drugs are distinct offenses, and are not multiplicitous even though they are based on the same facts. *Id.* at 940. However, because they are based on the same facts, both conspiracies are intertwined. *Id.* at 948. When both are specified as predicate crimes to support a charge of use of a firearm during a crime of violence or drug crime, and only one crime qualifies as a valid predicate, a habeas petitioner cannot overcome harmless error analysis. *Id*. at 950.

---

[1] In each reverse-sting, the government offered the opportunity to commit the crime, but there was no actual stash house to rob. Defendants were arrested after a planning meeting.

[2] In *Johnson*, this court held the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) to be unconstitutional. 576 U.S. at 597-98.

[3] In *Davis*, this court held that 18 U.S.C. § 924(c)(3)(B)'s definition of crime of violence is unconstitutional. 139 S. Ct. at 2324-25, 2336.

In the second case, *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the Eleventh Circuit denied relief on two bases: (1) the claim was procedurally defaulted,[4] and (2) the predicate crimes alleged to support the conspiracy to possess a firearm during or in relation to a crime of violence or drug crime were intertwined, so the appellate court could presume the conviction was based on both types of predicate crimes. *Id.*at 1280. The court held that it was Granda's burden to prove that the jury relied *only* on the invalid predicate crime to support its conviction. *Id.* at 1288. The court acknowledged this was an impossible burden because of its finding that the predicate crimes were intertwined. *Id.* at 1291. The court went on to find that, even if the jury partially relied on the invalid predicate to conviction, such an error could never overcome a harmless error analysis. *Id.* at 1294. The *Granda* court further stated: "But Granda cites no authority that justifies extending the categorical approach – a method for determining whether a conviction under a particular statute qualifies as a predicate offense under a particular definitional clause – to the context of determining on which of several alternative predicates a jury's general verdict relied." *Id.* at 1295. The court said that harmless error analysis does not involve judicial factfinding: "But a judge conducting a *Brecht*[5] harmless error analysis does not find a fact at all; instead, the judge asks as a matter of law whether there is grave doubt about whether an instruction on an invalid predicate substantially influenced what the jury already found beyond a reasonable doubt." *Id.* However, the court's own statement shows it is supplanting its own judgment of "what the jury already found." Since the jury only rendered a general verdict of guilty or not guilty, there is no way to determine what the jury actually found. Instead, the court is making an assumption as to which facts it believes supported the jury's verdict.

[4] Because procedural default is not an issue in Foster's case, that issue will not be addressed here.
[5] In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this court established that habeas review of trial error is subject to harmless error analysis.

The third decision on this issue is *Wade Parker v. United States*, 993 F.3d 1257 (11th Cir 2021). Wade Parker is a co-defendant of Anthony Foster. The appellate decision applies the same analysis and reasoning as the other cases, including *Foster*, with the one addition that the court held Parker, like Granda, procedurally defaulted his claim.

The fourth decision on this issue is this case. The Eleventh Circuit's decision in *Foster v. United States*, ___ F.3d ___, No. 1914771 (11th Cir. May 4, 2021) built upon the foundations laid in *Cannon, Granda* and *Parker* to conclude that the invalid and valid predicate crimes were inextricably intertwined. Therefore, the inclusion of an invalid predicate offense in the indictment and jury instructions was harmless error. *Id.* slip op. at p. 13, 14. In so doing, the court stated: "In *Granda*, we declined to extend the categorical approach to the distinct 'context of determining on which of several alternative predicates a jury's general verdict relied.'" Slip op. p.19-20, citing *Granda*, 990 F.3d at 1295.

The court recognized that: "The categorical approach 'is a method for determining whether a conviction under a particular statute qualifies as a predicate offense under a particular definitional clause.'" Slip op. 19, citing *Granda*, 990 F.3d at 1295. The court made no effort to explain why that is different from determining whether a general jury verdict is based on a non-qualifying predicate. The notion that the jury's verdict could be at least partially based on a non-crime goes against the basic tenants of our criminal justice system. Due process and equal protection should, at a minimum, guarantee that a criminal conviction is based on a valid crime.

The categorical approach should apply to the legal analysis in this case. If it was used, the court would never reach a determination as to whether crimes were interwined, which necessarily involves supplanting a judge's view of the facts for that of the jury.

