# APPENDIX

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**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 21-4146**

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DARRELL E. GILLESPIE,

Defendant - Appellant.

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Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Frank W. Volk, District Judge. (2:13-cr-00091-4)

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Argued: January 25, 2022 Decided: March 8, 2022

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Before WILKINSON, NIEMEYER, and HEYTENS, Circuit Judges.

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Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Heytens joined.

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**ARGUED:** John Hampton Tinney, Jr., HENDRICKSON & LONG, PLLC, Charleston, West Virginia, for Appellant. Monica D. Coleman, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Lisa G. Johnston, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

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WILKINSON, Circuit Judge:

A jury convicted Darrell Gillespie of various offenses stemming from a series of armed home-invasion robberies. On appeal, he challenges one of his convictions for carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) and argues that his sentence was substantively unreasonable. Gillespie rightly points out that Hobbs Act conspiracy does not constitute a crime of violence. But the district court's contrary jury instruction was not plain error because the jury's special verdict form reveals that Gillespie was convicted under a *Pinkerton* theory of liability, which remains valid. Because he was not prejudiced by the improper jury instruction and because the district court adequately explained and justified his sentence, we affirm.

I.

A.

Darrell Gillespie and his friends Robert Barcliff, Keith Glenn, and Brandon Davis decided to steal guns, drugs, and money from drug dealers because they were less likely to report the crimes to the police. The conspirators understood they would need to use guns to successfully rob drug dealers. The robberies took place from 2011 to 2012 and stretched from Pennsylvania to Tennessee, although they were concentrated in West Virginia and Virginia.

Gillespie was present during the group's first robbery, which occurred in September 2011, and during which Barcliff used a gun to subdue the victim. The conspirators continued to engage in violent robberies throughout the winter of 2011. The robbery that underlies the § 924(c) charge at the heart of this appeal took place on December 13, 2011,

in Kanawha City, West Virginia. The victim, Theodore Dues, left his apartment door unlocked in anticipation of his girlfriend's return from an afternoon shopping trip. While Barcliff and Glenn normally led the robberies, Davis and Gillespie insisted on entering first to prove their mettle to the gang. Wearing masks, Gillespie and Davis burst into Dues' apartment. In the ensuing tussle, Dues was struck with the butt of a pistol. The trial witnesses (Dues, Barcliff, Davis, and Glenn) unanimously agreed that at least some of the robbers were carrying firearms but were split on whether Gillespie was personally armed during the robbery.

After hearing yelling, Barcliff and Glenn entered the apartment to find Dues held at gunpoint and cradling his 8-month-old child. While searching the residence, the robbers discovered a second child in a bedroom, whom Barcliff tried to quiet. After ransacking the apartment, the conspirators located an ounce or two of marijuana and stole several hundred dollars from Dues' wallet. Adding insult to injury, Davis told Dues to quit selling drugs with his children in the residence and not to leave his door unlocked.

After several months of additional robberies, Gillespie, Glenn, and Davis were pulled over by West Virginia police on March 23, 2012. When officers searched the car, they discovered a victim's wallet, pepper spray, a mask, and several guns stolen by the gang the day before, including a fully automatic AK-47 replica.

B.

Gillespie and the other members of the gang were indicted in the Southern District of West Virginia. Gillespie and a co-defendant opted to go to trial under a fourteen-count

Fifth Superseding Indictment. Several other conspirators pleaded guilty and testified against Gillespie at trial.

As relevant to this appeal, Gillespie was charged with robbery affecting interstate commerce (Hobbs Act robbery) in violation of 18 U.S.C. §§ 2 and 1951; conspiracy to commit robberies affecting interstate commerce (Hobbs Act conspiracy) in violation of 18 U.S.C. § 1951; and using, carrying, or brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(l)(A), covering the use of a gun during the Dues robbery.

The indictment referenced two distinct theories of liability for the § 924(c) charge: a direct theory of liability and a vicarious *Pinkerton* theory. Under the *Pinkerton* doctrine, defendants are vicariously "liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy." *United States v. Hare*, 820 F.3d 93, 105 (4th Cir. 2016). The government's direct theory of liability was that Gillespie personally carried a gun during the Hobbs Act robbery of Theodore Dues (a crime of violence). In contrast, the government's *Pinkerton* theory was that rather than personally carrying a gun, Gillespie was vicariously liable for the act of a co-conspirator because at least one of the other robbers carried a gun during the robbery. While the *Pinkerton* theory relied on the existence of a conspiracy, the conspiracy functioned only as a means of holding Gillespie liable for his co-conspirator's use of a gun, not as a stand-alone predicate offense.

