No. 22-5866

IN THE
SUPREME COURT OF THE
UNITED STATES

GREGORY A. MILTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

Mr. Gregory A. Milton
Pro se Petitioner
Reg. No. 04717-084
F.C.I. Otisville
Post Office Box 1000
Otisville, New York 10963

QUESTION PRESENTED

Whether the court of appeals' failure to adhere to this Court's repeated admonishment on the correct application of the COA standard requires this Court to grant petitioner a COA on his *Davis* and *Taylor* claims; or, in the alternative, GVR his *Davis*/*Taylor* claims following issuance of a COA by this Court for resolution of those claims in the first instance in the lower court.

ARGUMENT

The Respondent, United States seeks this Court to reject this Petitioner's request for a COA which is required in order for him to appeal, "his challenge to the classification of his Hobbs Act conviction as a crime of violence" as defined in 18 U.S.C. §924(c) (See Brief of the United States in Opposition to Petition for A Writ of Certiorari, p. 8; hereafter, "Resp. ___").

It is Respondent's position that, petitioner's "contention lacks merit[;]" (id.), however its stance flies in the face of this Court's repeated admonishment to lower courts on the correct standard to be applied when a habeas applicant seeks a COA. First, this Court has made abundantly clear, that a COA inquiry is not a determination on the merits. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003)("[A] COA determination requires an overview of the claims in the habeas petition and a general assessment of their merits"). Secondly, the liberal COA standard only requires a demonstration by the habeas applicant that his claims are debatable amongst reasonable jurist in accordance with §2253(c). See Buck v. Davis, 580 U.S. 100, 101 (2017)("At the COA stage, the only question is whether the applicant has shown that jurist could disagree with the district court's resolution of his constitutional claims or that jurist could conclude the issues presented are adequate to deserve encouragment to proceed further")(internal quotations and citations omitted). Finally, a habeas applicant seeking to obtain a COA is not required to demonstrate that he would win. See Miller-El, at p. 337 (stating that, "[i]t is consistent with §2253 that a COA will issue in some

instances where there is no certainty of ultimate relief [because] when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'")(quoting Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983); see also, Buck, supra (Justice Thomas, dissenting; joined by Justice Alito)(acknowledging that, "[a] court may grant a COA even if it might ultimately conclude that the underlying claim is mertiless, so long as the claim is debatable")(citing Miller-El, at p. 336).

Therefore, contrary to the Respondent's premise that "[t]he court of appeals' decision does not conflict with any decision of this Court...[because it] has repeatedly denied petitions for writs of certiorari challenging the classification of the Hobbs Act as a crime of violence" amounts to a material fallacy. (Resp. 8). This is because Respondent's position that this Court's denial of certiorari review on the question of whether completed Hobbs Act robbery is a crime of violence post-Taylor may still stand under the Categorical approach is debatable. (Resp. 10-11 & n. 5).[1] See United States v. Taylor, 596 U.S. ___, 142 S.Ct. 2015)(2022)(recognizing that in order "[t]o determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause,...[the Court] must apply a categorical approach").

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[1] The flaw in Respondent's premise is apparent when considering the recognition of "the settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits." United States v. Carver, 260 U.S. 482, 490 (1923); see also, e.g., Lawrence v. Chater, 516 U.S. 163, 191((1996)(Justice Scalia, dissenting, joined by Justice Thomas)("insist[ing] that [this Court's] denial of certiorari does not suggest a view on the merits")(citing Teague v. Lane and Singleton v. Commission).

In applying the categorical approach, it is important to note that under the principles of statutory construction, the Hobbs Act statute does not differentiate between a completed "robbery or extortion" or an attempt or conspiracy to commit a violation of the statute. See e.g., United States v. Skowronski, 968 F.2d. 242, 249 (2nd Cir. 1992)(stating that "Hobbs Act makes no distinction between attempt, conspiracy, and completed robbery").

Certainly, if Congress sought to expand these two elements to seperately exclude inchoate offenses establishing their own elements, as opposed to mere aspects of a Hobbs Act offense it would have "spoken in clear and definite language." See Scheidler v. NOW, Inc. 537 U.S. 393, 409 (2003)(quoting McNally v, United States, 483 U.S. 350, 359-60 (1987)). In fact, Congress's intent with respect to its revision of the Hobbs Act's underlying substantive scope arguably supports petitioner's contention. See Scheidler v. NOW II, 547 U.S. 9, 20 (2006)(stating that "the Reviser's notes indicate that linguistic changes to the Hobbs Act simply amount to 'change in phaseology and arrangement necessary to effect consolidation") (quoting H.R. Rep. No. 304, 80th Cong., ist Sess., A131 (1947)).

This Court has long held that 18 U.S.C. §1951(a) consist of "two essential elements of a Hobbs Act crime: interference with commerce, and [robbery or] extortion." Stirone v. United States, 361 U.S. 219, 257 (1960). This Court's expressed recognition that the Hobbs Act contains only two elements demonstrates that any attempt or conspiracy to violate the statute by "robbery or extortion" includes any "attempts or conspiracies" as a single element. See NOW II, supra at p. 14 & 20)("Congress revised the Hobbs Act's

language in 1948 as part of its general revision of the criminal code [it did] not intend[ ] to create new crimes but to recodify those then in existence")(quoting Morrisette v. United States, 347 U.S. 246, 269 n. 28 (1952)); see also, United States v. Robinson, 119 F.3d. 1205, 1212 (11th Cir. 1997)(stating that "[t]here are two elements in a Hobbs Act prosecution (1) robbery or act of extortion, or an attempt or conspiracy to rob or extort and (2) an interference with interstate commerce")(citing Stirone).