The Second Circuit approached the issue using a plain error analysis because the issue had not been preserved at trial. The two Second Circuit cases arose from direct appeal, unlike Foster whose case appealed denial of habeas relief. The Second Circuit required the defendant to show (1) an error, (2) that was plain, and (3) that affected substantial rights. *United States v. Eldridge*, No. 18-3294, p. 22-23 (2d Cir. June 22, 2021). It found the defendant established an error that was plain, therefore satisfying the first two prongs of plain error analysis. *Id.* at p.25. However, the court found the defendant had not established that the error affected his substantial rights. *Id.* at p.26-30.

In *United States v. Heyward*, No. 19-1054 (2d Cir. June 28, 2021), the Second Circuit came to the opposite conclusion and vacated the offending conviction, in part, based on the Government's concession that the § 924(c) conviction could not be supported. The court cautioned that its "… analysis rests on factors specific to this litigation …" In *Heyward*, the court found the predicate crimes each had an independent factual basis. The crimes were not intertwined. The court never reached the question of whether the crime of conviction included both valid and invalid predicate crimes. *Id.* at p.4-5, 18-20. "Although not raised by the Government, it bears mentioning that we do not need to and are not now considering the more fraught question of whether a single racketeering conspiracy encompassing both qualifying ad non-qualifying conduct under § 924(c) is itself automatically a qualifying offense." *Id.* at p.23-24.

While the Second Circuit applied a plain error analysis to the issue in a direct appeal, the Eleventh Circuit took a different approach in the habeas context. It would be helpful to have this court set forth the correct standard for legal analysis of this issue.

QUESTION 2: After Hedgpeth v. Pulido, 555 U.S. 57 (2008) are all Stromberg errors subject to harmless error review?

In *Stromberg v. California*, 283 U.S. 359 (1931), this court held that a conviction must be vacated when it rests on both constitutional and unconstitutional alternatively-phrased grounds, and it is impossible to tell from a general jury verdict on which ground the conviction was based. This principle was affirmed in *Yates v. United States*, 354 U.S. 298, 312 (1957). "To say that a general verdict of guilty should be upheld even though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams v. North Carolina*, 317 U.S. 287, 292 (1942).

The Eleventh Circuit recognized: "*Stromberg* stands for 'the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground.'" *Foster*, Slip op. p.18, citing, *Griffin v. United States*, 502 U.S. 46, 53 (1991).

However, the Eleventh Circuit then stated: "*Hedgpeth v. Pulido*, 555 U.S. 57, 58, 62 (2008) (per curiam), [] held that *Stromberg* error is subject to the *Brecht* harmless error standard." *Foster*, Slip op. p.18-19. The court recognized no exception to the application of harmless error analysis where there is a *Stromberg* error.

Because of the application of harmless error analysis, the Eleventh Circuit held that it must look at the whole record in the case to determine whether the petitioner was prejudiced. *Foster*, Slip op. p.19. According to the Eleventh Circuit, the categorical approach could never apply to any analysis that involves looking at prejudice. This greatly undermines application of the categorical approach and the prior precedent established by *Stromberg*.

This case did not just involve an erroneous jury instruction. The error arose from the very nature of the charges. The counts in question alleged multiple predicate crimes thereby assuring that it would be impossible to know which crime(s) formed the predicate for the jury's verdict, and allowing the jury to convict based on multiple theories. The jury was not told it has to unanimously agree on a particular predicate crime. Because the government chose to charge it in this way, the defendant was denied due process in that he may have been convicted of a non-existent crime and may not have jury unanimity in the verdict. Even the possibility of such a result should warrant vacating the verdict under these circumstances.

In *Heyward*, the Second Circuit applied a *Yates* analysis to overturn the § 924(c) conviction making no mention of layering on a harmless error analysis. *Heyward.* at p.22-25.

CONCLUSION

Based upon the foregoing petition, the court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit on both issues.

Respectfully submitted,

RANDEE J. GOLDER, P.A.
Counsel of Record
PO Box 243756
Boynton Beach, Florida 33424-3756
(561) 676-2585

September 24, 2021

_____
Randee J. Golder, Esq.

APPENDIX

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14771

D.C. Docket Nos. 0:19-cv-62215-WPD; 0:07-cr-60238-WPD-4

ANTHONY FOSTER,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 4, 2021)

Before JORDAN, MARCUS and GINSBURG,* Circuit Judges.

MARCUS, Circuit Judge:

A law enforcement reverse sting operation caught Anthony Foster in the midst of an effort to commit armed robbery of a house he believed held the cocaine stash of a Colombian drug cartel. A jury convicted Foster of, among other things, both conspiring to use and using a firearm during a crime of violence or drug trafficking offense in violation of 18 U.S.C. § 924(o) and § 924(c). On direct appeal, we affirmed his convictions and the ensuing sentence. United States v. Parker et al., 376 F. App'x 1, 3 (11th Cir. 2010) ("Parker I"). Foster now appeals the district court's rejection of his § 2255 collateral attack on these convictions.