After a two-week trial, the jury was presented with instructions tracking the government's twin theories of § 924(c) liability. The instructions therefore specified that the "first basis" for liability was "the underlying charges of robbery affecting interstate

commerce." JA 271. When considering this first basis, the jury was instructed to acquit on this theory of § 924(c) liability if the government failed to prove "beyond a reasonable doubt that the defendant under consideration attempted, committed or aided and abetted a robbery affecting interstate commerce." JA 271. The jury rejected this first theory of § 924(c) liability, probably because the testimony of Gillespie's co-conspirators was split on whether he was personally carrying a firearm during the robbery.

The "second basis" for § 924(c) liability relied on *Pinkerton* and the "underlying charge of conspiracy to commit robberies contained in Count One." JA 272. The jury instructions proceeded to explain *Pinkerton* liability: "the illegal actions of [a conspirator] may be attributed to other individuals who are then members of the conspiracy," if committed "during the existence or life of a conspiracy" and "in order to further or somehow advance the goals or objectives of the conspiracy." JA 272. Moreover, to find Gillespie liable for a § 924(c) violation under *Pinkerton*, the jury was also required to find beyond a reasonable doubt that (1) a member of the conspiracy; (2) carried a firearm during the Hobbs Act robbery of Theodore Dues; (3) during and in furtherance of the conspiracy; and (4) while Gillespie was a member of the conspiracy. In contrast with the first theory, the jury accepted this *Pinkerton* theory of § 924(c) liability.

C.

After Gillespie's trial, he moved for acquittal on the § 924(c) conviction arguing that the district court improperly instructed that Hobbs Act conspiracy qualified as a crime

of violence.* The district court acknowledged that the jury was incorrectly instructed that Hobbs Act conspiracy qualified as a crime of violence. But the court determined that Gillespie could not establish plain error because he had not suffered prejudice from the improper instruction. Rather than being convicted based on an improper Hobbs Act conspiracy predicate, the 27-question special verdict form demonstrated that Gillespie's § 924(c) conviction rested "explicitly on the *Pinkerton* theory." JA 397. And *Pinkerton* vicarious liability for the acts of a co-conspirator remains a valid basis for conviction, provided that the co-conspirator commits a crime of violence while carrying a gun.

At Gillespie's sentencing hearing, the district court adopted the Presentence Report, which established an Offense Level of 32, a Criminal History Category of I, and a Guidelines range of 121-151 months. Gillespie sought a downward variance and argued he was receiving an unfairly longer sentence compared to his co-conspirators because he had opted to exercise his right to trial, rather than pleading guilty and cooperating with the government. The district court rejected this argument and explained that Gillespie was not similarly situated to his co-conspirators because their more lenient sentences were driven by their acceptance of responsibility under Guidelines § 3E1.1 and government motions for substantial assistance under Guidelines § 5K1.1.

* Before the district court, Gillespie also moved for acquittal on a second § 924(c) conviction based on his brandishing of a firearm during a second robbery. The district court rejected his argument because the jury found him guilty both on the *Pinkerton* theory and on the theory that he personally brandished a firearm—and both theories remain valid. Gillespie does not challenge this second § 924(c) conviction on appeal.

The district court acknowledged that the Guidelines were merely advisory and explained why the § 3553(a) factors supported the chosen sentence. In particular, the court focused on the serious nature of the offenses and emphasized that "[t]he violence used in these robberies was extensive and very serious," and that based solely on "greed," the conspirators "restrained and assaulted victims in their residences." Supp. JA 39–40. The court therefore imposed a bottom-of-the-Guidelines-range sentence of 121 months, which, combined with the § 924(c) mandatory minimum stacking provisions (resulting in an additional 60 months for carrying a gun and an additional 84 months for brandishing a gun) led to a total sentence of 265 months. Gillespie's co-defendant Jamaa Johnson received a 235-month sentence. Government cooperators Brandon Davis, Keith Glenn, and Robert Barcliff received 70-, 110-, and 192-month sentences respectively.

II.