Significantly, prior to this Court's decisions in United Davis, 588 U.S. ____, 139 S.Ct. 2319 (2019), and United States v. Taylor, 596 U.S. ____, 142 S.Ct. 2015 (2022), any aspect of a Hobbs Act violation was considered a crime of violence and in violation of the statute. (See Petition for Writ of Certiorari, p. 10 hereafter, "Pet. for Cert,. p. ___"). Clearly, this proposition supports that it is debatable as to whether the Hobbs Act robbery element is indivisible and must be viewed as a single offense under the categorical approach—particularly after this Court's Taylor decision. See Taylor, 142 S.Ct. ____, n. 3 (acknowledging that "it is unclear whether the [Hobbs] Act's 'means' clause sets forth elements or merely list alternative ways a defendant may take or obtain property against the victim's will. If the latter is true, as some courts have held, a jury need unanimously conclude only that the defendant used one of the listed means, it need not agree on which one")(citing cases). This ambiguity in the statute should apply with equal force to the "robbery or extortion" elements in §1951(a), regardless of whether the Act is completed, attempted or conspiracy to commit a violation of the statute.

Considering the acknowledged ambiguity in the statute, arguably the rule-of-lenity would equally apply in the context of this Petitioner's Davis/Taylor claim. See United States v. Davis, at p. 775 (recognizing that "the rule of lenity's teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor"). Therefore, under the categorical approach, the least conduct of the offense in a Hobbs Act robbery crime would be conspiracy to commit the offense, with attempt being one rung up the statutory ladder; however, both of which are now not a crime of violence under Davis/Taylor. (See Pet. for Cert. p. 9). Thus, under the categorical approach Hobbs Act robbery does not align with §924(c)(3)(A), and a reasonable jurist could debate whether the crime of Hobbs Act robbery is divisible requiring the government to only prove to a jury the single element of "robbery or extortion" in a criminal prosecution. (id, pp. 12-13); see also, Taylor, at p. 2025 (asking "whether the elements of one federal law align with those prescribed in another")(emphasis mine).

Given the ambiguity in the "means" clause, and whether it list a defendant as alternatively violating the Hobbs Act robbery element the Respondent's argument that §1951(b)(1) "eliminates" any doubts the "robbery" element aligns with §924(c)(3)(A) is debatably incorrect. Hence, it naturally follows that a reasonable jurist can find debatable whether a completed Hobbs Act predicate may satisfy §924(c)'s element clause under this Court's categorical jurisprudence. This very point was expressed in the Fourth Circuit, when it stated, "we do not hold that a challenge such as Said's will never succeed when the defendant has been convicted of both a §924(c)

charge and a valid crime-of-violence predicate." United States v. Said, 26 F.4th 653, U.S. App. Lexis 4904 *17-18 (4th Cir. 2021) (stating "[s]uch a broad question is not before us, and another case with a different set of facts may well come out differently, as the Government agreed at oral arguments").

More importantly, even assuming without conceding that "[t]he district court correctly applied the modified categorical approach;" (Resp., 12), it is recognized as "simply a tool for implementing the categorical approach[.]" (See Pet. for Cert., Appx. F, p. 10) (citing cases).[2] In any event, the Respondent's position that this Petitioner is not entitled to a COA based on his general verdict claim i.e., the jury's reliance on a valid and invalid predicate is debatable. Because contrary to the Respondent's refusal to take due note of "the jury's obvious confusion;" (see Appx.F., p. 7), the record supports as a matter of law the jury rendered a general verdict which this Court has long held cannot stand. (See Pet. for Cert., p. 16; see also, Appx. F, p. 9 & Appx. R3, p. 4).

Clearly, Respondent's tacit concession that the unredacted indictment played a part in the jury's finding of guilt on Count 3; Resp. 13)(acknowledging that "even if the indictment suggested that petitioner's Section 924(c) conviction could rest on an attempt or conspiracy to commit Hobbs Act robbery, the jury instructions eli-

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[2] Respondent makes note that, "[a]t petitioner's invitation, the district court treated the Hobbs Act as creating divisible offenses for robbery; (Resp. 6), however, the record shows that Petitioner specifically requested the district court view the robbery element in the Hobbs Act as "indivisible." (See Appx. R1, p. 2).

minated that possibility"), arguably renders the district court's denial of Petitioner's Davis/Taylor claims debatable amongst reasonable jurist.

According to the standard applicable to the review of Shepard documents; (see Appx, R2, p. 5), the jury instructions alone could not defeat Petitioner's Davis/Taylor claims as proposed by Responden; (Resp. 13), given that the other Shepard documents support a contrary conclusion. (See Appx. R2, 9)(stating that "reviewing all the Shepard documents available in this case....the reliance on jury instructions alone cannot suffice to support the district court's decision on appellant's Davis claim"). Particularly when, as noted previously, a reasonable jurist would agree that when a jury renders a general verdict based on both vaild and invalid predicate offenses, a conviction cannot stand. (See Appx. F, p. 9) (citing cases); see also, e.g., United States v. Sorrell, U.S. Appx. Lexis 18266 *6 (6th Cir. June 30, 3022)(citing Black v. United States, 561 U.S. 465, 470 (2010)(quoting Yates v. United States)).

Furthermore, as the district court itself acknowledged, "Count Three plainly charge[d] actual Hobss Act robbery, [and] also charged that [petitioner]...did attempt and conspire to obstruct, delay and affect commerce by...robbery." United States v. Milton, U.S. Dist. Lexis 75808 *7 (W.D.Va. April 21, 2021); (id, *15)("the verdict form...simply ask the jury to find [petitioner] guilty or not guilty '[a]s charged in Count Three of the Indictment'"). Therefore, the fact that the jury was provided with an unredacted indictment which contained now invalid predicates based on two of this Court's decisions. And, two of the Shepard documents support

the jury rendered a general verdict; (see ECF 94-1—Third Superseding Indictment), see Appx R2, p. 6)(citing United States v. Barrington)(quoting United States v. Sanabria, 437 U.S. 54, 65-66 (1978)(stating "[t]he precise manner in which the indictment is drawn cannot be ignored").

