

APPENDIX A

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-13059

Non-Argument Calendar

CHARLIE JOHN WILLIAMS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket Nos. 6:16-cv-01197-ACC-GJK,
6:07-cr-00104-ACC-GJK-1

Appendix A

Before WILSON, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

Charlie Williams appeals the district court's denial of his authorized, successive 28 U.S.C. § 2255 motion to vacate his 18 U.S.C. § 924(c) conviction on the ground that it was based on an invalid predicate, conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951. We granted a certificate of appealability ("COA") on the issue of whether his § 924(c) conviction remains valid in light of the Supreme Court's holding in *United States v. Davis*, 139 S. Ct. 2319 (2019). He argues that we should presume that his § 924(c) conviction rests on the least culpable offense, *i.e.*, Hobbs Act robbery conspiracy, rather than the alternate predicate in his indictment, conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841, 846. He asserts that we should apply the least culpable offense assumption based on the categorical approach and Sixth Amendment concerns. He contends that his claim is not subject to procedural default because his challenge is jurisdictional. In this context, he avers that our decision in *Granda v. United States*, 990 F.3d 1272, 1285 (11th Cir. 2021) is erroneous and therefore inapplicable.

When reviewing a district court's denial of a § 2255 motion, we review questions of law *de novo* and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). Our review of an unsuccessful § 2255 motion is generally limited

20-13059

Opinion of the Court

3

to issues enumerated in the COA. *Dell v. United States*, 710 F.3d 1267, 1272 (11th Cir. 2013).

Section 924(c)(1)(A) of Title 18 of the United States Code criminalizes the use or carrying of a firearm in furtherance of, or during and in relation to, a “crime of violence” or a “drug trafficking crime.” A “drug trafficking crime” means any felony offense punishable under the Controlled Substances Act, including conspiracy and attempt to possess cocaine with intent to distribute. 18 U.S.C. § 924(c)(2); 21 U.S.C. §§ 841, 846. After *Davis*, we 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 § 924(c) conviction. *Granda*, 990 F.3d at 1285.

Nevertheless, “a conviction under § 924(c) does not require that the defendant be convicted of, or even charged with, the predicate offense.” *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019). In the guilty plea context, we have upheld § 924(c) convictions where the factual proffer independently supported a valid alternative predicate in the indictment. *See, e.g., id.* In *In re Navarro*, 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. *Id.* We held that because he had admitted facts that established the drug trafficking crimes, his § 924(c) conviction was “fully supported” and was, thus, “outside the scope of *Davis*.” *Id.* There, we 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.* at 1303 n.4.

We also do not apply the “categorical approach” or assume that a conviction rests on the least culpable predicate offense when deciding whether a *Davis* error in the § 924(c) context is reversible. *See Granda*, 990 F.3d at 1295. Under the prior precedent rule, a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*. *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). We therefore do not address Williams’s procedural default argument because his claim fails on the merits. *See Castillo*, 816 F.3d at 1303.

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

Williams’s argument that this Court should assume that his § 924(c) conviction rests on the least culpable offense, *i.e.*, the

20-13059

Opinion of the Court

5

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. Therefore, we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CHARLIE JOHN WILLIAMS,

Petitioner,

v.

Case No: 6:16-cv-1197-Orl-22GJK
(6:07-cr-104-Orl-22GJK)

UNITED STATES OF AMERICA,

Respondent.

ORDER

This cause is before the Court on the Amended Motion to Vacate, Set Aside, or Correct Sentence ("Amended Motion to Vacate," Doc. 26) filed by Petitioner pursuant to 28 U.S.C. § 2255. Petitioner also filed a Memorandum of Law (Doc. 23) in support of the Amended Motion to Vacate. The Government filed a Response in Opposition to the Motion to Vacate ("Response," Doc. 24) in compliance with this Court's instructions and with the *Rules Governing Section 2255 Proceedings for the United States District Courts*. Petitioner filed a Reply (Doc. 28) to the Response. For the following reasons, the Court concludes that Petitioner is not entitled to relief on his claims.

I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner and two other individuals in a four-count Indictment with the commission of various crimes. (Criminal Case No. 6:07-cr-104-Orl-

Appendix B

22GJK Doc. 25).¹ Petitioner was charged as follows: (1) conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count One); (2) conspiracy to possess with intent to distribute cocaine hydrochloride in violation of 21 U.S.C. § 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. §§ 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. §§ 922(g)(1), 924(a)(2) and 2 (Count Four). Petitioner pled guilty to all four counts without a plea agreement. (Criminal Case Doc. 75).