Foster claims that under United States v. Davis, 139 S. Ct. 2319 (2019), the only crime-of-violence offense that the jury could have relied on to predicate the challenged convictions -- conspiracy to commit Hobbs Act robbery -- is not actually a crime of violence. Even though conspiracy to commit Hobbs Act robbery is not a crime of violence, his § 2255 motion still fails. This is because in addition to the Hobbs Act conspiracy, the district

* Honorable Douglas H. Ginsburg, United States Circuit Judge for the District of Columbia Circuit, sitting by designation.

court instructed the jury that it could predicate the challenged § 924(c) and (o) convictions on two related drug trafficking offenses, attempt and conspiracy to possess cocaine with intent to distribute. Given the facts and circumstances presented at trial, the jury could not have relied on the invalid Hobbs Act conspiracy predicate without also relying on the drug trafficking offenses, each of which remain valid predicates. Our recent holdings in Granda v. United States, 990 F.3d 1272, 1292, 1296 (11th Cir. 2021) and Parker v. United States, --- F.3d ----, No. 19-14943, 2021 WL 1259432, at *6 (11th Cir. Apr. 6, 2021) ("Parker II") defeat Foster's claims. We affirm.

I.

A.

The facts of this case have already been thoroughly set out by this Court in Foster's direct appeal and in our recent ruling on a co-defendant's § 2255 motion. See Parker I, 376 F. App'x at 6–10; Parker II, 2021 WL 1259432, at *1–2. Rather than repeating all of those facts, it is enough to note that Foster conspired with others and planned to commit armed robbery of a house he believed held some 15 kilograms of cocaine. Parker I, 376 F. App'x at 7; Parker II, 2021 WL 1259432, at *1–2. He was unaware, however, that this plan was part of a sting operation by the Bureau of

Alcohol, Tobacco, Firearms and Explosives ("ATF"). The robbery crew comprised three individuals in addition to Foster -- Ishwade Subran, Patrick Aiken, and Wade Parker. Parker II, 2021 WL 1259432, at *1. According to the plan, Foster was supposed to execute the robbery along with Parker and Aiken; Subran would serve as the getaway driver. Parker I, 376 F. App'x at 8; Parker II, 2021 WL 1259432, at *2. As the crew waited for the cartel to phone in the location of the stash house, the police moved in and arrested Subran, Aiken, Parker, and Foster. Parker I, 376 F. App'x at 7; Parker II, 2021 WL 1259432, at *2.

At the time of his arrest, law enforcement agents found a loaded Smith & Wesson 9mm pistol on Foster's person. Parker I, 376 F. App'x at 9; Parker II, 2021 WL 1259432, at *2. An agent also discovered a loaded Walther PPK/S .380 caliber pistol between the driver's seat and the center console in the Infiniti that Subran, Aiken, and Parker had arrived in. Parker II, 2021 WL 1259432, at *2. The car also contained a rope, duct tape, black gloves, and Foster's Jamaican passport. Id.

B.

A grand jury sitting in the Southern District of Florida returned a superseding indictment charging Foster, Aiken, Subran, and Parker with:

- Count 1: Conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a);
- Count 2: Conspiracy to possess with intent to distribute at least five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846;
- Count 3: Attempt to possess with intent to distribute at least five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A);
- Count 4: Conspiracy to use and carry a firearm during and in relation to a crime of violence as set forth in Count 1 and a drug trafficking offense as set forth in Counts 2 and 3, and to possess a firearm in furtherance of such crimes, in violation of 18 U.S.C. § 924(o);
- Count 5: Using and carrying a firearm during and in relation to a crime of violence as set forth in Count 1 and a drug trafficking offense as set forth in Counts 2 and 3, and possessing a firearm in furtherance of such crimes, in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2; and
- Count 6: Possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

Parker I, 376 F. App'x at 3. Aiken pleaded guilty, but the other defendants proceeded to trial. Id. at 5. The jury heard testimony from the undercover ATF agent and other agents recounting the facts as we have described them. Id. at 6–8; Parker II, 2021 WL 1259432, at *1–2.