Importantly, given the record in this case, it is obvious that the lower courts disregarded this Court's admonishment concerning issuance of a COA on Petitioner's Davis/Taylor claims. Thus, this Court should either grant petitioner a COA on his Davis/Taylor claims and apply the categorical approach; see McGee v. McFadden, 139 S.Ct. 2608 (20[illegible])(Justice Sotomayer, dissenting from denial of certiorari)(stating that "[u]nless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down"). Or, in the alternative, GVR the matter to the lower court after granting a COA and allow the lower court to review this Petitioner's Davis/Taylor claims in the first instance. See United States v. Grzegorczyk, 142 S.Ct. 2580 (2022)(Justice Sotomayor, dissenting from the denial of a grant, vacate and remand order, joined by Justice Breyer, Justice Kagan and Justice Gorsuch)(recognizing that "[i]n the modern era, th[is] Court has explained that a GVR order may be appropriate even where teh Solicitor General may not concede, or the Court may not perceive, an absolute certainty that the judgment would be different on remand").

In this case though, an important question of the reach and scope of a federal criminal statute is presented based on a retroactive change in law. Thus, the underlying question of law presented herein i.e., whether this Court's intervening decisions in Davis/Taylor which changed the legal landscape for what constitutes

a valid crime of violence predicate for purposes of §924(c) should be resolved.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Gregory A. Milton

Mr. Gregory A. Milton
Pro se Petitioner
Reg. No. 04717-084
F.C.I. Otisville
Post Office Box 1000
Otisville, New York 10963

APPENDIX R1

Mr. Gregory A. Milton
Reg. No. 04717-084
F.C.I. Ray Brook
Post Office Box 900
Ray Brook, New York 12977

R1

July 8, 2020

Chambers of the Honorable
Judge Michael F. Urbanski
United States District Court
Western District of Virginia
116 N. N. Main Street
Harrisburg, Virginia 22801

Re: United States v. Gregory A. Milton, Case No. 95-Cr-70074 (MFU)

Dear Honorable Judge Urbanski:

Please find enclosed a synopsis of several issues which are pending before you in the above named case, two of which have been identified as being "pro se" by both my court-appointed attorney, Ms. lisa M. Lorish and the AUSA Jennifer Bockhorst in the pleadings and response filed by them.

Presently, I am unaware as to when the reply is due to be filed by Ms. Lorish, and am awaiting a legal call between her and I to discuss the filing of the same. Therefore, to preserve my opportunity to file my pro se reply, I am submitting the enclosed synopsis until I am able to fully present my pro se arguments to this Court. I have provided Ms. Lorish with a copy of the enclosed so that she is fully aware of my intent.

Thank your Honor for his time and attention to this very important matter, and I pray that you and your loved ones are safe during this unprecedented time in our country's history.

Respectfully yours,

Gregory A. Milton

Mr. Gregory A. Milton
Pro se Movant

enc.

The government's argument that the §924(c) conviction in Count Four remains valid is contrary to the trial record and law.

- The government acknowledges that "Count Three included both attempt and conspiracy in the same count, and the jury verdict did not ask the jury to specific the grounds of conviction." (See Government's §2255 Response, p. 9).

- This acknowledgement demonstrates that the jury returned a general verdict, and reveals that it cannot be said to have found unanimously which of the three predicate offenses its verdict was based i.e., Hobbs Act robbery, Attempted Hobbs Act robbery, or Conspiracy to commit Hobbs Act robbery. In fact, during deliberations the jury requested to be provided with "a copy of the instructions and the items under each count." (See Attachment 1).

- In response to the jury's inquiry, the Court noted that the jury was provided with "a copy of the indictment" which charged movant in Count Three with Hobbs Act robbery, Attempted Hobbs Act robbery, and Conspiracy to commit Hobbs Act robbery—the latter of which has been invalidated as a predicate offense for purposes of §924(c), The court elected to "reinstruct [the jury] on the elements as to each of the counts[;]" (id.), and then instructed the jury for a second time that movant was "charged in Count Four with knowingly using a firearm during and in relation to the robbery alleged in count three" without specifying whether the reference to "robbery" was an attempt, conspiracy, or the actual commission of that offense. (See Attachments 2 & 3).

- Although the Hobbs Act is divisible, distinguishing robbery from extortion—it is indivisible when it comes to robbery, and creates separate crimes of robbery, attempted robbery or conspiracy to rob therefore making it necessary for a jury to find unanimously which violation of 18 U.S.C. §1951(a) movant was guilty or not guilty of violating for purposes of §924(c).

- It would appear that the jury in movant's case was confused as to what the indictment it was provided with charged, and the instruction given by the court. (See Attachment 1). Moreover, the jury appears to have been further confused given that the conspiracy charge was "fully alleged and incorporated" into Count Three, which included robbery as part and parcel of the conspiracy under ¶4. In fact, counsel sought a multiple conspiracy instruction to be given to the jury however the record shows none was given. (See Attachment 4).

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- Based on the record, the government cannot now avoid the effect of the general verdict made by the jury concerning Count Three, and presume that the jury found unanimously that movant was guilty "of a completed robbery;" (Gov't Resp., p. 10). Likewise, the government cannot disregard "the scope of what was proven in Count Three." (Id., p.11). Especially when, it was the government which submitted the indictment to the jury and did not seek a special verdict establishing that the jury found beyond a reasonable doubt the specific predicate offense in Count Three was "a completed robbery" and could support the §924(c) conviction in Count Four in order to support its position that movant's §924(c) remains valid in light of Davis and Simms.

