

NO.: **21-8035**

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

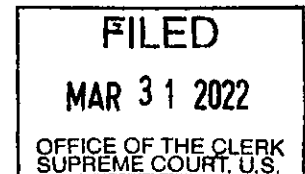
UNITED STATES OF AMERICA,
Respondent,

ORIGINAL

v.

CHARLIE JOHN WILLIAMS,
Petitioner.

On Petition for Writ of Certiorari
To the Court of Appeals
For the Eleventh Circuit



PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTION PRESENTED

Whether Petitioner's conviction under 18 U.S.C. section 924 (c) remains valid under the Supreme Court's holding in United States v. Davis, 139 S. Ct. 2319 (2019)?

LIST OF PARTIES

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**IN THE
SUPREME COURT OF THE UNITED STATES**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is

☒ is unpublished; or

The opinion of the United States district court appears at Appendix B to the petition and is

☐ is unpublished.

The opinion of the United States Court of Appeals for the Eleventh Circuit on motions for rehearing and rehearing en banc appears at Appendix C.

The brief of the Government to the United States Court of Appeals for the Eleventh Circuit appears at Appendix D.

JURISDICTION

The date on which the United States Court of Appeals decided my case on rehearing was February 16, 2022. See Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

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

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

STATEMENT OF THE CASE

Petitioner unknowingly plotted with an undercover federal agent to rob a stash house of a large quantity of cocaine in 2007. (ECF # 128 at 18 of 20). Petitioner recruited two other co-defendants to assist with the robbery. (*Id.*) The stash house, the intended victims in the stash house, and the quantity of cocaine to be stolen were made up by the undercover federal agent to entice the group to participate. (*Id.*). Petitioner

and the two other co-defendants were arrested when they met with the undercover agent at a warehouse where they were going to meet after the robbery. (**Id.**)

A Grand Jury in the Middle District of Florida charged Petitioner and two other individuals in a four-count Indictment with the commission of various crimes on July 12, 2007. (**Criminal Case No. 6:07-cr-104-Orl-22-GJK; ECF # 25**). Petitioner was charged as follows: (1) conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. section 1951 (Count One); (2) conspiracy to possess with intent to distribute cocaine hydrochloride in violation of 21 U.S.C. section 846 (Count Two); (3) carrying a firearm during and in relation to a crime of violence and drug trafficking offense in violation of 18 U.S.C. sections 924 (c) (1) (A), (c) (2), (c) (3), and 2 (Count Three); and (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. sections 922 (g) (1), 924 (a) (2) and 2 (Count Four). (**Id.**) Petitioner pled guilty to all four counts without a plea agreement on October 1, 2007. (**ECF # 75**).

The Court entered a Judgment in a Criminal Case on December 20, 2007 in which Petitioner was adjudicated guilty of the offenses and sentenced to imprisonment for a total term of 352 months¹, to be followed by concurrent terms of supervised release of 5 years. (**ECF # 90**). Petitioner's direct appeal to the Eleventh Circuit Court of Appeals was affirmed February 11, 2009. (**ECF # 122**). See also **United States v Williams, No. 08-10094 (11th Cir. Feb. 11, 2009)**. Petitioner filed his first section 2255 motion on April 8, 2010 (**ECF # 123**), which the Court denied on September 16, 2011. (**ECF # 133**).

¹ Petitioner was sentenced to 292 months on Count One; 240 months on Count Two; 120 months on Count Four, with the sentences for Counts One Two, and Four to be served concurrently; and a consecutive 60 months sentence on Count Three for a total sentence of 352-month.

In light of the Supreme Court's opinion in Johnson v. United States, 576 U.S. 591 (2015), where the Court struck down the residual clause in 18 U.S.C. section 924 (e) as unconstitutionally vague, Petitioner sought relief in an authorized successive section 2255 motion in the district court. (ECF # 161). The district court denied the unauthorized section 2255 motion, and Petitioner sought and received permission from the Eleventh Circuit to file a successive section 2255 motion. After the appointment of counsel and on March 3, 2020, the authorized successive section 2255 was amended to add a claim based on United States v. Davis, 139 S. Ct. 2319 (2019), which struck down the similarly worded residual clause in section 924 (c) as unconstitutionally vague. (ECF #'s 171 & 174, respectively).