The Court entered a Judgment in a Criminal Case (Criminal Case Doc. 90) in which Petitioner was adjudicated guilty of the offenses and sentenced to imprisonment for a total term of 352 months, to be followed by supervised release for a total term of 5 years. The Eleventh Circuit Court of Appeals affirmed. (Criminal Case Doc. 122).

Petitioner later filed a § 2255 motion, which the Court denied. (Criminal Case Doc. Nos. 123, 133). The Eleventh Circuit Court of Appeals granted Petitioner's application to file the instant second or successive § 2255 motion to vacate, set aside, or correct sentence. (Criminal Case Doc. 161).

II. LEGAL STANDARD

¹ Criminal Case No. 6:07-cr-104-Orl-22GJK will be referred to as "Criminal Case."

Section 2255 permits a federal prisoner to bring a collateral challenge by moving the sentencing court to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). "A petitioner is entitled to an evidentiary hearing if he "alleges facts that, if true, would entitle him to relief." *Rosin v. United States*, 786 F.3d 873, 877 (11th Cir. 2015) (citation and quotation omitted). However, "a defendant must support his allegations with at least a proffer of some credible supporting evidence." *United States v. Marsh*, 548 F. Supp. 2d 1295, 1301 (N.D. Fla. 2008). The Court "is not required to grant a petitioner an evidentiary hearing if the § 2255 motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Rosin*, 786 F.3d at 877 (citation and quotation omitted).

III. ANALYSIS

Petitioner raises two claims: (1) the Supreme Court has declared the Armed Career Criminal Act's residual clause unconstitutionally vague, and he "was subjected to 60-month consecutive sentences on Count 3 under § 924(c)(3)(B), a similarly-worded residual clause that is also unconstitutionally vague" (Claim One); and (2) his conviction "on count 3, which was based on the residual clause of 18 U.S.C. § 924(c)(3)(B), was imposed in violation of due process." (Doc. 26 at 5-6).

In granting Petitioner's application to file a successive § 2255 motion, the Eleventh Circuit discussed that "Count 3, the § 924(c) count, charged Williams with using and carrying a firearm 'in relation to a crime of violence and a drug trafficking crime,' and

referred to conspiracy to possess crack cocaine (Count 2) as well as conspiracy to commit Hobbs Act robbery, presumably offering each as a possible predicate for the § 924(c) charge." (Doc. 161 at 4). The Eleventh Circuit found that Petitioner's Indictment was duplicitous because it listed a crime of violence and a drug trafficking offense as the companion for his § 924 offense. (*Id.* at 5). The Eleventh Circuit further discussed:

That is because the jurors had multiple crimes to consider in a single count, so they could have convicted Williams of the § 924(c) offense without reaching unanimous agreement on during which crime it was that Williams possessed the firearm. Or, they could have unanimously agreed that he possessed a firearm at some point during the Hobbs Act conspiracy, but not during the drug trafficking crime. Either way, 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.* at 5-6).

Petitioner argues that, since the Indictment charged multiple offenses to support a single § 924(c) offense (conspiracy to commit Hobbs Act robbery and conspiracy to possess crack cocaine), the Court "must presume that Mr. Williams's § 924(c) charge rests on the least culpable predicate, the conspiracy to commit Hobbs Act robbery," which does not qualify as a crime of violence under the § 924(c) elements clause. (Doc. 23 at 6-7).

In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the Supreme Court held that the residual clause in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. The Supreme Court in *Davis* rejected a § 924(c) conviction predicated on Hobbs Act conspiracy because

Hobbs Act conspiracy can only be defined as a crime of violence under § 924(c)'s residual clause.

As a result, Petitioner's conviction under § 924(c) remains valid only if the drug trafficking crime remains a valid predicate offense. As mentioned above, the Eleventh Circuit discussed that, because the jurors had multiple crimes to consider in a single count, they could have convicted Petitioner of the § 924(c) offense without reaching a unanimous agreement on which crime it was that Petitioner possessed the firearm. However, the Eleventh Circuit was mistaken in that this case did not involve a jury trial; rather, Petitioner pled guilty to the offenses.