- Additionally, the trial court's overall charge to the jury mentioned "conspiracy" over sixty (60) times, and the indictment provided to the jury included conspiracy to commit Hobbs Act robbery, as well as linked it to the "[i]nterstate trafficking of narcotics" as a necessary element in Count Three. It now would be extremely difficult for the government to avoid the general verdict and speculate as to it being limited to simply a completed Hobbs Act robbery as opposed to the now invalidated residual clause in §924(c), which can no longer apply to conspiracy to commit a Hobbs Act robbery.

- This is because the government's attempt to read the language in Count Three as narrowing the Hobbs Act robbery offense, negating the general verdict which includes the now invalidated Hobbs Act conspiracy allegation in the third superseding indictment should be rejected. (See Gov't Resp., pp. 10-11). Given the record shows that a general verdict was rendered on Count Three in movant's case, the Fourth Circuit decision in Mathis cannot trump its invalidation of Hobbs Act conspiracy in Simms by reliance on the §924(c) count which was predicted on Count Three in movant's case.

The government's failure to squarely address movant's statutory challenge to the Federal Three Strikes Law under both Johnson/Dimaya/Davis decisions and the plain language of the §3559(c)(2)(F) is totally in error.

- The government attempts to rely on a procedural default to escape addressing movant's challenge to his mandatory life sentence for Count Three (Hobbs Act conviction) is misplaced. Clearly, movant initially sought to challenge the imposition of his mandatory life sentence in his pro se successive §2255 which the Fourth Circuit granted him permission to file. (See Attachment 5); (see also, Attachment 6).

Banister v. Davis, 590 U.S. ___, 140 S.Ct. ___, 207 L.ed.2d. 58 (2020). Moreover, appellant hereby incorporates all the previous arguments made in support of his COA request outlined in his Rule 59(e) and Rule 52(b) motions. (See J.A., pp. 24-35).

R2

ISSUE TWO:

> This Court should order full briefing in order to review the district court's error in denying this appellant's constitutional claim under Davis, Simms, Taylor.

SUPPORTING FACTS AND ARGUMENTS:

In July 2016, appellant was granted authorization by this Court to file a second or successive motion under §2255, which challenged his conviction and sentence after a jury found him guilty of violating Hobbs Act robbery in Count Three of his Third Superseding Indictment, and of Use of a Firearm during and in relation to the Hobbs Act violation in Count Four.

After appellant's "subsequent §2255 petition was stayed for a period of time as the case law following Johnson applicable to convictions under §924(c) developed[;]" Milton, LX 75808 * 1, the district court ultimately determined that because the jury's verdict under Count Three "qualifie[d] as a crime of violence under the force clause of §924(c), his motion to set aside his conviction on Count Four must fail." Id., * 22. However, "reasonable jurists could find the district court's assessment of th[is] constitutional claim debatable or wrong[;]" Slack v. McDaniel, 529 U.S. 473, 484 (2000), because the jury in appellant's case rendered a general verdict as to Count Three—Hobbs Act robbery. See United States v. Najjar, 300 F.3d. 466, 480 n. 3 (4th Cir. 2002)(explaining that "[a] general ver-

dict should be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected"); see also, e.g., Board of County Supervisors v. Scott & York, Inc., 763 F.2d. 176, 177 (4th Cir. 1985)(recognizing that a court "cannot distill special findings from a general verdict and to do so 'would intrude on the independent role of the jury as much as a court's unilateral amendment of its verdict"); and United States v. Raia, 993 F.3d. 185, 195 (3rd Cir. 2021)(stating "[w]hen a case involves a general verdict, establishing that the verdict necessarily determined any particular issue is extremely difficult")(quoting United States v. Bailin, 977 F.2d. 270 (7th Cir. 1992)).

Contrary to the district court's conclusion that appellant "was convicted of Hobbs Act robbery alone" and not attempt or conspiracy to commit Hobbs Act robbery, cannot rule the day once the totality of the evidence is considered. Milton, LX 75808 * 16. Especially given, this circuit has long held that in the context of collateral proceedings under §2255, it is the burden on the defendant to prove his entitlement to relief by a preponderance of the evidence. See United States v. Basham, 789 F.3d. 358, 379 (4th Cir.2015)(applying preponderance of evidence standard to §2255 claim); see also Miller, v. United States, 261 F.2d. 546, 547 (4th Cir. 1958)(same).

Under this standard, the evidence supports that appellant is entitled to relief under Davis, Simms, and Taylor contrary to the district court's conclusion that "Count Three of the Third Superseding Indictment makes clear that [appellant] was charged with actual Hobbs Act robbery." Milton, LX 75808 * 3. Clearly, the district court acknowledged as it must, that Count Three of the indictment provided

to the jury that appellant was charged with "attempt and conspire" to violate the Hobbs Act along with actual robbery.[3]

Thus, given the jury was provided with all three predicates in the unredacted indictment, this inadvertant error confused the jury due to the discrepancy between the indictment and jury instructions. This is apparent from the relevant exchange between the trial court and the jury, clearly supporting appellant's position of tangible jury confusion. However, it is apparent that the district court did not consider this crucial evidence in rendering its decision when the jury demonstrated its confusion, where it initially stated that:

> "Ladies and gentlemen, I have a note from you. I'll do a little interpreting of that. The note says we need a copy of the instructions and the items under each count. Let me try to interpret what you've asked here and see it I'm correct. It is my understanding we sent a copy of the indictment back with you, so you have a copy of the indictment. What you are asking me, as I understand it, is to re-instruct you on the elements as to each of the counts, and I will do that.