As for Count 4 -- the § 924(o) count -- the district court instructed the jury that to convict it had to find beyond a reasonable doubt that the defendants conspired "to commit the crime of violence charged in [Count 1]"

or "to commit the drug trafficking offense charged in either Counts 2 or 3," and that they knowingly carried or possessed a firearm while doing so.[1]

As for Count 5 -- the § 924(c) count -- the judge instructed the jury that to convict it had to find beyond a reasonable doubt that the defendants "committed the crime of violence charged in Count 1 of the Indictment or that the [defendants] committed the drug trafficking offense charged in either Counts 2 or 3 of the indictment," that the defendants "knowingly carried or possessed a firearm," and that the defendants "carried the firearm in relation

---

[1] In relevant part, § 924(o) provides that "[a] person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both." 18 U.S.C. § 924(o). In turn, § 924(c) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
>
> (i) be sentenced to a term of imprisonment of not less than 5 years . . . .

Id. § 924(c)(1)(A). The statute defines "drug trafficking crime" (in relevant part) as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." Id. § 924(c)(2). "'[C]rime of violence' means an offense that is a felony and:

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

Id. § 924(c)(3). We often refer to subsection (A) as the "elements clause" and to subsection (B) as the "residual clause."

to or possessed the firearm in furtherance of the crime of violence or the drug trafficking offense." The court further instructed:

> The indictment charges that each Defendant knowingly carried a firearm during and in relation to a crime of violence and a drug trafficking offense and possessed a firearm in furtherance of a crime of violence and a drug trafficking offense. It is charged, in other words, that the defendant violated the law as charged in Count 5 in different ways. It is not necessary, however, for the Government to prove that the defendant violated the law in all of those ways. It is sufficient if the Government proves, beyond a reasonable doubt, that the Defendants knowingly violated the law in some way; but, in that event, you must unanimously agree upon the way in which the Defendants committed the violation.

The district court did not include this unanimity instruction with its Count 4 instructions.

The jury returned a general verdict finding Foster guilty on all six counts. The district court sentenced Foster to a total prison term of 260 months: 200-month terms of imprisonment to be served concurrently for each of Counts 1–4; a 120-month term for Count 6, to be served concurrently; and a 60-month term for Count 5, to be served consecutively. The court also imposed a $100 special assessment for each count.

Foster appealed, and this Court affirmed his convictions and sentence. Parker I, 376 F. App'x at 3. Foster did not argue in his appeal that his convictions on Counts 4 or 5 were based on invalid predicates. Later, based

on intervening amendments to the Sentencing Guidelines, the district court granted Foster's motion to reduce his sentence to a total term of imprisonment of 248 months. The order reducing the sentence did not contain a breakdown by count of Foster's newly reduced sentence.

Foster filed an initial § 2255 motion raising issues not relevant here, which the district court denied. He unsuccessfully sought leave to file successive petitions three times. In re: Anthony Foster, No. 16-12105 (11th Cir. May 27, 2016); In re: Anthony Foster, No.16-14080 (11th Cir. July 25, 2016); In re: Anthony Foster, No. 16-16303 (11th Cir. Oct. 31, 2016).

Foster filed still another petition for leave to file a successive § 2255 motion after the Supreme Court's decision in Davis, 139 S. Ct. at 2336 invalidated the § 924(c) residual clause as unconstitutionally vague. Foster argued that his convictions on Counts 4 and 5 must be set aside since the indictment, general verdict, and jury instructions left open the possibility that the jury had relied on an invalid predicate offense to convict him of the § 924(o) and (c) offenses, i.e., the jury may have used Count 1, conspiracy to commit Hobbs Act robbery, as the supporting predicate for both counts. Under controlling Eleventh Circuit caselaw, Hobbs Act conspiracy does not qualify as a crime of violence predicate under the § 924(c)(3) elements

clause. See Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019). We granted Foster's application.

Foster filed our order granting him leave to file a successive petition in district court on September 3, 2019. Two days later, the district court issued an order "defer[ring] ruling for ten (10) days to await a response from the Government." The court apparently treated Foster's motion for leave to file a successive petition as if it were an actual § 2255 motion. On September 18, 2019, the district court set a hearing date, observing that it had "deferred ruling for ten (10) days to await a response from the Government. No response was filed." The district court also appointed counsel to represent Foster. The hearing was subsequently postponed to November 18, 2019. On November 14, 2019, Foster filed a counseled Motion to Vacate Pursuant to 28 U.S.C. § 2255, which the court "construe[d] as an amended motion to vacate." The government's response was due by November 29, 2019. The government did not file a written response.