Gillespie's primary contention on appeal is that his § 924(c) conviction for carrying a firearm during the robbery of Theodore Dues should be reversed because the district court incorrectly instructed the jury that Hobbs Act conspiracy constituted a crime of violence. We review for plain error because Gillespie did not object to the instruction before the district court. *United States v. Ramirez-Castillo*, 748 F.3d 205, 211 (4th Cir. 2014). Establishing plain error requires a defendant to demonstrate "(1) an error was made; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 212.

Under the second factor, an error is plain if, "at the time of appellate consideration, the settled law of the Supreme Court or this circuit establishes that an error has occurred."

*United States v. Walker*, 934 F.3d 375, 378 (4th Cir. 2019) (quotation marks omitted). And because we held in *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc), that Hobbs Act conspiracy does not constitute a crime of violence, the district court's contrary instruction was therefore plainly erroneous.

But for an error to prejudice a defendant sufficiently to "affect substantial rights," "[i]t must have affected the outcome of the district court proceedings." *Ramirez-Castillo*, 748 F.3d at 215 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). In the context of a § 924(c) conviction, the verdict stands even if the jury was instructed on an invalid predicate, so long as the jury relied on a valid basis for conviction. *See Hare*, 820 F.3d at 105–06; *United States v. Crawley*, 2 F.4th 257, 263 (4th Cir. 2021) ("We reaffirm our holding in *Hare* that a § 924(c) conviction based on one valid and one invalid predicate offense remains sound.").

Under plain error review, Gillespie's claim fails because he cannot "demonstrate that the erroneous instruction given resulted in his conviction," and therefore cannot establish prejudice. *Hare*, 820 F.3d at 105. He correctly observes that a conviction for personally carrying a firearm during a Hobbs Act conspiracy is no longer valid. But this is of no moment for Gillespie because the special verdict form affirmatively demonstrates his conviction was based on a valid *Pinkerton* theory under which he is liable for his co-conspirator's use of a firearm during the Dues robbery, not a direct Hobbs Act conspiracy predicate.

A.

The text of § 924(c) contains two definitions of a crime of violence: the force (or elements) clause and the residual clause. The force clause looks to whether a crime "has as an element the use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), whereas the residual clause sought to determine whether the crime involved a "substantial risk" that physical force would be used, 18 U.S.C. § 924(c)(3)(B). In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Supreme Court found the residual clause definition unconstitutionally vague, leaving only the force clause. And in *United States v. Simms*, 914 F.3d at 233–34 (en banc), we concluded that Hobbs Act *conspiracy* does not constitute a crime of violence under the force clause, and therefore may not serve as a direct § 924(c) predicate. By contrast, Hobbs Act *robbery* constitutes a prototypical crime of violence under the force clause and thus continues to serve as a valid § 924(c) predicate. *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019).

Gillespie argues that because the application of *Pinkerton* relies on the existence of a conspiracy (in his case, a Hobbs Act conspiracy) and because Hobbs Act conspiracy is not a crime of violence, he was therefore convicted based on an improper § 924(c) predicate offense. But Gillespie's argument confuses Hobbs Act conspiracy as a standalone § 924(c) predicate—which was prohibited by *Davis* and *Simms*—and vicarious liability for a co-conspirator's act of carrying a gun during a crime of violence under *Pinkerton*—which remains a valid theory of § 924(c) liability.

It is well-established that defendants may be held liable for the substantive offenses of their co-conspirators. *Pinkerton v. United States*, 328 U.S. 640 (1946). *Simms* and *Davis*

did nothing to upset this theory of liability in the § 924(c) context. In *Pinkerton*, the Court reiterated the principle that "so long as the partnership in crime continues, the partners act for each other in carrying it forward," meaning that "an overt act of one partner may be the act of all." *Id.* at 646–47 (citing *United States v. Kissel*, 218 U.S. 601, 608 (1910)). Under the *Pinkerton* doctrine, defendants are vicariously "liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy." *Hare*, 820 F.3d at 105. "The principle underlying the *Pinkerton* doctrine is that 'conspirators are each other's agents; and a principal is bound by the acts of his agents within the scope of the agency.'" *United States v. Dinkins*, 691 F.3d 358, 384 (4th Cir. 2012) (quoting *United States v. Aramony*, 88 F.3d 1369, 1379 (4th Cir. 1996)). *Pinkerton* is merely another form of vicarious liability, akin to aiding and abetting, that apportions "criminal responsibility for the commission of substantive offenses" based on principles of "agency and causation." *United States v. Ashley*, 606 F.3d 135, 143 (2010).