(see J.A., pp. 12 & 36)(Emphasis mine). Then prior to the jury returning its verdict, the jury again expressed its confusion on the record, stating that:

> "Ladies and gentlemen, I have a question from you that says, to the effect, we do not understand when we write our verdict on count one are we, one stating defendant is guilty/not guilty of all six points listed on the grand jury indictment; or two, just to the three elements under conspiracy?"

(See J.A. p. 12; p. 37-38)(Emphasis mine).

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[3] Even though, when instructing the jury the trial court redacted the terms "attempt and conspir[acy]", it is now known that the court and parties were apparently unaware that the jury was provided with an unredacted version of the indictment which solidifies the Davis error. (See ECF No. 370 p. 9)(citing ECF Nos. 94 & 164).

Obviously, these jury questions appear to demonstrate an emphasis on the conspiracy in Count One, which alleged in paragraph "4. That during the course of the conspiracy...[appellant and others] ...robbed [the victim]." (See ECF No. 94). Furthermore, the Third Superseding Indictment stated that, "The grand jury charges: 1. That Paragraphs 2 and 4 of Count One of this Indictment is fully realleged and incorporated into this Count Three of this Indictment." (Id.);[4] Equally important, is the fact that the trial court's instructions on Count Three ties directly back into the drug charge in Count One. (See ECF No. 383-1, p. 9)("Interstate trafficking in narcotics is interstate commere").

Consequently, in denying appellant's Davis claim, the district court reasoned that it was "not convinced from an examination of all of the documents approved for review...that [appellant] was convicted of attempt and conspiracy in addition to actual Hobbs Act robbery." Milton, LX 75808 * 4 (internal citations omitted).

However, contrary to the district court's reasoning the jury instructions which are taken as a whole; (see ECF No. 383-1, p. 1), as well as the other relevant Shepard documents demonstrate by a preponderance of the evidence that it was error for the district court to have made such a conclusive finding. See United States v. Washington, 629 F.3d. 403, 410 (4th Cir. 2011)(applying a preponderance of the evidence standard in modified categorical cases to district court's evaluation of Shepard documents).

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[4] Critically, on Count Four of which appellant's Davis claim rest, the Third Superseding Indictment states, "[t]hat Count Three of this indictment is fully realleged and incorporated into this Count Four." (See ECF No. 94)(Emphasis mine). See e.g., United States v. Howard, 271 F.Supp.2d. 79, 89 (D.D.C. 2009)(recognizing that "if one count incorporates paragraphs from another count, the incorporated paragraph too may be considered in determining whether a count is properly [charged as] an offense").

First of all, in reviewing all the Shepard documents available in this case i.e., the unredacted indictment, jury instructions and verdict form; see Omargharib v. Holder, 775 F.3d. 192 n. 10 (4th Cir. 2014), the reliance on jury instructions alone cannot suffice to support the district court's decision on appellant's Davis claim. See Milton, LX 75808 * 17 (stating that "the jury instructions conclusively establish that [appellant] was convicted only of Hobbs Act robbery as no argument was made nor instructions given to the jury as to attempt or conspiracy to violate the Hobbs Act"). Secondly, when the jury instructions are taken as a whole the tangible risk of confusion by the jury becomes apparent due to the its exposure to the unredacted indictment which contained the term "conspiracy" and the trial court's instructions with regard to that term in reference to Count One. (See ECF No. 383-1, pp.6-7).

It is beyond question, that the jury rendered a general verdict in appellant's case, finding him guilty of Count Three which charged three separate predictes i.e., actual, attempt and conspiracy to violate of the Hobbs Act. (See ECF Nos. 94 & 164). Moreover, the jury's inquiry requesting "the items under each court" and later whether its verdict as to whether appellant was "guilty/not guilty of all six points listed on the grand jury indictment" as to the conspiracy, more than demonstrates the jury confusion given its exposure to the "extrinsic information" contained in the unredacted indictment. See e.g., United States v. Siegleman, 467 F.Supp.2d. 1253, 1276 (N.D.Ala. 2006)(finding that unredacted indictment necessarily constitute extrinsic information); see also, United States v. Coleman, 552 F.3d. 853, 857 (D.C. Cir. 2009)(exposure to unredacted indictment reversible error); United States v. Walker, 557 F.2d. 741 (10th Cir. 1977)

(reversing and remanding case because of the potential for jury confusion created by the conflicting language in the indictment and the jury instructions).

The district court appears to dismiss as irrelevant that the jury was erroneously provided with the unredacted indictment which charged "attempt and conspir[acy]" in reference to the Hobbs Act charge, thus ignoring the affect this error had on the jury's general verdict. See Milton, LX 75808 * 9 (stating that "in reading Count Three, the court did not read to the jury the 'attempt and conspire to obstruct language in Count Three"). However, it is now apparent that the jury had this information squarely placed before it in the unredacted indictment. Thus, at this late hour it is not enough to simply acknowledge that the jury was provided this extrinsic information. Milton, LX 75808 * 15 ("Count Three of the indictment includes attempt and conspiracy language"). What is of import is the fact that in this approved Shepard document the jury was exposed to this extrinsic information. And more importantly, is the fact that the jury rendered a general verdict making it impossible to determine "not what might have been done but by what in fact, was done." See United States v. Barrington, 662 F.2d. 1046, 1050 (4th Cir. 1981)("Legal consequences ordinarily flow from what has actually happened, not from what [the jury] might have done from the advantage of hindsight.....[t]he precise manner in which an indictment is drawn cannot be ignored")(quoting United States v. Sanabria, 437 U.S. 54, 65-66 (1978)).