The district court denied the successive section 2255 on June 16, 2020 and denied a certificate of appealability (COA). (ECF # 175). The district court found that Petitioner had pled guilty to a section 924 (c) offense predicated on both a crime of violence and a drug-trafficking crime, had admitted facts that amply supported a section 924 (c) offense predicated on the drug-trafficking crime, and actually had pleaded guilty to the drug-trafficking crime. (**Id.** at 6). Concluding that Petitioner's section 924 (c) conviction was "independently supported by his drug-trafficking related conduct," the district court denied Petitioner's authorized successive section 2255 motion. (**Id.**) (See also Appendix B).

In the COA from the district court's denial of his authorized section 2255 motion, Petitioner asserted that the Eleventh Circuit must presume that his section 924 (c) conviction is predicated only on the Hobbs Act robbery conspiracy, which no longer qualifies as a crime of violence. The Eleventh Circuit subsequently granted Petitioner a

certificate of appealability concerning “[w]hether [his] conviction under 18 U.S.C. section 924 (c) remains valid under the Supreme Court’s holding in United States v. Davis, 139 S. Ct. 2319 (2019).” .

Once Petitioner and the Government briefed the issue on appeal, on November 12, 2021, the Eleventh Circuit AFFIRMED by finding:

“[Petitioner]’s argument that this Court should assume that his section 924 (c) conviction rests on the least culpable offense, i.e., the Hobbs Act robbery conspiracy, under the categorical approach is inapposite because that assumption does not apply in this context. Similarly, his argument that Granda is inapplicable because it was decided erroneously is also without merit given that we must follow Granda ’s holdings as they are binding. Finally, because this case did not involve a jury trial, Sixth Amendment concerns are not germane here.”

(**Appendix A**). Petitioner’s petitions for rehearing and rehearing en banc, filed on December 9, 2021, was denied on February 16, 2022. (**Appendix C**). Due to the COVID-19 pandemic and several lockdowns at the institution, Petitioner was given to June 10, 2022 to file his writ of certiorari to this Court.

REASONS FOR GRANTING THE WRIT

In the instant matter, the writ should be granted to determine whether Petitioner’s section 924 (c) conviction must be vacated; since he pled guilty to only one of the predicates in a duplicitous count. The law is clear on the matter for a jury trial and “a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.” The writ should be granted so that this Court can decide whether the same principles apply to a guilty plea to a duplicitous count when the guilty plea is to only one of the two predicates and one of the predicates is now invalid.

Summary of the Argument

Petitioner's section 924 (c) conviction (Count Three) was predicated on conspiracy to commit Hobbs Act robbery or conspiracy to possess with intent to distribute cocaine hydrochloride and (Counts One and Two, respectively). In Davis, the Supreme Court held that the residual clause in section 924 (c) (3) (B) is unconstitutionally vague. The Eleventh Circuit has previously established that Davis applies retroactively on collateral review, and that one of the predicates alleged in Count Three — Hobbs Act conspiracy — is no longer a valid predicate offense. See Brown v. United States, 942 F.3d 1069 (11th Cir. 2019). Although Count Three alleged two predicate offenses, Petitioner alleged that the Eleventh Circuit must presume Petitioner's predicate offense is Hobbs Act conspiracy for four reasons.

First, the Sixth Amendment requires that this Court presume Petitioner's conviction on Count Three is based on Hobbs Act conspiracy, as discussed in In re Gomez, 830 F.3d 1225 (11th Cir. 2016), and in the brief below. Second, the categorical approach requires this Court to presume Petitioner's section 924 (c) conviction rests on the least-culpable predicate offense — Hobbs Act conspiracy. This approach is supported by the Supreme Court's opinion in Shepard v. United States, 544 U.S. 13 (2005), and has most recently been followed by other courts around the nation. Third, this result is also compelled by precedent from the Supreme Court and Eleventh Circuit's precedent, which hold that the Court must set aside a verdict which rests on a constitutionally invalid ground. Stromberg v. California, 283 U.S. 359 (1931); Parker v. Sec'y for Dep't of Corr., 331 F.3d 764, 777 (11th Cir. 2003). Four, Petitioner was given the opportunity to plead guilty to one of two predicates and now, that the conspiracy to

commit the Hobbs Act robbery is the least culpable offense, should the Eleventh Circuit have presumed that Petitioner's conviction rests on the Hobbs Act conspiracy. As this is not a valid predicate offense, Petitioner's conviction must be vacated.