Following the hearing, the district court denied Foster's petition on the merits. It held that since "the Hobbs Act Conspiracy was inextricably intertwined with the drug trafficking charges in Counts Two and Three," "there is no reasonable likelihood that the jury based its verdicts solely on the

predicate Hobbs Act Conspiracy and not also on the two drug trafficking predicates." The district court explained "that absent a strained interpretation of the jury's verdict, the jury had to have found a drug trafficking predicate." The court nevertheless granted a certificate of appealability because Foster had "made an appropriate showing on the issue of whether the jury verdict indicates that his convictions on Counts Four and Five were predicated on a drug trafficking crime."

Foster timely appealed.

II.

We begin with the government's argument, raised for the first time on appeal, that Foster procedurally defaulted his Davis claim. "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." Massaro v. United States, 538 U.S. 500, 504 (2003).

In this case, the government submitted no written response to Foster's petition in district court. Moreover, during the November 18th hearing, the government never argued that Foster had procedurally defaulted his Davis claim. The only oblique reference to procedural default arose when the

government said that "Foster's motion should be denied[,]" and that its "position is similar to" the position it took in a separate case concerning Foster's co-defendant.[2] The government had ample opportunity to assert the defense of procedural default in Foster's case, yet it said nothing about the issue aside from making an indirect reference to an argument made in a separate case. Foster was not a party to Parker's civil action, and he had no chance to address whether he could show cause for not timely raising the error at trial or on direct appeal and actual prejudice from the error, or that he was actually innocent. See Bousley v. United States, 523 U.S. 614, 622 (1988) ("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'") (internal citations omitted). The long and short of it is that the government afforded Foster's counsel no real chance to respond to the claim of procedural default; nor did the district court dispose of Foster's § 2255 petition on the basis of procedural default.

[2] In its brief filed in co-defendant Parker's case, the government argued that Parker's claims were procedurally defaulted. See Government's Response to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to Title 28, U.S.C., Section 2255 at 6, Parker v. United States, No. 19-CV-62070-WPD, ECF No. 4 (S.D. Fla. Aug. 30, 2019).

Under the peculiar circumstances of this case, we find that the government has waived the affirmative defense of procedural default. See Trest v. Cain, 522 U.S. 87, 89 (1997) ("[P]rocedural default is normally a defense that the [government] is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter.") (internal quotation marks and citation omitted) (alteration accepted); Howard v. United States, 374 F.3d 1068, 1070 (11th Cir. 2004) (finding "the government procedurally defaulted [a movant's] procedural default by failing to raise this affirmative defense in the district court"); Shukwit v. United States, 973 F.2d 903, 904 (11th Cir. 1992) (finding the government "waived its right to argue procedural default on appeal" when it "did not raise the procedural bar issue in the district court"); United States v. Jordan, 915 F.2d 622, 629 (11th Cir. 1990) (declining to address procedural default since "the government did not assert in the district court that Jordan's failure to present his claim on direct appeal should bar consideration of the merits"); Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984) ("The State's failure to raise . . . the . . . procedural default argument[] in the district court bars it from prevailing on those claims in the Court of Appeals.").

As for the merits of Foster's claim, however, we conclude that Foster cannot prevail. The Hobbs Act conspiracy was inextricably intertwined with Foster's conspiracy and attempt to possess with intent to distribute cocaine (Counts 2 and 3), convictions Foster does not dispute are valid drug trafficking predicates for Counts 4 and 5. Accordingly, the inclusion of an invalid predicate offense -- the Hobbs Act conspiracy -- in his indictment and jury instructions was harmless.

On collateral review, the harmless error standard mandates that "relief is proper only if the . . . court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict. There must be more than a reasonable possibility that the error was harmful." Davis v. Ayala, 576 U.S. 257, 267–68 (2015) (internal quotation marks and citations omitted); Ross v. United States, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam) (applying this standard to a § 2255 motion); see also Granda, 990 F.3d at 1292–93 (applying this standard to a § 2255 Davis claim); Parker II, 2021 WL 1259432, at *6 (same). Put another way, the court may order relief only if the error "resulted in actual prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotation marks and citation omitted).

In determining whether an error resulted in actual prejudice, the reviewing court should "ask directly" whether the error substantially influenced the jury's decision. O'Neal v. McAninch, 513 U.S. 432, 436 (1995). If the court "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," the court must conclude that the error was not harmless. Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1114 (11th Cir. 2012) (quoting O'Neal, 513 U.S. at 437). We review de novo the question of harmlessness under Brecht. Phillips v. United States, 849 F.3d 988, 993 (11th Cir. 2017).