In an analogous case, *Herrera v. United States*, 798 F. App'x 441 (11th Cir. 2020), the defendant pled guilty to Count Five of the indictment, which charged him with carrying a firearm during and in relation to a crime of violence (as charged in Count One) or a drug-trafficking crime (as charged in Counts Two and Three) in violation of § 924(c). The Eleventh Circuit discussed that conspiracy to commit Hobbs Act did not constitute a crime of violence under the still-valid elements clause of § 924(c)(3)(A) and that the defendant's § 924(c) conviction remained valid only if it was supported by a predicate offense other than conspiracy to commit Hobbs Act robbery. The defendant's signed plea agreement stated that his § 924(c) conviction was predicated on both a crime of violence and a drug-trafficking crime, and the factual proffer that he affirmed contained sufficient facts establishing he committed the drug-trafficking crimes charged in Counts Two and

Three. Consequently, the Eleventh Circuit held that the defendant was "not entitled to relief under *Davis* because his § 924(c) conviction is independently supported by his drug-trafficking-related conduct." (*Id.* at 443).

In the present case, Petitioner's § 924(c) conviction was predicated on both a crime of violence and a drug-trafficking crime, and he pled guilty to both crimes. Also, the factual proffer that Petitioner affirmed contained sufficient facts to establish that he committed the drug-trafficking crime charged in Count Two. Petitioner affirmed the prosecutor's statement of the facts which included that he "agreed" with three co-conspirators to "kill the individuals in [a] house, steal the cocaine, split it up amongst themselves, and distribute to make money off it later . . ." (Criminal Case Doc. 128 at 17). They discussed the fact that "the defendants would have firearms with them." (*Id.* at 18). Petitioner also confirmed that, at the time of their arrest, he and his two co-conspirators had three ski masks and three firearms in the vehicle with them, which were loaded and prepared to fire. (*Id.*). Moreover, Petitioner actually pled guilty to the drug trafficking crime with which he was charged, which provides additional assurance that the drug trafficking facts in this case were not disputed.

Under the circumstances, Petitioner is not entitled to relief under *Davis* because his "§ 924(c) conviction is independently supported by his drug-trafficking-related conduct." *Herrera*, 798 F. App'x at 441. Petitioner's conviction, therefore, is valid, and Claims One and Two are denied. The Amended Motion to Vacate will be denied.

Allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

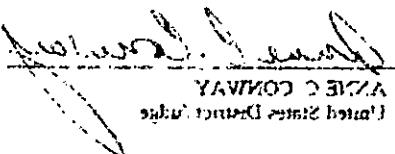
1. The Amended Motion to Vacate, Set Aside, or Correct Sentence (Doc. 26) is **DENIED**.
2. This case is **DISMISSED** with prejudice.
3. Petitioner is **DENIED** a certificate of appealability.

4. The Clerk of the Court is directed to enter judgment in favor of Respondent
as to close this case. A copy of this Order and the judgment shall also be filed in criminal

case number #03-cr-104-04-JZCJ/K

5. The Clerk of the Court is directed to terminate and release section 2255
motion filed in criminal case number #03-cr-104-04-JZCJ/K

DONE and ORDERED in Orlando, Florida on June 16, 2003.


GEORGE C. COWNE
U.S. DISTRICT JUDGE
Florida State Bar No. 35450

Copies transmitted to:

Court of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13059-CC

CHARLIE JOHN WILLIAMS,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, LAGOA, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX D

No. 20-13059-CC

In the
**United States Court of Appeals
for the Eleventh Circuit**

CHARLIE JOHN WILLIAMS,
Movant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Nos. 6:07-CR-104-ACC-GJK & 6:16-cv-1197-ACC-GJK

BRIEF OF THE UNITED STATES

KARIN HOPPMANN
Acting United States Attorney

SARA C. SWEENEY
Assistant United States Attorney
Appellate Division

ROBERTA JOSEPHINA BODNAR
Assistant United States Attorney
Appellate Division
Florida Bar No. 986909
35 S.E. 1st Ave., Ste. 300
Ocala, FL 34471
(352) 547-3600

June 16, 2021

Charlie Williams v. United States
No. 20-13059-CC

**Certificate of Interested Persons
and Corporate Disclosure Statement**

In addition to the persons identified in the certificate of interested persons and corporate disclosure statement in Charlie Williams's principal brief, the following persons have an interest in the outcome of this case:

1. Albritton, A. Brian, former United States Attorney;
2. Bentley, A. Lee, III, former United States Attorney;
3. Hoppmann, Karin, Acting United States Attorney;
4. Muldrow, W. Stephen, former Acting United States Attorney;
5. O'Neill, Robert E., former United States Attorney; and
6. Sweeney, Sara C., Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Statement Regarding Oral Argument

The United States does not request oral argument.