*Pinkerton*'s viability as a vicarious theory of § 924(c) liability has never depended on the categorization of Hobbs Act conspiracy as a crime of violence, and Gillespie's argument otherwise is a red herring. After *Davis* and *Simms*, it is true, a defendant cannot be convicted under § 924(c) for personally carrying a gun during a Hobbs Act *conspiracy*. But if a conspirator commits a Hobbs Act *robbery* while carrying a gun, the conspirator has violated § 924(c). And under *Pinkerton*, their co-conspirators can be held vicariously liable for the § 924(c) violation so long as the robbery and use of the firearm were reasonably foreseeable to the defendant and in furtherance of a conspiracy. The defendant would still be liable even if, unlike Gillespie, the defendant was not present at the robbery

and never touched a gun. This remains the case after *Davis* and *Simms* because *Pinkerton*'s applicability never turned on whether the underlying conspiracy constituted a crime of violence. *Pinkerton* liability arises in a number of contexts, many of them wholly non-violent: *Pinkerton* itself involved a bootlegging conspiracy and imposed vicarious liability for "violations of the Internal Revenue Code." 328 U.S. at 641.

This court previously addressed the issue of *Pinkerton*'s continued applicability to § 924(c) charges in *United States v. Johnson*, 827 F. App'x 283 (4th Cir. 2020). Like Gillespie, the defendant in *Johnson* was convicted of Hobbs Act conspiracy, Hobbs Act robbery, and violating § 924(c) under an improper instruction that the conspiracy charge constituted a crime of violence. *Id.* at 284–85. The prosecution advanced several theories of liability, including *Pinkerton*, and the jury returned a general verdict of guilty. *Id.* at 285. The court explained that Johnson's argument "confuses the *offense* of Hobbs Act conspiracy" as a predicate offense—which *Simms* foreclosed—and vicarious *liability* for reasonably foreseeable crimes committed in furtherance of a conspiracy under *Pinkerton*—which remains valid. *Id.* at 286. Johnson therefore could not demonstrate prejudice because "the jury could have based the firearms convictions" on the still-valid *Pinkerton* theory. *Id.*; *see Hare*, 820 F.3d at 105 (requiring the defendant demonstrate "the erroneous instruction given resulted in his conviction").

In *United States v. Woods*, the Sixth Circuit addressed the same confusion between *Pinkerton* as a theory of vicarious liability and conspiracy as a predicate crime of violence and came to the same conclusion: "a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the § 924(c)

elements clause." 14 F.4th 544, 552 (6th Cir. 2021). And each circuit to address the issue agrees. *See United States v. Hernandez-Roman*, 981 F.3d 138, 145 (1st Cir. 2020); *United States v. Howell*, No. 18-3216, 2021 WL 3163879, at *4 (3d Cir. July 27, 2021); *United States v. Henry*, 984 F.3d 1343, 1356–57 (9th Cir. 2021); *see also Reyes v. United States*, 998 F.3d 753, 758–59 (7th Cir. 2021) (upholding § 924(c) conviction under *Pinkerton* after *Davis*). There is thus no doubt that *Pinkerton* remains a valid theory of § 924(c) liability.

B.

It was precisely this still-valid theory of *Pinkerton* liability that the jury embraced when finding Gillespie guilty of the challenged § 924(c) conviction. Throughout the trial, the government alleged that Gillespie violated § 924(c) on two theories—first, that he had personally used a firearm during a Hobbs Act robbery; and second, that he was liable for his co-conspirator's use of a firearm during a Hobbs Act robbery under *Pinkerton*. The jury instructions and special verdict questions likewise distinguished between these twin theories of liability. The special verdict form demonstrates that the jury selected the *Pinkerton* theory, foreclosing a finding of prejudice.

The jury instructions differentiated between the "first basis" for the § 924(c) charges predicated on "the underlying charges of robbery affecting interstate commerce," JA 271, and the "second basis" for the § 924(c) charges based on *Pinkerton* liability:

> Under this second basis, a member of a conspiracy who commits another crime during the existence or life of a conspiracy and commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy.