Argument

Whether Petitioner's conviction under 18 U.S.C. section 924 (c) remains valid under the Supreme Court's holding in United States v. Davis, 139 S. Ct. 2319 (2019)?

In United States v. Davis, 139 S. Ct. 2319 (2019), this Court held that section 924 (c) (B) (3) is unconstitutionally vague. After Davis, the Eleventh Circuit held that a conspiracy to commit a Hobbs Act robbery did not qualify as a crime of violence under the elements clause. Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019). Because a conspiracy to commit a Hobbs Act robbery no longer qualifies as a "crime of violence," it therefore can no longer serve as a valid predicate for a section 924 (c) conviction. Granda v United States, 990 F.3d 1272, 1285 (11th Cir. 2021).

For Count Three of the Indictment, Petitioner was charged thusly:

"[Petitioner] did knowingly use and carry a firearm, ..., during and in relation to a crime of violence and drug trafficking offense for which [he] may be prosecuted in a court of the United States, that is, conspiracy to commit a Hobbs Act robbery, as charged in Count One of this Indictment; and conspiracy to possess with intent to distribute and distribute a mixture and substance containing a detectable amount of cocaine hydrochloride, as charged in Count Two of this Indictment;

All in violation of Title 18, United States Code, Sections 924 (c) (1) (A), (c) (2), (c) (3), and Title 18, United States Code, Section 2.

ECF # 25 at 3-4 of 9. In the brief to the Eleventh Circuit, Petitioner argued that the Sixth Amendment required that Court to assume Petitioner's section 924 (c) conviction was based on conspiracy to commit Hobbs Act robbery. Petitioner argued that the Court's

decision in In re Gomez, 830 F.3d 1225 (11th Cir. 2016), showed why. In Gomez, the government charged the defendant with a duplicitous section 924 (c) count. The charge was “duplicitous” because it “list[ed] multiple potential predicate offenses in a single section 924 (c) count.” Id. at 1227.

The Eleventh Circuit explained in Gomez that “we can’t know what, if anything, the jury found with regard to Gomez’s connection to a gun and these [predicate] crimes.” Id. After all, “a general verdict of guilty does not reveal any unanimous finding by the jury that the defendant was guilty of conspiring to carry a firearm during one of the potential predicate offenses, all of predicate offenses, or guilty of conspiring during some and not others.” Id.; see also United States v. Jones, 935 F.3d 266, 270 (5th Cir. 2019) (“[T]he jury was given two theories of guilt for the section 924 offenses—a crime of violence predicate and a drug trafficking predicate — and it may have relied on the invalid crime of violence predicate to the exclusion of or in addition to the valid drug trafficking predicate.”).

The Gomez Court continued, “[t]his lack of specificity has added [Sixth Amendment] significance [under Alleyne v. United States, 570 U.S. 99 (2013)] because section 924 (c) increases the mandatory minimum based on a finding that the defendant used or carried a firearm.” 830 F.3d 1225. “Alleyne held that because these findings ‘increase the mandatory minimum sentence,’ they are ‘elements and must be submitted to the jury and found beyond a reasonable doubt.’” Id. (quoting Alleyne, 570 U.S. at 108). And “[a]n indictment that lists multiple predicates in a single section 924 (c) count allows for a defendant’s mandatory minimum to be increased without the unanimity Alleyne required.” Id. Thus, while courts can review the record and “guess which predicate the

jury relied on,” “Alleyne expressly prohibits this type of ‘judicial factfinding’ when it comes to increasing a defendant’s mandatory minimum sentence.” Id. at 1228.

Petitioner argued that Gomez’s reasoning required the Eleventh Circuit to use the Hobbs Act conspiracy — the least culpable offense — to analyze Petitioner’s section 924 (c) conviction. Any contrary judicial finding would violate the rule of Alleyne and the Sixth Amendment. The categorical approach required the Court to presume Petitioner’s conviction is based on conspiracy to commit Hobbs Act Robbery. The categorical approach — specifically the least-culpable-act rule — also shows why the Eleventh Circuit must presume Petitioner’s section 924 (c) conviction is based on conspiracy to commit Hobbs Act robbery. When a statute of conviction is divisible into alternative elements constituting distinct offenses, courts may consider a limited set of documents that will “necessarily” and “conclusive[ly]” identify the defendant’s offense of conviction. Shepard v. United States, 544 U.S. 13, 16, 21, 24–26 (2005).

When, as here, these documents fail to establish the crime for which the defendant was “necessarily” convicted, the Court must assume that he was convicted of the least serious one. See Johnson v. United States, 559 U.S. 133, 137 (2010).

The indictment in the instant matter charged Petitioner with two distinct section 924 (c) offenses —Hobbs Act conspiracy and conspiracy to possess with intent to distribute cocaine hydrochloride — and the available Shepard documents do not conclusively establish the offense supporting Petitioner’s section 924 (c) conviction. The indictment, the sentencing hearing, and district court’s judgment are all silent as to which of those offenses formed the basis of Petitioner’s conviction. Thus, the district court and

the Eleventh Circuit must presume Petitioner's section 924(c) conviction was based on conspiracy to commit Hobbs Act robbery.

The Fourth Circuit's recent decision in United States v. Runyon supports Petitioner's argument. 2020 WL 7635761 (4th Cir. Dec. 23, 2020). There, the defendant had a duplicitous section 924 (c) offense, and the jury found Mr. Runyon guilty without indicating whether it was relying on conspiracy to commit murder for hire or carjacking. Id. at *4. The Fourth Circuit held that it "must assume that Runyon could have been convicted by the jury's reliance on either predicate offense, requiring us to determine whether each predicate offense qualifies as a crime of violence." Id. (citing Curtis Johnson, 559 U.S. 133, 137 (2010), and United States v. Vann, 660 F.3d 771, 774–75 (4th Cir. 2011) (en banc) (per curiam)). Thus, "if one predicate offense does not qualify, the court would be required to vacate the conviction." Id. In other words, when, as here, a record is unclear about whether a client's conviction depended on an underlying offense that qualifies as a "crime of violence" or an underlying offense that does not (for example, Hobbs Act conspiracy), the Court must vacate the section 924 (c) conviction. See id.

District courts around the country have similarly followed Runyon's reasoning. Most recently, in United States v. White, et al., the district court for the Western District of Texas vacated two section 924 (c) convictions. Case No. 7:11-cr-00276, Doc. 31 (W.D. Tex. Dec. 9, 2020). There, the district court determined that it had to use the categorical approach to determine which predicate offense supported the defendants' section 924 (c) convictions. Id. at *6 (concluding that "the Shepard documents [e.g., the jury instructions] established that [the] section 924 (c) convictions were predicated on

Hobbs Act extortion, not Hobbs Act robbery.”). Because Hobbs Act extortion is not a “crime of violence” after Davis, the district court vacated the section 924 (c) convictions. Id. Runyon and White compel the conclusion that under the categorical approach, this Court must presume Petitioner’s conviction is based on conspiracy to commit Hobbs Act robbery. Precedent from the Supreme Court and the Eleventh Circuit required the Eleventh Circuit and the district court to presume Petitioner’s conviction is based on conspiracy to commit Hobbs Act Robbery. Precedent from the Supreme Court and this Court also requires the Court to presume Petitioner’s section 924 (c) is based on conspiracy to commit Hobbs Act robbery.

In Stromberg v. California, 283 U.S. 359 (1931), the Supreme Court held that “a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.” Zant v. Stephens, 462 U.S. 862, 881 (1983) (referencing Stromberg). “In such circumstances, it is impossible to determine on which basis the jury reached its verdict, so deficiency in only one basis requires the entire verdict to be set aside.” Parker v. Sec’y for Dep’t of Corr., 331 F.3d 764, 777 (11th Cir. 2003) (citing Stromberg for the proposition that “[i]f any of the [bases] in question is invalid under the Federal Constitution, the conviction cannot be upheld”). Several district courts in the Eleventh Circuit have found this argument has merit, relying heavily on Stromberg and Parker to vacate duplicitous section 924 (c) convictions if one of the predicate offenses no longer qualifies as a “crime of violence” in light of Davis. See Horne v. United States, Case No. 20-22108-CIV-ALTONOGA (S.D. Fla. Sept. 9, 2020); Taylor v. United States, Case No. 20-22618-CIV-HUCK (S.D. Fla.

Aug. 19, 2020); Watson v. United States, Case No. 1:04-cr-591-LMM (N.D. Ga. Mar. 9, 2020), Williams v. United States, Case No. 1:19-cr-155-CAP-4 (N.D. Ga. Apr. 2, 2020), and Wainwright v. United States, Case No. 19-62364-CIV-COHN (S.D. Fla. Apr. 6, 2020).

In rejecting Petitioner's argument on appeal, the Eleventh Circuit stated:

[Petitioner]'s conviction remains valid despite the Supreme Court's decision in Davis because his section 924 (c) conviction is fully supported by a valid alternate predicate offense. Because his drug trafficking conspiracy charge remains a valid predicate for section 924 (c) conviction purposes and is further supported by his guilty plea and factual proffer, the district court did not err in denying his section 2255 motion.

"[Petitioner]'s argument that this Court should assume that his section 924 (c) conviction rests on the least culpable offense, i.e., the Hobbs Act robbery conspiracy, under the categorical approach is inapposite because that assumption does not apply in this context. Similarly, his argument that Granda is inapplicable because it was decided erroneously is also without merit given that we must follow Granda's holdings as they are binding. Finally, because this case did not involve a jury trial, Sixth Amendment concerns are not germane here."

See Appendix A at 4-5 of 5.

In the guilty plea context, the Eleventh Circuit has upheld section 924 (c) convictions where the factual proffer independently supported a valid alternative predicate in the indictment. **Appendix A at 4 of 5.** As support, the Eleventh Circuit used its decision in In re Navarro, in which the defendant, Navarro, was charged with several crimes, including conspiracy to commit Hobbs Act robbery, conspiracy to possess cocaine with intent to distribute, attempted possession of cocaine with intent to distribute, and carrying a firearm in furtherance of a crime of violence or a drug trafficking crime. No. 19-12612 (11th Cir. July 30, 2019). The Eleventh Circuit held that because he had admitted facts that established the drug trafficking crimes, his section 924 (c) conviction was "fully supported" and was, thus, "outside the scope of Davis." Id. There, the

Eleventh Circuit held that Sixth Amendment concerns did not apply because the plea agreement and factual proffer made clear that his conviction was based upon the predicate charges. Id. **Appendix A at 4 of 5.**

First, Petitioner opposes the Eleventh Circuit's reasoning that because, Petitioner pled guilty to the duplicitous indictment, it did not have to presume that the Hobby Act robbery conspiracy as being the predicate for the section 924 (c) offense. Unlike the defendant in Navarro, Petitioner did not have a plea agreement and his factual proffer did not make clear which predicate his section 924 (c) offense was based.

In pertinent parts of its explanation of the elements for Count Three at Petitioner's Rule 11 hearing, the Government stated:

Your Honor, as to count three the defendant is charged with using and carrying a firearm during and in relation to counts one and two, and he's also charged in that count with aiding and abetting others in doing so. The elements of that offense, *that the defendant committed either a crime of violence charged in count one or the drug events charged in count two.* Second, that the defendant knowingly used or carried a firearm during the commission of that offense or possessed a firearm as charged, either himself or aiding and abetting another. And third, *that the defendant used or carried the firearm in relation to the crime of violence charged in count one or the drug trafficking offense charged in count two.*

ECF #128 at 6-7 of 20. The district court accepted the Government's explanations on the elements for Count Three. **Id. at 7 of 20.** Therefore, Petitioner did not plead guilty to both predicates for his section 924 (c) offense; since, he could and did plead guilty to either the crime of violence or the drug trafficking crime. Even though, In re Gomez, Jones, 935 F.3d at 270; and Runyon, 2020 WL 7635761, the duplicitous section 924 (c) count concerns jury trials, Petitioner's guilty plea to a duplicitous count with a choice of the predicate offenses, should require the same standard be applied to Petitioner's guilty plea.

The Eleventh Circuit stated that it was bound by another panel decision.

Appendix A at 4-5 of 5. Even though, Petitioner acknowledges that Granda was binding on a panel of the Eleventh Circuit; he maintained that the Eleventh Circuit used an incorrect legal standard.² The categorical approach requires the Court to presume Petitioner's conviction is based on Hobbs Act conspiracy. The categorical approach — specifically the least-culpable-act rule — shows why the Court must presume Petitioner's section 924 (c) conviction is based on Hobbs Act conspiracy. When a statute of conviction is divisible into alternative elements constituting distinct offenses, courts may consider a limited set of documents that will “necessarily” and “conclusive[ly]” identify the defendant's offense of conviction. Shepard v. United States, 544 U.S. 13, 16, 21, 24–26 (2005). When, as here, these documents fail to establish the crime for which the defendant was “necessarily” convicted, the Court must assume that he was convicted of the least serious one. See Johnson v. United States, 559 U.S. 133, 137 (2010). Here, the indictment charged Petitioner with two distinct section 924 (c) offenses and the available Shepard documents do not establish the offense supporting Petitioner's section 924 (c) conviction. Thus, the Court must presume Petitioner's section 924 (c) conviction is based on the least culpable offense of Hobbs Act conspiracy.

But this Court does not need to follow precedent by a panel or by a court sitting en banc ““if the decision rests on authority that subsequently proves untenable”” considering Supreme Court decisions. United States v. Williams, 808 F.3d 253, 261 (4th Cir. 2015) (quoting U.S. Dep't of Health & Hum. Servs. v. Fed. Lab. Relations Auth.,

² The government relies on the standard set forth in Beeman v. United States, 871 F.3d 1215 (11th Cir. 2017). Gov. Br. at 14. But Beeman applies to ACCA cases. Granda, which applies a different standard, applies to section 924 (c) cases.

983 F.2d 578, 581–82 (4th Cir. 1992)). Authority is untenable if its reasoning or holding is inconsistent with a Supreme Court decision. U.S. Dep’t of Health & Hum. Servs. v. Fed. Lab. Relations Auth., 983 F.2d 578, 582 (4th Cir. 1992); Etheridge v. Norfolk & W. Ry. Co., 9 F.3d 1087, 1090–91 (4th Cir. 1993) (concluding that the Court was no longer bound by a decision after “a superseding contrary decision of the Supreme Court . . . specifically rejected the reasoning on which [that decision] was based and that, accordingly, [that decision] is no longer a correct statement of the law”).

As a result, Petitioner’s convictions under section 924 (c) cannot stand under Davis. This is because the Shepard documents establish that Petitioner’s section 924 (c) convictions were predicated on Hobbs Act robbery and not on the conspiracy to possess with intent to distribute cocaine. The Eleventh Circuit overlooked the fact that the Supreme Court has been steadfast in insisting upon clarity in the language of criminal statutes. “The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” United States v. Santos, 553 U.S. 507, 514 (2008). “[T]he ties must go to the defendant.” Id.; see also Davis, 139 S.Ct. at 2333 (stating that the rule of lenity “teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor”). Resolving this in Petitioner’s favor means vacating the infirm section 924 (c) conviction.

The Eleventh Circuit did not state that Petitioner’s claim is procedurally defaulted, but the Government argues that procedurally defaulted his Davis claim and his default is inexcusable. **Gov. Br. at 15; see also Appendix D.** But in United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018), the Eleventh Circuit addressed whether a claim is a jurisdictional and thus not subject to waiver. Id. at 340–344. The distinction comes

down to the following inquiry: if the claim being raised is that the specific conduct charged in the indictment falls outside the sweep of the charging statute, the claim is jurisdictional and not subject to waiver or procedural default. See St. Hubert, 909 F.3d at 343–44; United States v. Bane, 948 F.3d 1290, 1294 (11th Cir. 2020); United States v. Peter, 310 F.3d 713, 715 (11th Cir. 2002).

If, however, the claim is simply that the indictment omits an essential element, the claim is not a jurisdictional claim. Id. Here, Petitioner’s claim is that the government wrongly based his 18 U.S.C. section 924 (c) offense on Hobbs Act conspiracy because Hobbs Act conspiracy is not a “crime of violence” under the statute. In other words, the claim is that the specific conduct charged in the indictment falls outside the sweep of the charging statute. Under this Court’s precedent, that claim is jurisdictional and not subject to procedural default. See St. Hubert, 909 F.3d at 343–44. Petitioner’s claim is that carrying a firearm during or in furtherance of a conspiracy to commit Hobbs Act robbery is not a federal offense. And there is nothing the government could have added to that charge that would have transformed that into a federal offense. Thus, the error here is jurisdictional and not subject to procedural default. See St. Hubert, 909 F.3d at 340; Bane, 948 F.3d at 12.

The Government argues that Petitioner is not factually innocent and that the actual-innocence exception requires proof of factual, and not just legal, innocence. **Gov. Br. at 20; see also Appendix D.** But that simply means a claim of insufficient evidence is not enough to establish actual innocence. See Bousley v. United States, 523 U.S. 614, 623–24 (1998) (explaining that the government may introduce new evidence to rebut a claim of actual innocence); Schlup v. Delo, 513 U.S. 298, 327–28 (1995) (observing that

the rules of admissibility are not binding on the district court, emphasizing the beyond-a-reasonable-doubt standard, and focusing on the behavior of the trier of facts); see also Sawyer v. Whitley, 505 U.S. 333, 340 (1992). Further, Mr. Williams can establish that he factually innocent. As the Eleventh Circuit has recognized, “[t]o meet this standard, a petitioner must ‘show that it is more likely than not that no reasonable juror would have convicted him’ of the underlying offense.” Johnson v. Alabama, 256 F.3d 1156, 1171 (11th Cir. 2001) (quoting Schlup, 513 U.S. at 327); see Granda v. United States, 990 F.3d 1272, 1292 (11th Cir. 2021). Petitioner maintains he is factually innocent because his section 924 (c) offense was based only on the Hobbs Act conspiracy, which is not a “crime of violence.” Though Petitioner acknowledges the Court contrary opinion in Granda as to this point, Petitioner maintains the Court decided Granda incorrectly and that he is factually innocent.

The Tenth Circuit addressed a similar situation in United States v. Bowen, 936 F.3d 1091 (10th Cir. 2019), where the movant appealed the denial of his section 2255 motion in which he claimed that based on Johnson v. United States, 576 U.S. 591 (2015), his section 924 (c) conviction should be vacated. 936 F.3d 1091 (10th Cir. 2019). While the petitioner in Bowen’s case was on appeal, the Supreme Court held in United States v. Davis, 139 S. Ct. 2319 (2019), that section 924 (c)’s residual clause is unconstitutionally vague. After Davis, the government agreed that the motion in Bowen would be timely if section 924 (c)’s residual clause were unconstitutionally vague and his predicate offenses did not qualify under the elements clause because he would be actually innocent of his offense. The Tenth Circuit found that the petitioner in Bowen was actually innocent because his predicate offenses did not qualify. Id. at 1108. Thus, no matter if his motion

stemmed from Johnson or Davis, it was timely. Id. Here, like in Bowen, the government argues that Petitioner has procedurally defaulted on his claim. See **Gov. Br. at 16–17**. As Bowen shows, though, Petitioner is actually innocent and has not procedurally defaulted his section 2255 claim³.

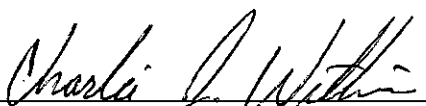
CONCLUSION

Petitioner did not plead guilty to conspiracy to commit a Hobbs Act robbery and conspiracy to possess with intent to distribute cocaine during and relation to using and carrying a firearm; he pled guilty to only one of the predicate offenses. The elements for the section 924 (c) violation included a choice of predicates at the Rule 11 hearing. At the time of his guilty plea, both predicate offenses were qualifying predicates for a violation of section 924 (c). But, after Davis, the conspiracy to commit a Hobbs Act robbery is not a predicate offense for a violation of section 924 (c). Conspiracy to commit a Hobbs Act robbery is the less severe offense than conspiracy to possess with intent to distribute cocaine; because, conspiracy to commit a Hobbs Act robbery has a statutory maximum of 240-month, and conspiracy to possess with intent to distribute cocaine has statutory minimum and maximum of 10 years to life.

Based on the argument above, Petitioner requests that this Court vacate the Eleventh Circuit's order denying his section 2255 motion and remand this case for further proceedings.

Respectfully submitted on the 26th day of MAY 2022.

³ Actual innocence is an exception to both timeliness and procedural default. Thus, although Bowen addressed timeliness, it shows that a movant may be actually innocent of violating section 924 (c) if his conviction is based on an offense that is not a “crime of violence.”


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