Table of Contents

Certificate of Interested Persons and Corporate Disclosure Statement.....	C-1
Statement Regarding Oral Argument.....	i
Table of Contents	ii
Table of Citations.....	iii
Statement of Jurisdiction	vi
Statement of the Issue.....	1
Statement of the Case.....	1
<i>Course of Proceedings</i>	2
<i>Statement of the Facts</i>	5
<i>Standard of Review</i>	5
Summary of the Argument	6
Argument and Citations of Authority	7
Williams is not entitled to relief from his 18 U.S.C. § 924(c) conviction based on <i>United States v. Davis</i> , 139 S. Ct. 2319 (2019).	7
Conclusion.....	15
Certificate of Service	

Table of Citations

Cases

<i>*Beeman v. United States</i> , 871 F.3d 1215 (11th Cir. 2017)..... <i>Bousley v. United States</i> , 523 U.S. 614 (1998)..... <i>Brady v. United States</i> , 397 U.S. 742 (1970)..... <i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)..... <i>Foster v. United States</i> , 996 F.3d 1100 (11th Cir. 2021)..... <i>*Granda v. United States</i> , 990 F.3d 1272 (11th Cir. 2021)..... <i>passim</i> <i>High v. Head</i> , 209 F.3d 1257 (11th Cir. 2000)..... <i>In re Hammoud</i> , 931 F.3d 1032 (11th Cir. 2019)..... <i>Jennings v. Stephens</i> , 135 S. Ct. 793 (2015)..... <i>Johnson v. United States</i> , 576 U.S. 591 (2015)..... <i>Jones v. United States</i> , 153 F.3d 1305 (11th Cir. 1998)..... <i>Lynn v. United States</i> , 365 F.3d 1225 (11th Cir. 2004)..... <i>McCoy v. United States</i> , 266 F.3d 1245 (11th Cir. 2001)..... 	6, 14 9, 12 12 14 13, 14 9 14 6 1, 3 12 5 6, 10
--	--

<i>Murray v. Carrier,</i> 477 U.S. 478 (1986)	12
<i>Osley v. United States,</i> 751 F.3d 1214 (11th Cir. 2014)	5
<i>Parker v. Sec'y for Dep't of Corr.,</i> 331 F.3d 764 (11th Cir. 2003)	13
<i>Parker v. United States,</i> 993 F.3d 1257 (11th Cir. 2021)	13
<i>Pitts v. Cook,</i> 923 F.2d 1568 (11th Cir. 1991)	9, 10
<i>Stromberg v. California,</i> 283 U.S. 359 (1931)	13
<i>United States v. Davis,</i> 139 S. Ct. 2319 (2019)	<i>passim</i>
<i>United States v. Frady,</i> 456 U.S. 152 (1982)	9, 14
<i>United States v. Williams,</i> 307 F. App'x 273 (11th Cir. 2009)	3
<i>Williams v. United States,</i> 985 F.3d 813 (11th Cir. 2021)	14
Statutes	
18 U.S.C. § 2	2
18 U.S.C. § 922(g)	2
18 U.S.C. § 924(c)	<i>passim</i>
18 U.S.C. § 924(c)(1)(A)(i)	7, 8
18 U.S.C. § 924(c)(3)	8
18 U.S.C. § 924(e)	1

18 U.S.C. § 1951	2
21 U.S.C. § 841(a)(1).....	2
21 U.S.C. § 841(b)(1)(A).....	2
21 U.S.C. § 846	2
28 U.S.C. § 1291	vi
28 U.S.C. § 1331	vi
28 U.S.C. § 2253(c)	vi
28 U.S.C. § 2253(c)(1)	vi
28 U.S.C. § 2255	<i>passim</i>

Rules

Fed. R. App. P. 4(a)	vi
----------------------------	----

Statement of Jurisdiction

This is an appeal from a final order and judgment of the United States District Court for the Middle District of Florida denying a 28 U.S.C. § 2255 motion. Docs. 29–30.¹ That court had jurisdiction. *See* 28 U.S.C. § 1331. The court entered its order on June 16, 2020, Doc. 29, and judgment on June 17, 2020, Doc. 30, and Charlie Williams timely filed his notice of appeal on August 18, 2020, Doc. 31. *See* Fed. R. App. P. 4(a). A judge of this Court granted a certificate of appealability. Doc. 34; *see* 28 U.S.C. § 2253(c). This Court has jurisdiction over this appeal. *See* 28 U.S.C. §§ 1291, 2253(c)(1), and 2255.

¹Williams's underlying criminal case is *United States v. Williams*, No. 6:07-cr-104-Orl-ACC-GJK, and his section 2255 case is *Williams v. United States*, No. 6:16-cv-1197-Orl-ACC-GJK. Record citations are to his section 2255 case unless otherwise indicated.