JA 272. Nowhere did the jury instructions explaining the *Pinkerton* theory require that the jurors find Hobbs Act conspiracy to be a crime of violence. Nor did the instructions suggest that Hobbs Act conspiracy was being treated itself as a predicate offense rather than a means for imposing vicarious liability through *Pinkerton*. And the indictment identified only Hobbs Act robbery as the underlying crime of violence.

Likewise, the special verdict form made clear that the conviction was based on *Pinkerton* liability, not Hobbs Act conspiracy as a stand-alone predicate offense. The verdict form demonstrates that the jury carefully distinguished between the two theories. In Question 10, the jury rejected the theory that Gillespie personally carried a firearm during the Hobbs Act robbery of Theodore Dues. But in Question 11, the jury found Gillespie guilty of the § 924(c) charge based on vicarious *Pinkerton* liability "arising out of the acts of a co-conspirator." JA 294.

The theory foreclosed by *Simms* is one in which a defendant personally carries a firearm during a Hobbs Act conspiracy as the predicate offense. *See Howell*, 2021 WL 3163879, at *4 ("The invalid theory . . . is that he committed the § 924(c) offenses by using a gun during conspiracies to commit Hobbs Act robberies, while the valid theory [is guilt] by virtue of his association with those who used a gun during completed Hobbs Act robberies."). Question 11, which clearly referenced a *Pinkerton* theory, cannot be interpreted to reference this impermissible theory of liability because it based liability not on Gillespie's personal use of a firearm, but on the "acts of a co-conspirator." JA 294.

The evidence at trial overwhelmingly supported this *Pinkerton* theory and demonstrated that Gillespie repeatedly participated in violent armed robberies of drug

dealers as part of an extensive conspiracy. This evidence primarily consisted of (1) the testimony of three of the conspirators who opted to cooperate with the government, (2) the testimony of the gang's victims, (3) the discovery of stolen goods (including an AK-47 replica and a victim's wallet) and criminal paraphernalia (such as a mask and pepper spray) in the group's possession, and (4) cell phone records corroborating the conspirators' presence at the robberies. In some instances, Gillespie initiated the robberies and in others he personally carried a firearm. The testimony of cooperators Barcliff, Glenn, and Davis—the other three robbers present that night—and the victim Theodore Dues, established that Gillespie entered Dues' apartment and helped to violently subdue him. And while testimony varied on whether Gillespie personally carried a gun that night, every witness agreed that at the very least, other members of the gang were armed.

It is also perfectly clear that Gillespie knew his co-conspirators would be engaged in a violent robbery while armed with firearms. Any failure to instruct that firearm use must be reasonably foreseeable for *Pinkerton* liability to attach therefore cannot justify reversal. After all, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). First, trial testimony established it was understood by the gang that guns would be needed to successfully rob drug dealers. Second, Gillespie had personally carried a gun and witnessed gun use by his compatriots during previous robberies. And finally, all witnesses agreed that at least some members of the conspiracy were visibly carrying guns during the Dues robbery. Any instructional error on foreseeability was therefore harmless. *See United States v. Blackman*, 746 F.3d 137, 141–

42 (4th Cir. 2014) (finding foreseeability based on "pre-robbery discussions" of firearm use); *Hare*, 820 F.3d at 105.

Congress enacted § 924(c) based on its determination that the addition of a gun to an already violent crime "increases the likelihood of harm to innocent individuals and law enforcement agents." *See United States v. Grinnell*, 915 F.2d 667, 669 (11th Cir. 1990). And Gillespie's participation in the Dues robbery involved precisely the combination of violent crime and firearms that Congress sought to criminalize in § 924(c). Because the *Pinkerton* theory remains valid after *Simms* and *Davis*, and the evidence of his guilt under this theory is unassailable, Gillespie cannot establish an error affecting his substantial rights, and therefore cannot demonstrate reversible error.

III.

Gillespie next argues that his bottom-of-the-Guidelines-range sentence was substantively unreasonable because it resulted in a longer sentence than that received by his co-conspirators who opted to plead guilty and cooperate with the government. We review sentences in two steps. First, we determine whether the district court has committed significant procedural error. *United States v. Fowler*, 948 F.3d 663, 668 (4th Cir. 2020) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007). Second, we consider whether the sentence imposed was substantively reasonable. *Id.*

A sentence is procedurally unreasonable if the district court committed a serious procedural error, such as improperly calculating the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. *Id.*

Gillespie does not claim that his sentence was procedurally unreasonable. A wise concession, as the district court properly calculated the Guidelines range of 121-151 months, did not treat the range as mandatory, considered the § 3553(a) factors, and explained the decision to sentence Gillespie at the bottom of the Guidelines range, rather than grant a downward variance.

Gillespie instead argues that he has been subject to an improper "trial penalty" and that his bottom-of-the-Guidelines sentence is therefore substantively unreasonable because it creates an "unwarranted sentence disparit[y]" with his co-conspirators under 18 U.S.C. § 3553(a)(6). A sentence is substantively unreasonable only where under the totality of the circumstances, the "sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in § 3553(a)." *United States v. Mendoza-Mendoza*, 597 F.3d 212, 216 (4th Cir. 2010). And "any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable." *United States v. Louthian*, 756 F.3d 295, 306 (4th Cir. 2014).

Gillespie's argument fails for two reasons. First, a sentence is not "unreasonable under § 3553(a)(6) merely because it creates a disparity with a co-defendant's sentence." *See United States v. Pyles*, 482 F.3d 282, 290 (4th Cir. 2007), *vacated on other grounds*, 552 U.S. 1089 (2008); *United States v. Withers*, 100 F.3d 1142, 1149 (4th Cir. 1996). Second, individuals who opt to go to trial are not similarly situated to those who plead guilty and cooperate with the government for purposes of § 3553(a)(6). *United States v. Susi*, 674 F.3d 278, 288 (4th Cir. 2012).

The lower sentences of some of Gillespie's co-conspirators were driven by the Sentencing Guidelines which provide offense level reductions for defendants who accept responsibility for their offenses, U.S.S.G. § 3E1.1, and downward departures for those who provide substantial assistance to the government, U.S.S.G. § 5K1.1. "[D]efendants who exercise their right to a trial have no entitlement to the same benefit." *Susi*, 674 F.3d at 287–88. We can therefore discern no abuse of discretion in the district court's conclusion that the "greed" and "extensive" violence characterizing Gillespie's offenses did not warrant a lesser sentence. Supp. JA 40.

Unlike some of his co-conspirators, Gillespie deliberately chose not to cooperate with the government or to accept responsibility for his crimes. After spurning this opportunity, Gillespie cannot now claim a benefit he deliberately rejected.

IV.

Gillespie and his co-conspirators cynically targeted drug dealers under the belief they would be less likely to reveal the gang's predations to law enforcement. Even if by their illegal conduct the dealers placed themselves in opposition to the law, the law does not deny them all protection. It is of course the function of the law to punish such dealers for their misdeeds, but it is not the prerogative of Gillespie and his co-conspirators. The evidence at trial was overwhelming that Gillespie repeatedly violated the victims' homes through a string of violent armed robberies. Sometimes he personally carried a gun and at other times his co-conspirators did so. The Supreme Court long ago affirmed the commonsense principle that those who enter criminal conspiracies bear responsibility for

the reasonably foreseeable actions taken by co-conspirators to advance the group's criminal aims. It was that principle that drove this case, and the judgment is in all respects

*AFFIRMED.*

FILED: March 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 21-4146
(2:13-cr-00091-4)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DARRELL E. GILLESPIE

Defendant - Appellant

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J U D G M E N T

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In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

# UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA
v.
DARRELL GILLESPIE

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 2:13-CR-00091-4

USM Number: 11363-088

John H. Tinney, Jr.
Defendant's Attorney

## THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One, Two, Five, Six, Ten, Eleven, Twelve, and Fourteen

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 1951 | Conspiracy to commit armed robberies | 5/21/2012 | One |
| 18 U.S.C. § 924(o) | Conspiracy to use firearms in crimes of violence | 5/21/2012 | Two |
| 18 U.S.C. §§ 1951 and 2 | Robbery affecting interstate commerce | 5/21/2012 | Five |

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 4, 2021
Date of Imposition of Judgment