Therefore, an "examination of all the documents approved for review by the Supreme Court[;]" Milton, LX 75808 * 9, i.e., the unredacted indictment, jury instructions, and verdict form, two of

which definitely weighed in favor of granting appellant's Davis claim under the appropriate preponderance standard leans towards reversal of the district court's ruling. See Washington, supra. Since the Shepard documents arguably establish that the jury more likely than not found appellant guilty of the invalid predicate offenses listed in the unredacted indictment. See United States v. Sanchez-Ramirez, 570 F.3d. 75 n. 7 (1st Cir. 2009)(reasoning that "because the documents permissibly reviewed under Shepard [ ] do not exclude the possibility that the [appellant] was convicted of [attempted or conspiracy to violated the Hobbs Act]" there is a reasonable probability that the jury based its verdict on an invalid predicate). This is because notwithstanding that the jury instructions did not mention "attempt or conspiracy," the plain language of the unredacted indictment (coupled with the general verdict supported by the verdict form) makes clear that these offenses were before the jury when it considered appellant's guilt on Count Three.

Significantly, the duplicity in Count Three of the Third Superseding Indictment; see United States v. Burns, 990 F.2d. 1426, 1438 (4th Cir. 1993)(stating that "duplicity is the joining in a single count of two or more distinct and separate offenses")(internal quotation omitted), made it impossible to determine which of the distinct predicate offenses the jury found in this case, contrary to the district court's conclusion. See In re Cannon, 931 F.3d. 1236, 1243 (11th Cir. 2019); see also, United States v. Runyon, 994 F.3d. 192, 202 (4th Cir. 2021)(stating that a court "review[s] the indictment which [defendant] was convicted and the jury instructions leading up to the conviction to determine the actual crime

for which [defendant] was convicted").[5]

Thus, considering the relevant Shepard documents with the trial record demonstrating there was a tangible indication of jury confusion, based on its asking pointed questions concerning the instructions and the conspiracy; (see J.A. , p. 12), and being directed to the fact it was given "a copy of indictment" leans strongly in the favor that the district court erred in denying appellant's Davis claim. See United States v. Mathis, 932 F.3d. 242, 264 (4th Cir. 2019)(stating the court "review[s] certain underlying documents, including the indictment, to determine what crime, with what elements, formed the basis of a defendant's conviction"). Especially since, even in applying the modified categorical approach, a court cannot look to the defendant's actual conduct. See Mathis v. United States, 136 S.Ct. 2243, 2249 (2018).

Under the circumstances, this Court should grant a COA in order to determine whether the district court clearly erred in placing undue emphasis on the jury instructions in appellant's case, when there clearly were other relevant Shepard documents that supported a contrary conclusion. Especially when, taking "all" the relevant Shepard documents in full consideration, demonstrates a grave ambiguity in what predicate offense the jury found appellant violated in this case based on the Davis, Simms, and Taylor errors.

This Court has previously granted a COA on an identical issue involving an attempted Hobbs Act robbery offense in Taylor, supra

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[5] The Runyon Court's use of the conjunction "and" in identifying these two Shepard documents would presumably demonstrate that they stand in equipoise, making the deciding factor in this case the verdict form which "did not specify the basis of conviction" setting forth a general verdict. See United States v. Berry, 2020 U.S. Dist. Lexis 20380 (W.D.Va. February 6, 2020).

(see Appeal No. 19-7616, Doc. 16 (4th Cir. February 12, 2020). However, in deciding that attempted Hobbs Act robbery could not support a §924(c) offense; Taylor, 979 F.3d. at p. 210 ("we hold that attempted Hobbs Act robbery is not 'catergorically' a 'crime of violence'"), the Taylor Court did not reach the issue of whether an indictment which charged a valid and invalid predicate could similarly support a §924(c) offense based on a general verdict as in the instance case.[6]

There can be little doubt that a grave ambiguity exist concerning the unredacted indictment which charged "attempt and conspiracy" and the verdict form which amounts to a general verdict. (See J.A., p.39). Thus, the fact that the jury instructions did not include the "attempt and conspiracy" language in appellant's case this adds no clarity resolving the error or satisfies Shepard's demand for certainty. Shepard, 544 U.S. at p. 21.

In sum, this Court should grant appellant a COA, reverse and remand his case to the district court with instructions to vacate Count Four; or appoint counsel and order full briefing to resolve the question of whether Davis, Simms, and Taylor applies to the circumstances of his particular situation given the grave ambiguity demonstrated by the Shepard approved documents.

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[6] Even though, the Supreme Court has granted certiorari review in United States v. Taylor, 2021 U.S. Lexis 3582 (July 2, 2021), even if this Court's decision was to be reversed that would not cure the error in appellant's case. Especially given, the unredacted indictment also charged him with conspiracy to violate the Hobbs Act, and the verdict form is completely silent on which predicate in Count Three served at the basis for his §924(c) conviction in Count Four.

APPENDIX R3

JSN

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

GREGORY MILTON,

Appellant.

Appeal No. 21-7316

R3

MOTION TO SUPPLEMENT ISSUE TWO
OF APPELLANT'S INFORMAL BRIEF

Comes Now, Gregory Milton, the undersigned Pro se Appellant, and submits this Supplemental Motion to Issue Two of his Informal Brief, in light of United States v. Said, ___ F.4th ___; Lexis 4904 (February 23, 2022) and United States v. Crawley, 2 F.4th 257; Lexis 18736 (4th. Cir. 2021). In support of this Court entertaining this motion and granting the ultimate relief sort herein, appellant states as follows based in law and fact.

Pending before this Court is appellant's informal brief seeking review of the denial of his conviction under §924(c) based on Davis, Simms and Taylor. (See Informal Brief, Doc. 6, p. 11; hereafter, "Inf. Br., p. ___").[1]

In Said, supra this Court essentially found that he did not meet his burden of showing that the error in his case pertaining to the jury instructions "met the Brecht harmlessness standard."