It is undeniable that Foster's valid drug trafficking predicates are inextricably intertwined with the invalid Hobbs Act conspiracy predicate. See Granda, 990 F.3d at 1291 (noting "the alternative predicate offenses are inextricably intertwined" because "each arose from the same plan and attempt to commit armed robbery of a tractor-trailer full of cocaine"). The evidence adduced at trial showed that Foster was an active participant in a plan to rob at gunpoint a stash house that he believed held at least 15 kilograms of cocaine. See, e.g., Parker I, 376 F. App'x at 8 (describing undercover agent's testimony that Foster knew "everything" about the

robbery plan and that he would accompany Parker and Aiken into the stash house to conduct the robbery); Parker II, 2021 WL 1259432, at *2. Further, Foster had a weapon on his person during the planned robbery. Parker I, 376 F. App'x at 9; Parker II, 2021 WL 1259432, at *2. Based on this robbery scheme, the jury found Foster guilty of each of three potential predicate offenses -- conspiracy to rob the stash house and conspiracy and an attempt to possess with intent to distribute the cocaine in the house.

There can be no grave doubt that the inclusion of the invalid predicate did not have a substantial influence in determining the jury's verdict in this case. See O'Neal, 513 U.S. at 435 ("By 'grave doubt' we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error."). The jury could not have found that Foster's gun use or possession or his gun conspiracy was connected to his conspiracy to rob the stash house without also finding at the same time that they were connected to his conspiracy and attempt to possess with intent to distribute the cocaine he planned to rob from the same stash house. Since there is no real possibility that Foster's convictions on Counts 4 and 5 rested solely on the invalid Hobbs Act conspiracy predicate, the inclusion of an invalid predicate offense in the indictment and jury

instructions was harmless. Cf. United States v. Cannon, 987 F.3d 924, 948 (11th Cir. 2021) (trial record "ma[de] clear" that no rational juror could have found that defendants carried firearms in connection with a conspiracy to rob a cocaine stash house but not also in connection with a conspiracy to possess with intent to distribute the cocaine taken from the house).

We held as much on materially similar facts in Granda. 990 F.3d at 1293. There, we observed that "the jury could not have concluded that Granda conspired to possess a firearm in furtherance of his robbery conspiracy without also finding at the same time that he conspired to possess the firearm in furtherance of his conspiracy and attempt to obtain and distribute the cocaine, his attempt at carjacking, and the attempt at the robbery itself" because "[t]he objective of the robbery and the carjacking was the same: to obtain and sell the multi-kilogram quantity of cocaine that was to be taken by force from the truck." Id. at 1289. We said the same thing in Parker II, which involved Foster's co-defendant. Parker II, 2021 WL 1259432, at *1–2. "It is inconceivable that the jury could have found that Parker conspired to, and did, use and carry a firearm in furtherance of his conspiracy to rob the house (the invalid predicate) without also finding at the

same time that he did so in furtherance of his conspiracy and attempt to obtain the cocaine in the same house (both valid predicates)." Id. at *4.

Although Foster argues that it is possible the jury relied only on the now-invalid predicate offense, he points to nothing in the trial record that would suggest the jurors distinguished between the alternative predicate crimes. Foster's position is even weaker than Granda's, who asserted -- unsuccessfully -- that his acquittal on a § 924(c) charge was an indication that the jury predicated his § 924(o) conviction on the Hobbs Act conspiracy predicate rather than on what he termed the "substantive" alternative predicates. Granda, 990 F.3d at 1291. Foster, by contrast, was convicted of both § 924(o) and § 924(c) charges; he has no credible basis to argue that it is more likely that the jury predicated these convictions on a robbery conspiracy offense than on the "substantive" drug trafficking offenses, and, in any case, we rejected this argument in Granda. See Parker II, 2021 WL 1259432, at *5.

We note that the jury instructions in this case "suffered from a defect not present in Granda" as "the district court failed to instruct the jury that it had to unanimously decide which predicate or predicates supported the conviction" on Count 4. Id. at *5 (citing Granda, 990 F.3d at 1291).

Nevertheless, here, as in Parker II, the record makes clear that the jury was unanimous in its verdict. Foster's predicate offenses were inextricably intertwined so that if the jurors found one applicable -- and we know they did since they found Foster guilty of Counts 4 and 5 -- they necessarily arrived at the same conclusion with respect to the other predicate offenses. See id.; Granda, 990 F.3d at 1291 ("The tightly bound factual relationship of the predicate offenses precludes Granda from showing a substantial likelihood that the jury relied solely on Count 3 to predicate its conviction on Count 6.").