Frank W. Volk
Frank W. Volk
United States District Judge

March 22, 2021
Date

DEFENDANT: DARRELL GILLESPIE
CASE NUMBER: 2:13-CR-00091-4

## ADDITIONAL COUNTS OF CONVICTION

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 924(c)(1)(A) | Carrying a firearm in a crime of violence | 5/21/2012 | Six |
| 18 U.S.C. § 922(j) and 18 U.S.C. §§ 924(a)(2) and 2 | Possessing, concealing, and storing stolen firearms and ammunition | 5/21/2012 | Ten |
| 18 U.S.C. §§ 1951 and 2 | Robbery affecting interstate commerce | 5/21/2012 | Eleven |
| 18 U.S.C. § 924(c)(1)(A) | Brandishing a firearm in a crime of violence | 5/21/2012 | Twelve |
| 18 U.S.C. § 371 | Conspiracy to obstruct justice | 5/21/2012 | Fourteen |

AO 245B (Rev. 09/19) Judgment in Criminal Case
Sheet 2 — Imprisonment



DEFENDANT: DARRELL GILLESPIE
CASE NUMBER: 2:13-CR-00091-4

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Counts One, Two, Five, and Eleven: 121 months to run concurrently with one another; Count Ten: 120 months to run concurrently with Counts One, Two, Five, and Eleven; Count Fourteen: 60 months to run concurrently with Counts One, Two, Five, Ten, and Eleven; Count Six: 5 years (60 months) to be served consecutively with Counts One, Two, Five, Ten, Eleven, and Fourteen; Count Twelve: 7 years (84 months) to be served consecutively with all other counts, providing for a total term of 265 months.

☑ The court makes the following recommendations to the Bureau of Prisons:
The Defendant should be incarcerated in a facility as close to his home in Georgia as possible.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DARRELL GILLESPIE
CASE NUMBER: 2:13-CR-00091-4

## SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Five (5) years on Counts Six and Twelve to run concurrently with one another and three (3) years as to the remaining counts to run concurrently with Counts Six and Twelve.

## MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DARRELL GILLESPIE
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## STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

## U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DARRELL GILLESPIE
CASE NUMBER: 2:13-CR-00091-4

## ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

While on supervised release, the Defendant must not commit another federal, state, or local crime, must not possess a firearm or other dangerous device, and must not unlawfully possess a controlled substance. The Defendant must also comply with the standard terms and conditions of supervised release as recommended by the United States Sentencing Commission and as adopted by the United States District Court for the Southern District of West Virginia, including the special condition that the defendant shall participate in a program of testing, counseling, and treatment for drug and alcohol abuse as directed by the probation officer, until such time as the Defendant is released from the program by the probation officer. In addition, the Defendant shall comply with the Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3, as follows:

I) If the Defendant is unemployed, the probation officer may direct the Defendant to register and remain active with Workforce West Virginia;
2) The Defendant shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. The Defendant shall not use any method or device to evade a drug screen;
3) As directed by the probation officer, the Defendant will make co-payments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments; and
4) A term of community service is imposed on every Defendant on supervised release or probation. Fifty hours of community service is imposed on every Defendant for each year the Defendant is on supervised release or probation. The obligation for community service is waived if the Defendant remains fully employed or actively seeks such employment throughout the year.

DEFENDANT: DARRELL GILLESPIE
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## SPECIAL CONDITIONS OF SUPERVISION

1) The Defendant is not a resident of this district; therefore, the period of supervised release is to be administered by the district where the Defendant is a legal resident and/or the district where a suitable release plan is developed.
Justification: The probation officer recommends the above condition based on the Defendant's lack of ties to the Southern District of West Virginia and his desire to return to Georgia upon his release.

DEFENDANT: DARRELL GILLESPIE
CASE NUMBER: 2:13-CR-00091-4

# CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Restitution | Fine | AVAA Assessment* | JVTA Assessment** |
|---|---|---|---|---|---|
| **TOTALS** | $ 800.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 |

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

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss*** | Restitution Ordered | Priority or Percentage |
|---|---|---|---|

| | | |
|---|---|---|
| **TOTALS** | $ 0.00 | $ 0.00 |

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: DARRELL GILLESPIE
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# SCHEDULE OF PAYMENTS

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

**A** ☑ Lump sum payment of $ 800.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

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

**C** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

**D** ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** ☑ Special instructions regarding the payment of criminal monetary penalties:
If not paid immediately, the Defendant shall pay the special assessment while incarcerated through participation in the Inmate Financial Responsibility Program by paying quarterly installments of $25.00 each.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

| Case Number<br>Defendant and Co-Defendant Names<br>*(including defendant number)* | Total Amount | Joint and Several Amount | Corresponding Payee, if appropriate |
|---|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.