Statement of the Issue

Whether Williams is entitled to relief from his 18 U.S.C. § 924(c) conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019).

Statement of the Case

After plotting in 2007 to break into a cocaine stash house, kill the guards, steal the cocaine, and sell it, Williams pleaded guilty to conspiracy and firearms offenses, including a charge under 18 U.S.C. § 924(c) predicated on both a drug-trafficking crime and a crime of violence, specifically, Hobbs Act robbery conspiracy. Years later, this Court granted Williams permission to file a second or successive 28 U.S.C. § 2255 motion challenging the constitutionality of his section 924(c) conviction based on *Johnson v. United States*, 576 U.S. 591 (2015), which struck the residual clause in 18 U.S.C. § 924(e) as unconstitutionally vague. Williams eventually amended his motion to add a claim based on *United States v. Davis*, 139 S. Ct. 2319 (2019), which struck the similarly worded residual clause in section 924(c) as unconstitutionally vague. In this appeal from the district court's denial of his motion, Williams contends that this Court must presume his section 924(c) conviction is predicated only on the Hobbs Act robbery conspiracy, which no longer qualifies as a crime of violence.

Course of Proceedings

A grand jury charged Williams and others with conspiring to commit a Hobbs Act robbery, in violation of 18 U.S.C. § 1951 (count one), conspiring to possess five or more kilograms of cocaine with the intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846 (count two), using or carrying firearms during and in relation to a crime of violence or a drug-trafficking crime, in violation of 18 U.S.C. §§ 924(c) and 2 (count three), and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. § 922(g) (count four). Crim. Docs. 25, 75. The indictment alleged, as underlying predicate offenses for the section 924(c) count, both the conspiracy to commit a Hobbs Act robbery alleged in count one and the drug-distribution conspiracy alleged in count two. Crim. Doc. 25 at 3.

Williams pleaded guilty without a plea agreement. Doc. 75. At his change-of-plea hearing, the United States proffered that Williams and two co-conspirators had agreed with an undercover agent to rob a stash house where 22 to 39 kilograms of cocaine were stored. Crim. Doc. 128 at 17. Understanding that there were always two individuals in the house and that at least one of them would be armed, Williams and his co-conspirators had planned that, using firearms, they would “kill the individuals in the house, steal the cocaine, split it up amongst themselves, and distribute [it] to make

money off it later[.]” *Id.* at 17–18. After discussing the terms of the robbery, Williams and his co-conspirators had followed the undercover agent to a warehouse where the cocaine was to be stored after the robbery. *Id.* at 18. Agents waiting there had arrested them and had found gloves, ski masks, and three loaded firearms. *Id.*

Williams agreed that all of the proffered facts were true and stated that there was nothing in the factual basis that he wished to change or correct. *Id.* at 18–19. Williams then pleaded guilty to all four counts. *Id.* at 19. The district court sentenced Williams to serve a total of 352 months’ imprisonment, consisting of concurrent terms of 240 months on count one, 292 months on count two, and 120 months on count four, followed by a consecutive term of 60 months on count three. Crim. Doc. 90.

Williams appealed to this Court and sought relief in a first 28 U.S.C. § 2255 motion, both unsuccessfully. Crim. Docs. 94, 123–24, 133; *United States v. Williams*, 307 F. App’x 273, 274–75 (11th Cir. 2009). Williams did not raise a vagueness challenge to the residual clause of section 924(c) in either proceeding. See *Williams*, 307 F. App’x at 274–75; Crim. Docs. 123–24, 133.

In 2016, this Court granted Williams permission to file a successive section 2255 motion challenging the constitutionality of his section 924(c) conviction based on *Johnson v. United States*, 576 U.S. 591 (2015). Crim. Doc.

161; Doc. 1. Williams later amended his motion to add a claim based on *United States v. Davis*, 139 S. Ct. 2319 (2019). Doc. 20.