[1] A COA has been sought on this matter, and in light of Said and Crawley, the arguments raised by appellant further supports that a reasonable jurist would find the district court's ruling debatable and the issue(s) in his case are adequate to deserve encouragement to proceed further. See Miller-El v. Cockrell, 537 U.S. 322 (2003)

Said, Lexis 4094 *2. Significantly, the Brecht standard was not applied in this appellant's case, and arguably is inapplicable because this Court reviews de novo legal conclusions in the denial of a §2255 motion, and the district court's factual findings for clear error. Id., *12 (quoting United States v. Roane, 378 F.3d. 382, 395 (4th Cir. 2004).

In this instance, the district court erred in concluding based on the modified categorical approach, that:

> "because Milton's jury was not instructed on either attempt or conspiracy to commit Hobbs Act robbery, the Court finds that his conviction on Count Three necessarily **included only actual Hobbs Act robbery**;"

United States v. Milton, U.S. Dist. Lexis 75808 *21. (Emphasis mine). This finding represents legal error since the record in this case does not support the district court's conclusion.

Specifically, the Court premised its conclusion on the fact that the jury was not instructed on "attempt or conspiracy in relation to Count Three," yet it acknowledges the jury was presented with these alternative charges. Milton, supra at *7 ("While Count Three plainly charges actual Hobbs Act robbery, **in also charged that Milton and others did 'attempt and conspire to obstruct, delay and affect commerce...by robbery**")(Emphasis mine). Thus, as this Court has made clear in Said, "a challenge such as Said's [may] succeed when the defendant has been convicted of both a §924(c) charge and a valid crime of violence predicate." Said at *23.[2]

[2] At oral arguments, Honorable Judge Keenan posed the question of whether a defendant could "ever show actual prejudice after there has been a conviction on a valid predicate?" In response, the government stated, "I don't think that means that defendants won't be able to do it in other cases, when a defendant is convicted of an underlying predicate and that predicate was accomplished with a firearm[.]" (See Oral Arg. at 40:08-41:40).

Therefore, even assuming that this Court begins its review in this case with the predicate convictions, as it did in Said, it is clear appellant "was charged with and the jury found him guilty of both valid and invalid predicates[;]" Said, at *10, however after that point appellant's and the Said case diverges. See Milton, at *7, supra. This is because Said was convicted of seven separate counts containing both valid and invalid predicate crimes of violence; whereas appellant was convicted of a single count which contained both a valid and now under Davis and Taylor, two invalid predicates.

Notwithstanding, that this Court has stated, "a §924(c) conviction may stand even if the jury based its verdict on an invalid predicate, so long as the jury also relied on a valid predicate;" Said, at *11 (citing United States v. Hare, 820 F.3d. 93 (4th Cir. 2016) and United States v. Crawley, 2 F.4th 257 (4th Cir. 2021), establishment of this principle cannot overrule decades of law applied to general verdicts. (See Inf. Br., pp. 11-12)(citing United States v. Najjar, 300 F.3d. 486 (4th Cir. 2002) and other cases); see also, McMellon v. United States, 387 F.3d. 329, 333 (4th cir. 2004)(noting that where two panels conflict, we must "follow the earlier of the conflicting opinions").

Furthermore, the principle the Hare Court espoused is based on a jury finding where the use of a special verdict form was employed, a procedure that was absent from appellant's case. See Hare, supra at pp. 105-06 (stating that "[t]he special verdict form clearly shows that the jury found appellant's guilt of possessing a firearm in furtherance of both [a crime of violence and a drug trafficking crime]").

Following this principle, the Crawley Court held it was permitted to determine the factual basis of defendant's guilty plea because it included both a valid and invalid predicate by "reading two critical record documents" in which he admitted facts necessary to sustain his §924(c) offense." Crawley, supra at Lexis *1). However, in this appellant's case, as the district court notes;

> "the verdict form did not [separate] Count Three into actual Hobbs Act robbery, attempt or conspiracy. Rather, it simply asked the jury to find Milton guilty or not guilty '[a]s charged in Count Three of the Indictment. ECF. No. 162."

Milton, at *15.

This is not surprising, and actual weighs in favor of appellant because it indisputably supports the jury rendered a general verdict, that makes "it impossible to tell which ground the jury [had] selected" in his case. See Hare, supra (quoting Najjar). Thus, the district court's reliance on three points to support its ruling is clearly in error under a categorical analysis.[3] See United States v. Runyon, ___ F.3d. ___; U.S. App. Lexis 41425 *9-10 (4th Cir. December 23, 2020)(applying the categorical approach by considering "the statutory definition of the offense by its elements and fact of conviction, without considering the actual facts supporting conviction.")(citing cases).

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[3] The district court reasoned that because 1) "in reading Count Three, [the trial court] did not read to the jury the 'attempt and conspire to obstruct' [or delay] language contained in Count Three[;]" 2) "the [trial] court also did not mention attempt or conspiracy in outlining the elements of Count Three to the jury[;]" and 3) "the jury...note during deliberations [was] interpreted as a request to re-instruct [the jury] on the elements as to each of the counts[.]" Milton, at *9-11.

As the district court recognized in appellant's case, "the question to be answered was whether [he] was convicted of attempted Hobbs Act robbery or conspiracy to engage in Hobbs Act robbery." Milton, at *15. However, because Hobbs Act traditionally is comprised of only two elements, at the time of appellant's conviction it is impossible to tell which Hobbs Act offense the jury found appellant committed, since it was presented with all three versions of the crime in a single count. See United States v. Williams, 342 F.3d. 350, 353 (4th Cir. 2003); see also, e.g., United States v. Robinson, 119 F.3d. 1205, 1212 (5th Cir. 1997)("There thus are two elements in a Hobbs Act prosecution (1) a robbery or act of extortion, or and attempt or conspiracy to rob or extort and (2) an interference with interstate commerce")(citing Stirone v. United States, 361 U.S. 212, 218 (1960).

Given the fact that the Hobbs Act statute at the time of appellant's conviction only "set out a single (or 'indivisible') set of elements to define a single crime" this Court should apply the categorical approach. Mathis v. United States, 136 S.Ct. 2243, 2248 (2016). In applying the categorical approach, this Court should look to the least of the now separate offenses in the Hobbs Act, and thereby reverse the §2255 Court's denial of appellant's Davis and Taylor claims then remand the case with instructions to dismiss Count Four. This is because in reviewing the Davis/Taylor error, the §2255 Court should have applied the preponderance of the evidence standard. (See Inf. Br., p. 14).

Moreover, even if the §2255 Court correctly applied the modified categorical approach, the result considering the record in this case would not fundamentally alter the appropriate outcome i.e.,

reversal of the §2255 Court's denial of appellant's Davis/Taylor claims, remanding the case with instructions to dismiss Count Four. Especially since, such a result is appropriate under either approach because the §2255 Court erred in denying appellant's retroactive Davis and Taylor claims on collateral review. Mathis, supra at p. 2249 (describing the modified categorical approach as an aid for determining the crime and elements defendant was convicted of committing).

Viewing the reasoning that the §2255 Court relied on in support of denial of this appellant's Davis and Taylor claims is contrary to the record. Especially considering, that when the §2255 Court reviewed the Shepard documents—which are similarly reviewed under the preponderance of the evidence standard; (see Inf. Br. p. 13)—it acknowledged as it must that "Count Three of the indictment **include**[d] attempt and conspiracy language[.]" Milton, *15 (Emphasis mine). Thus, even though the §2255 Court reasoned that "in reading Count Three, the [trial] court did not read to the jury the 'and attempt and conspire to obstruct' language in Count Three [since] [i]t was omitted." Id., at *10. The fact that the jury was provided with an unredacted version of the indictment which contained the omitted language, effectively neutralized the earlier reading by confusing the jury.

Likewise, when the §2255 Court noted that the trial court "also did not mention attempt or conspiracy in outlining the elements of Count Three to the jury[;]" thus this arguably could only add to the jury's confusion. Id., at *10. Particularly when, in originally instructing the jury, the trial court read the indictment omitting

"attempt and conspiracy." Thus, the absence of these aspects (and now elements) of the Hobbs Act offense obviously left the jury further confused once the trial court had referred them to the indictment when reinstructing the jury following its initial note. The record is clear that the jury's first note sought both "a copy of the instructions and the items under each count[,]" the latter of which supports the jury's concern with the language in the unredacted indictment. (See Inf. Br., p. 13).

Lastly, the most significant point was actually acknowledged by the §2255 Court referring to the fact that the jury sent a note during its deliberations. Milton, at *11. However, the §2255 Court paraphrasing the jury's note limited its effectiveness because it was simply focused on the jury's request to be "re-instruct[ed] on the elements as to each of the counts[;]" while disregarding the fact that the trial court clearly pointed the jury's attention to the unredacted indictment in its determining the exact offense appellant was found guilty of in Count Three. (See Inf. Br., p. 13).

This is particularly significant because when the trial court instructed the jury it initially omitted the "attempt and conspire language" but then provided it with an unredacted "copy of the indictment" which it directed the jury back to which contained the exact omitted language.[4] A reasonable jurist reviewing this record

[4] The §2255 Court's attempt to negate this obvious error concerning the jurors being provided with an unredacted copy of the indictment based on a general instruction "that the indictment is not evidence" is unavailing. Milton, at *9 & n. 5. Especially considering, it attempts in the same vain to rely on the government's closing arguments in its ruling when the same general instruction applies to "statements of counsel" in closing. See United States v. Runyon, 707 F.3d. 475, 516 (4th Cir. 2013).

would certainly find the §2255 Court's resolution of appellant's Davis and Taylor claims debatable, even in light of this Court's rulings in Said and Crawley, based on the facts of his case. This is because the fact that the jury sent out a second note during its deliberations expressing it did not "understand" given the "six points listed on the grand jury indictment" which clearly referred to the other counts. (See Inf. Br., p. 13).

Obviously, the fact that "the first paragraph of Count Four state[d] that 'Count Three of this indictment is fully realleged and incorporated into [ ] Count Four of the indictment" recognizably raised the jury eyebrows. Interestingly though, is the fact that the §2255 Court spoke to this point, but made no mention of the fact that the indictment similarly made clear that "[p]aragraph 2 and 4 of Count One of this Indictment is fully realleged and incorporated into [ ] Count Three of th[e] Indictment." (see Inf. Br., p. 14).

Clearly, given all the counts of the indictment which appellant was convicted of by the jury were intricately intertwined, and with it being provided with an unredacted copy of the indictment caused the jury to be confused. This is the only logicial conclusion, and one which renders the conviction of Count Four void because it is not based on a valid predicate specifically found by a unanimous jury premised on Davis and Taylor.

In sum, this Court should reverse the §2255 Court's denial of appellant's Davis and Taylor claims, and remand to the district court with instructions to dismiss Count Four.

Respectfully submitted,

Gregory Milton

Mr. Gregory Milton
Pro se Appellant
Reg. No. 04717-084
F.C.I. Ray Brook
Post Office Box 900
Ray Brook, New York 12977

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a true and complete copy of the foregoing has been given to prison officials for mailing, first class postage prepaid, and sent to: Office of the U.S. Attorney for the Western District of Virginia located at 180 West Main Street, Abingdon, Virginia 24210.

On this 15 day of April, 2022, pursuant to 28 U.S.C. §1746.

Gregory Milton

Mr. Gregory Milton
Pro se Appellant