Foster next argues that the district court engaged in impermissible "judicial factfinding" by reviewing the record to determine whether the jury relied on an invalid predicate offense and that the holding in Stromberg v. California, 283 U.S. 359, 368 (1931) necessitates vacatur in this case. Stromberg stands for "the principle that, where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." Griffin v. United States, 502 U.S. 46, 53 (1991). Foster's argument is unpersuasive in light of the Supreme Court's intervening decision in Hedgpeth v. Pulido, 555 U.S. 57, 58, 62 (2008) (per curiam), which held that

Stromberg error is subject to the Brecht harmless error standard. In fact, we noted in Granda that, following Hedgpeth, the harmless error inquiry must involve a "look at the record to determine whether the invalid predicate actually prejudiced the petitioner -- that is, actually led to his conviction -- or whether the jury instead (or also) found the defendant guilty under a valid theory." 990 F.3d at 1294. And as we have explained, the record in this case makes it crystal clear that if the jury relied on the invalid Hobbs Act conspiracy predicate, it also relied on the valid drug trafficking predicates. The inclusion of Hobbs Act conspiracy as a possible predicate was, therefore, harmless.

Foster also objects to the district court's reliance on the factual overlap among his predicate offenses by invoking a theory we rejected in Granda: that the "categorical approach" applies and requires us to presume that his Count 4 and 5 convictions were predicated on the least serious of the potential predicates, which he assumes is the Hobbs Act conspiracy charged in Count 1. The categorical approach is "a method for determining whether a conviction under a particular statute qualifies as a predicate offense under a particular definitional clause." Id. at 1295. In Granda, we declined to extend

the categorical approach to the distinct "context of determining on which of several alternative predicates a jury's general verdict relied." Id.

Finally, contrary to Foster's assertion, In re Gomez, 830 F.3d 1225, 1228 (11th Cir. 2016) -- which held that a petitioner in a similar case had made the prima facie showing necessary for permission to file a second or successive § 2255 motion -- does not "stand for the proposition that a court may not inquire as to which of several alternative predicates actually supplied the basis for a § 924(c) (or (o)) conviction or that a court is constrained to assume the verdict rested on the least culpable predicate offense." Granda, 990 F.3d at 1296. Foster's interpretation of the categorical approach is not a winning one.

We, therefore, hold that Foster did not suffer harm from the erroneous jury instruction. Accordingly, we **AFFIRM**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ANTHONY FOSTER,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 19-62215-CIV-DIMITROULEAS
(07-60238-CR-ZLOCH)
(11-62099-CIV-ZLOCH)
(17-60578-CIV-ZLOCH)

FINAL JUDGMENT AND ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Movant Foster's August 7, 2019 Motion to Vacate [DE-1, pp. 8-24]. The Court has heard arguments of counsel at a hearing held on November 18, 2019, and having reviewed the Court files, finds as follows:

1. On April 8, 2008, Foster and three Co-Defendants were charged in a Superseding Indictment. Foster was charged with: Count One, Conspiracy to Commit Hobbs Act Robbery; Count Two, Conspiracy to Possess with Intent to Distribute at least Five (5) kilograms of Cocaine; Count Three, Attempt to Possess with Intent to Distribute at least Five (5) kilograms of Cocaine; Count Four, Conspiracy to Carry a Firearm During a Crime of Violence and Drug Trafficking Crime; Count Five, Carrying a Firearm During a Crime of Violence (Count One) or During a Drug Trafficking Crime (Counts Two and Three); and Count Six, Possession of a Firearm by a Convicted Felon. [CR-DE-149].

2. Foster, Wade Parker, and Ishwade Subran proceeded to trial on May 12, 2008, before Judge James I. Cohn. [CR-DE-184]. The jury was instructed as follows:

> The indictment charges that each defendant knowing carried a firearm during and in relation to a crime of violence in a drug trafficking offense and possessed a firearm in furtherance of a crime of violence and a drug trafficking offense. It is charged, in other words, that the defendant violated the law as charged in Count 5 in different ways. It is not necessary, however, for the government to prove that the defendant violated the law in all of these ways. It is sufficient if the government proves beyond a reasonable doubt that the defendants knowingly violated the law in some way. But in that event, you must unanimously agree upon the way in which the defendants committed the violation. [CR-DE-280, pp. 20-21].

Agent Flanery testified that Foster had the firearm in his waistband on the day of arrest. [CR-DE-277, pp. 151-152, 155]. Counsel argued that Foster's participation in the case had been minimal; it was limited to the last day the act was supposed to have occurred. [CR-DE-303, p. 5].