Arguing that the section 924(c) count in the indictment was duplicitous because it had charged him with using and carrying a firearm during and in relation to both the robbery conspiracy and the drug-distribution conspiracy, Williams contended that he had entered a general plea to the offense and that, therefore, the basis for his section 924(c) conviction was ambiguous. Doc. 23 at 4–5. According to Williams, the court was required to presume that he had been convicted of the “least culpable offense”—a section 924(c) charge based on the now-nonqualifying Hobbs Act robbery conspiracy. *Id.*

The United States responded that the district court should not reach Williams’s arguments because he had procedurally defaulted his vagueness challenge and his default was not excusable based either on a showing of cause and prejudice or actual innocence. Doc. 24 at 8–13. The United States pointed out that Williams had pleaded guilty to both conspiracy offenses and, in his factual proffer, he had admitted facts that supported the section 924(c) charge based on both the crime of violence and drug-trafficking crime predicates. *Id.* at 14. The United States argued, therefore, that Williams could not establish either a basis to excuse his procedural default or meet his burden of establishing a *Davis* error on the merits. *Id.* at 14, 16–17.

The district court denied Williams relief on the merits without addressing his procedural default. Doc. 29. The court found that Williams had pleaded 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 Williams's section 924(c) conviction was "independently supported by his drug-trafficking related conduct," the court denied Williams's motion. *Id.*

This Court subsequently granted Williams a certificate of appealability concerning "[w]hether [his] conviction under 18 U.S.C. § 924(c) remains valid under the Supreme Court's holding in *United States v. Davis*, 139 S. Ct. 2319 (2019)." Doc. 34.

Statement of the Facts

All facts necessary to resolve this appeal are contained in the Statement of the Case, above.

Standard of Review

In review of a 28 U.S.C. § 2255 proceeding, this Court will review legal issues de novo and factual findings only for clear error. *See Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014); *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). This Court limits its review to those issues

specified in the COA, but it reads the COA to encompass procedural issues that it must resolve before reaching the merits of the underlying claim. *See McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001). Further, this Court may affirm the denial of habeas relief on any ground the record supports, regardless of the issue specified in the COA, *see Jennings v. Stephens*, 135 S. Ct. 793, 802 (2015), or the ground stated in the district court's order, *see Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).

Summary of the Argument

This Court should not address Williams's *Davis* claim because he procedurally defaulted it by failing to raise it in prior proceedings and his default is not excusable. Williams cannot establish cause, because a vagueness challenge to the residual clause of 18 U.S.C. § 924(c) is not novel. And even if he could establish cause, Williams cannot establish actual prejudice or factual innocence because he pleaded guilty to a section 924(c) offense predicated on both the no-longer-qualifying robbery conspiracy and the drug-distribution conspiracy that still qualifies as a section 924(c) predicate. Williams, therefore, cannot collaterally attack his conviction on a vagueness theory.

Even if not for his procedural default, Williams could not prevail. His arguments that this Court must presume his section 924(c) conviction was predicated solely on his participation in the robbery conspiracy are meritless in

light of the record of his guilty plea, and this Court already has rejected the legal basis for those arguments in several published decisions, anyway. Moreover, the presumption Williams imagines is entirely inconsistent with the burden of proof in a collateral proceeding. Ultimately, Williams bears the burden of proving that his section 924(c) conviction resulted from application solely of the residual clause, and he has failed to meet that burden.

Argument and Citations of Authority

Williams is not entitled to relief from his 18 U.S.C. § 924(c) conviction based on *United States v. Davis*, 139 S. Ct. 2319 (2019).

Williams argues that this Court must presume that his section 924(c) conviction was predicated solely on his participation in the Hobbs Act robbery conspiracy and, therefore, must vacate the conviction. Williams's brief at 6. This Court should not address Williams's argument because he procedurally defaulted his *Davis* claim, and his default is not excusable. In any event, Williams is not entitled to the presumption he urges. Williams is the one with the burden of proof, and based on this record, he loses.

Under 18 U.S.C. § 924(c), any person who uses or carries a firearm during and in relation to any crime of violence or drug-trafficking crime is subject to a five-year term of imprisonment in addition to the punishment provided for the crime of violence or drug-trafficking crime. 18 U.S.C. §

924(c)(1)(A)(i). A “crime of violence” is

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.

18 U.S.C. § 924(c)(3). “Subsection (A) is known as the ‘elements clause’ and subsection (B) as the ‘residual clause.’” *Granda v. United States*, 990 F.3d 1272, 1284 (11th Cir. 2021). Because *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), struck the residual clause as unconstitutionally vague, a Hobbs Act robbery conspiracy no longer qualifies as a crime of violence. *Granda*, 990 F.3d at 1285.

Here, the grand jury charged Williams with a Hobbs Act robbery conspiracy (count one), a drug-distribution conspiracy (count two), and using and carrying a firearm during a crime of violence (the robbery conspiracy) and a drug-trafficking crime (the drug-distribution conspiracy). Crim. Doc. 25. Williams pleaded guilty to those charges and to an additional firearm possession charge, Crim. Doc. 75, and he never argued in the trial court proceedings, on direct appeal, or in his first section 2255 motion that the residual clause of section 924(c) was unconstitutionally vague.

Williams, therefore, procedurally defaulted his *Davis* claim by not raising

it in any of those prior proceedings. *Granda*, 990 F.3d at 1285–86. That means he is barred from obtaining collateral review “unless he can either (1) show cause to excuse the default and actual prejudice from the claimed error, or (2) show that he is actually innocent” of the section 924(c) conviction. *Id.*; *see also Bousley v. United States*, 523 U.S. 614, 622–24 (1998). Like *Granda*, Williams cannot establish cause, prejudice, or actual innocence, so “he cannot collaterally attack his conviction on a vagueness theory.” *Granda*, 990 F.3d at 1286.

The cause-and-prejudice standard requires a section 2255 movant to show both (1) cause excusing each default, and (2) actual prejudice resulting from the errors of which he complains. *United States v. Frady*, 456 U.S. 152, 167–68 (1982). If he fails to prove either prong, the court need not decide whether he has proven the other. *Id.* at 168.

To show cause, the movant must show that “some external impediment” prevented him from constructing or raising the claim. *See High v. Head*, 209 F.3d 1257, 1262–63 (11th Cir. 2000). Futility does not constitute cause to the extent that the argument was “unacceptable to that particular court at that particular time.” *Bousley*, 523 U.S. at 623. Novelty of a claim may constitute cause, but only if the claim is so unusual that counsel “lacked the tools to construct” the claim. *Pitts v. Cook*, 923 F.2d 1568, 1572–74 (11th Cir. 1991). If

other defense counsel, even in other jurisdictions, “have perceived and litigated” the same claim, the claim is not novel and does not satisfy the cause requirement. *Id.* The question is not whether subsequent case law has made counsel’s task easier, but whether the claim was available at all at the time of the default. *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001).

A *Davis* vagueness challenge to a section 924(c) conviction is not sufficiently novel to establish cause. *Granda*, 990 F.3d at 1286–88. A *Davis* claim does not fit into any of the three circumstances in which novelty might constitute cause: (1) “when a decision of the Supreme Court explicitly overrules one of its precedents”; (2) “when a Supreme Court decision overturns a longstanding and widespread practice to which the Supreme Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved”; and (3) “when a Supreme Court decision disapproves of a practice the Supreme Court arguably has sanctioned in prior cases.” *Id.* (internal quotation marks and alterations omitted). Because “the tools existed to challenge myriad other portions of § 924(c) as vague; they existed to support a similar challenge to its residual clause.” *Id.* at 1288.

As the United States argued in the district court, Doc. 24 at 10, because a vagueness challenge to section 924(c)’s residual clause was available to Williams before he pleaded guilty, he cannot establish cause to excuse his

multiple procedural defaults, *see Granda*, 990 F.3d at 1288. But even if Williams could establish cause, he cannot establish actual prejudice.

Actual prejudice is more than just a possibility of prejudice; Williams must prove that the error worked to his “actual and substantial disadvantage,” infecting the entire proceeding “with error of constitutional dimensions.” *Granda*, 990 F.3d at 1288. To prove actual prejudice in the *Davis* context, Williams bears the burden of establishing a substantial likelihood that his section 924(c) conviction rests *only* on an invalid predicate. *Id.*

That is a burden Williams cannot meet, because he pleaded guilty to a section 924(c) offense predicated on both the robbery conspiracy that, at the time, was a crime of violence, and the drug-distribution conspiracy that remains a drug-trafficking crime. Crim. Doc. 128 at 7–9, 19. He also pleaded guilty to that same drug-trafficking crime, *id.* at 6, 9, 19, and admitted facts that amply supported a section 924(c) offense predicated on that drug-trafficking crime, *id.* at 17–18. As the district court found in denying Williams’s *Davis* claim on the merits, his section 924(c) conviction was “independently supported by his drug-trafficking related conduct.” Doc. 29 at 6.

These same facts prevent Williams from meeting the requirements of the “exceedingly narrow” actual-innocence exception as an alternative means to

excuse his procedural default. *Granda*, 990 F.3d at 1292. The actual-innocence exception allows a movant to avoid a procedural bar if he can show that the alleged error “has probably resulted in the conviction of one who is actually innocent.” *Bousley*, 523 U.S. at 624 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)); *accord Jones v. United States*, 153 F.3d 1305, 1308 (11th Cir. 1998). Because “[a]ctual innocence means factual innocence, not mere legal innocence[,]” *Granda*, 990 F.3d at 1292, that Williams pleaded guilty to a section 924(c) offense predicated in part on a now-invalid crime of violence is not enough. He is not factually innocent because his still-valid drug-trafficking crime supports his 924(c) conviction.

Williams cannot prevail on his arguments that this Court must presume that his conviction was predicated only on the robbery conspiracy. Williams relies on the Sixth Amendment, but he pleaded guilty to using or carrying a firearm in relation to the drug-trafficking crime and also pleaded guilty to the drug-trafficking crime itself, proving beyond a reasonable doubt that he committed the offenses. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (guilty plea is admission of acts charged in indictment as well as waiver of right to trial).¹

¹Even if Williams had been convicted following a trial in which a jury had returned a general verdict based on several possible predicates, one of which was invalidated under *Davis*, a reviewing court evaluating the error

Likewise, he complains that the categorical approach also requires this Court to presume that his conviction was based only on the robbery conspiracy, but 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.” *See Granda*, 990 F.3d at 1295. This Court has declined to graft it into the process of evaluating whether a *Davis* error is reversible. *Id.*; *see also Foster v. United States*, 996 F.3d 1100, 1109 (11th Cir. 2021); *Parker v. United States*, 993 F.3d 1257, 1264 (11th Cir. 2021).

Finally, *Stromberg v. California*, 283 U.S. 359, 367–68 (1931) and *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 777 (11th Cir. 2003), on which Williams relies, are inapposite here, because Williams’s conviction was not based on a general jury verdict; it was based on his guilty plea accompanied by his specific and unambiguous factual admissions during his guilty plea hearing. Moreover, this Court has held that, even after a trial involving a general jury verdict, neither *Stromberg* nor *Parker* relieves the Court of its obligation to conduct a harmless-error analysis to determine whether a defendant was prejudiced by the inclusion of a no-longer valid predicate among other, still-valid section

would not be involved in impermissible judicial fact-finding, as Williams contends. Rather, it would decide 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.” *See Granda*, 990 F.3d at 1295.

924(c) predicates. *Granda*, 990 F.3d at 1293–94 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Foster*, 996 F.3d at 1109.

Ultimately, the presumption Williams imagines is entirely inconsistent with the burden of proof in a collateral proceeding. As a section 2255 movant, Williams bears the burden of proof and persuasion on each and every aspect of his claim, *see Beeman v. United States*, 871 F.3d 1215, 1221, 1273 (11th Cir. 2017) (collecting cases), which is “a significantly higher hurdle than would exist on direct appeal” under plain-error review, *see Frady*, 456 U.S. at 164–66. This requires Williams to establish “all that is necessary to obtain § 2255 relief.” *Beeman*, 871 F.3d at 1273. If a reviewing court “cannot tell one way or the other” whether a necessary fact is true, the claim fails. *Id.*; *see also Williams v. United States*, 985 F.3d 813, 821 (11th Cir. 2021) (“If the evidence is silent or in equipoise, then the party with the burden fails.”). Accordingly, on collateral review of a *Davis* claim, a court cannot *presume* that a movant’s section 924(c) conviction resulted from application solely of the residual clause; it’s up to the movant—Williams—to prove it. *See In re Hammoud*, 931 F.3d 1032, 1041 (11th Cir. 2019) (citing *Beeman*, 871 F.3d at 1222–25).

Here, just as in *Granda*, 990 F.3d at 1292, the same facts that prevent Williams from establishing prejudice to excuse his procedural default make it impossible for him to carry his burden of proof on the merits. Because

Williams bears the ultimate burden of proof and has failed to meet it, this Court should affirm the district court's order.

Conclusion

The United States requests that this Court affirm the judgment and order of the district court.

Respectfully submitted,

KARIN HOPPMANN
Acting United States Attorney

SARA C. SWEENEY
Assistant United States Attorney
Appellate Division

By: *s/ Roberta Josephina Bodnar*
ROBERTA JOSEPHINA BODNAR
Assistant United States Attorney
Appellate Division
Florida Bar No. 986909
35 S.E. 1st Ave., Ste. 300
Ocala, FL 34471
(352) 547-3600
roberta.bodnar@usdoj.gov

Certificate of Service

I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on June 16, 2021, to:

SHENOOR KAUR GREWAL
Federal Public Defender's Office

Counsel for Charlie Williams

s/ Roberta Josephina Bodnar

ROBERTA JOSEPHINA BODNAR
Assistant United States Attorney

Gkpr no 6.9.21