3. On May 20, 2008, Foster was found guilty on all six (6) counts. [CR-DE-208].

4. On August 29, 20,08 Judge William J. Zloch sentenced Foster to 200 months in prison on Counts One, Two, Three, and Four, 120 months on Count Six to run concurrently, and 60 months on Count Five to run consecutively, for a total of 260 months. [CR-DE-243, 245]. Counsel argued that Foster's participation in the case had been minimal; it was limited to the last ay the act was supposed to have occurred. [CR-DE-303, p. 5].

5. On April 14, 2010, the Eleventh Circuit Court of Appeal affirmed. [CR-DE-327]. *U.S. v. Parker*, 376 Fed. Appx. 1 (11th Cir. 2010). The appellate court found that the evidence was sufficient to sustain the conviction for Possession of a Firearm in furtherance of a Drug Trafficking Crime:[1] "It was also reasonably foreseeable to Parker that the robbery would involve a gun. In addition, both Subran and Parker stated to police officers that they had met with (Agent) McKeen for the purpose of planning a narcotics robbery." *Id,* at 12. The United States Supreme Court denied certiorari on November 29, 2010. [CR-DE-330]. *Foster v. U.S.*, 562 U.S. 1065 (2010).

6. On September 19, 2011, Foster filed a Motion to Vacate. [DE-1 in 11-62099-CIV]. It was denied on July 31, 2012. [DE-19, 20 in 11-62099-CIV]. The Eleventh Circuit denied a certificate of appealability on April 10, 2013. [DE-32 in 11-62099-CIV]. Reconsideration was denied on May 23, 2013. [DE-33 in 11-62099-CIV].

7. On January 27, 2015, Judge Zloch reduced Foster's sentence to 248 months. [CR-DE-343].

8. On February 1, 2017, Foster filed another Motion to Vacate. [DE-1 in 17-60578-CIV]. It was denied on October 17, 2017. [DE-9 in 17-60578-CIV]. No appeal was taken.

9. In this latest collateral attack, authorized by the Eleventh Circuit on September 3, 2019, Foster contends his convictions in Counts Four and Five should be vacated, relying on *Davis v. U.S.*, 139 S. Ct. 2319 (2019), which held that the residual clause in 18 U.S.C. §

[1] Foster did not raise that issue on appeal.

924(c)(3)(B) was unconstitutionally vague. In the co-defendants motion to vacate, the Government contended that the defendants had procedurally defaulted that complaint by not raising the issue on direct appeal. The Government points to Justice Scalia's dissent in *James v. U.S.*, 550 U.S. 192, 229-230 (2007) to establish that the *Davis* argument would not have been novel in 2008 when Foster was sentenced. Additionally, the Government contends that Foster can not establish any prejudice. To establish prejudice, Foster would have to show that the jury based its verdict solely on the Hobbs Act Conspiracy predicate[2], and not on the other drug trafficking predicates. Here, the jury convicted Foster of both drug trafficking substantive counts (Attempt and Conspiracy). Moreover, the Hobbs Act Conspiracy was inextricably intertwined with the drug trafficking charges in Counts Two and Three. It is hard to see how the jury would not have found Foster either guilty on all three predicates or not guilty on all three.

10. Given the facts of this case, there is no reasonable likelihood that the jury based its verdicts solely on the predicate Hobbs Act Conspiracy and not also on the two drug trafficking predicates. The jury was instructed that to convict on Counts Four and Five, they would have to find one or more of the predicate acts, not all three (CR-DE-202, pp. 18-19]. Here, the jury convicted Foster on all three predicate acts. As in *In re: Navarro,* 931 F. 3d 1298, 1302 (11th Cir. 2019), his drug trafficking conduct independently supported the § 924(c)(1)(A) conviction. *See, Brown v. U.S.,* 2019 WL 5883708*4 (11th Cir. 2019), *but see, In re: Gomez,* 830 F. 3d 1225 (11th Cir. 2016). In *Navarro,* the defendant pled guilty. Nevertheless, it is clear that, absent a

[2] Which is not a crime of violence. *Brown v. U.S.,* 2019 WL 5883708*5 (2019).

strained interpretation of the jury's verdict, the jury had to have found a drug trafficking predicate. As it seemed in *In re: Cannon*, 931 F. 3d 1236 (11th Cir. 2019), Foster's predicate crimes were inextricably intertwined.

Wherefore, Foster's Motion to Vacate [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of November, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 19-14771

District Court Docket Nos.
0:19-cv-62215-WPD; 0:07-cr-60238-WPD-4

ANTHONY FOSTER,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 04, 2021
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch