

No. 22-

IN THE
Supreme Court of the United States

BYRON KEITH HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GEORGE E. CRUMP, III
Counsel of Record
P.O. Box 1523
Rockingham, NC 28380
(910) 997-5544
georgecrump@bellsouth.net

Counsel for the Petitioner



QUESTION PRESENTED

Must a defendant be informed at the Rule 11 plea colloquy of a factual basis to support the defendant's plea of guilty before the court can accept the defendant's plea of guilty as freely and voluntarily made? If so, then the petitioner herein had the automatic right to withdraw his plea of guilty pursuant to Fed. R. Crim. P 11 (d)(1) because he was not informed in court of a factual basis until sentencing.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

United States of America v. Byron Keith Howard, Nos. 20-4264 and 20-4273, Fourth Circuit Court of Appeals. Judgment entered March 23, 2023.

United States of America v. Byron Keith Howard, No. 18CR380-1, US District Court for the Middle District of North Carolina. Judgment entered March 26, 2020.

United States of America v. Byron Keith Howard, No. 19 CR 491-1, US District Court for the Middle District of North Carolina. Judgment entered March 26, 2020.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	.i
LIST OF PARTIES.....	ii
STATEMENT OF RELATED CASES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND FEDERAL STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	5
<p>Article VI, United States Constitution guarantees that the accused has the right to be informed both of the nature and cause of the accusation against him.</p> <p>The question presented is an important question of federal law because district courts frequently defer a finding of a factual basis until sentencing.</p> <p>The answer to the question presented determines whether the petitioner had an automatic right under Fed. R. Crim. P. 11 (d)(1) to withdraw his plea of guilty.</p>	
CONCLUSION.....	11

APPENDIX:

Opinion of The United States Court of Appeals for the Fourth Circuit Re: Affirming district court judgments entered March 23, 2023.....	1a
Deferred Finding of Factual Basis by District Court at change of plea hearing 1:19CR491-1	9a
Finding of District Court of a Factual Basis at sentencing hearing 1:19CR491-1	13a
Fed. R. Crim. P 11	15a

TABLE OF AUTHORITIES

Cases

<u>Boykin v. Alabama</u> ,	
395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).....	6
<u>North Carolina v. Alford</u> ,	
400 U.S. 25, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).....	7
<u>United States v. Battle</u> ,	
499 F.3d 315 (4 th Cir. 2007)	11
<u>United States v. Ketchum</u> ,	
550 F.3d 363 (4 th Cir. 2008)	10, 11
<u>United States v. Martinez</u> ,	
277 F. 3d 517 (4 th Cir. 2002)	10

Constitutional Provisions

United States Constitution, Amendment VI	2, 6, 7, 10
--	-------------

Statutes

18 U.S.C. § 922 (g)(1)	3
18 U.S.C. § 922 (j)	1, 3
18 U.S.C. § 924 (a)(2).....	1, 3
18 U.S.C. § 924(C)(1)(A) (i)	3
18 U.S.C. § 3231.....	2
18 U.S.C. § 3742(a)	2
21 U.S.C. § 841 (a)(1).....	1, 3
21 U.S.C. § 841(b)(1)(C)	1, 3
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2

Rules

Fed. R. Crim. P. 11	2, 3, 4, 5, 6, 7, 8, 9, 10, 11
---------------------------	--------------------------------

The Petitioner, Byron Keith Howard, presents the following Petition for Writ of Certiorari to the United States Supreme Court for its consideration.

The Petitioner, Byron Keith Howard, pled guilty without a plea agreement to possession with intent to distribute heroin and fentanyl in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C) in case 1:18 CR 380-1 in the Middle District of North Carolina. Judgment was entered on March 26, 2020.

The Petitioner, Byron Keith Howard, pled guilty pursuant to a plea agreement to possession of a stolen firearm in violation of 18 U.S.C. §§ 922(j) and 924 (a)(2) in case 1:19CR491-1 in the Middle District of North Carolina. Judgment was entered on March 26, 2020.

The Petitioner filed timely notices of appeal in each case to the United States Court of Appeals for the Fourth Circuit.

The United States Court of Appeals for the Fourth Circuit affirmed the district court judgments by opinion and judgment in both case 1:18CR380-1 and in case 1:19CR491-1. [Appendix 1a-8a] District Court case number 1:18CR380-1 has the Fourth Circuit case number 20-4273. District Court case number 1:19CR491-1 has the Fourth Circuit case number 20-4264, which is the lead case.

This Petition is as to the plea of guilty in 1:19CR491-1.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is appended to this petition. [Appendix 1a-8a]. The opinion of the United States Court of Appeals in the case United States of America v. Byron Keith Howard, 20-4264, 20-4273, 2023 WL 2610228 is unpublished.

JURISDICTION

This important question justifies review by this Court whose jurisdiction is invoked under 28 U.S.C § 1254 (1).

Subject matter jurisdiction was conferred upon the United States District Court pursuant to, and in accordance with, Title 18 U.S.C. § 3231. The district court judgments were entered on March 26, 2020.

Subject matter jurisdiction was conferred upon the Fourth Circuit Court of Appeals pursuant to, and in accordance with, 18 U.S.C § 3742 (a), Title 28 U.S.C. § 1291. The Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit were filed on March 23, 2023.

CONSTITUTIONAL PROVISION INVOLVED

“In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation...’ United States Constitution, 6th Amendment.

FEDERAL STATUTES INVOLVED

“Ensuring That a Plea is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in the plea agreement).” Fed. R. Crim. P 11 (b)(2).

“Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or Nolo Contendere:

(1) before the court accepts the plea, for any reason or no reason; or ...” Fed. R. Crim. P. 11 (d)(1). [Appendix 15a]

STATEMENT OF THE CASE

Byron Howard was charged in the Middle District of North Carolina in case 1:18CR380-1 in a three count Superseding Indictment. Count One charged Howard with possession with intent to distribute heroin and fentanyl in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(C). Count Two charged Howard with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924 (C)(1)(A)(i). Count Three charged Howard with possession of a firearm in commerce by a felon in violation of 18 U.S.C. §§ 922 (g)(1) and 924 (a)(2).

Howard pled guilty to Count One, possession with intent to distribute heroin and fentanyl, on September 3, 2019 without a plea agreement.

The government filed an Information with one count in a new case number 1:19CR491-1 on September 6, 2019 charging Howard with possession of a stolen firearm in violation of 18 U.S.C. §§ 922(j) and 924(a)(2).

Howard pled guilty in case number 1:19CR491-1 on September 9, 2021 to possession of a stolen firearm.

The remaining two counts of the Superseding Indictment were dismissed on Judgment. (JA 214)

The Rule 11 plea colloquy was on September 9, 2021 as to the plea of guilty to possession of a stolen firearm. 1:19CR491-1.

The district court found that Howard's plea was knowingly and voluntarily made. (JA 74) [Appendix 11a]

The government and the defense did not have a written factual basis for the charge of possession of a stolen firearm. Neither did the parties agree orally at the Rule 11 plea colloquy as

to a factual basis for the charge of possession of a stolen firearm. The district court directed the parties to file an amended factual basis. (JA 76) [Appendix 12a].

On September 17, 2019, over a week after the Rule 11 plea colloquy, an amended factual basis was filed with the district court as to the charge of possession of a stolen firearm.

Howard did not personally review the factual basis prior to the filing of the factual basis with the district court. Howard was shown the factual basis immediately prior to the presentence investigation interview. Howard did not personally admit to a factual basis as to possession of a stolen firearm.

Howard wrote a pro-se letter to the district court judge dated November 8, 2019 protesting his innocence as to possession of a stolen firearm. (JA 281) Howard wrote “I never possessed that gun. I never had any knowledge of the gun being in that Jeep.” (JA 283)

Howard, by and through defense counsel, made an oral motion at sentencing on February 5, 2020 that Howard be allowed to withdraw his plea of guilty in case number 1:19CR491-1 to possession of a stolen firearm. (JA 99)

An evidentiary hearing was held on February 5, 2020 on Howard’s oral motion to withdraw his plea of guilty to possession of a stolen firearm. The district court applied factors under Fed. R. Crim. P. 11 (d)(2)(B) as to a fair and just reason to withdraw the plea of guilty. (JA 176)

The district court denied the motion to withdraw the guilty plea to possession of a stolen firearm at the sentencing hearing on February 13, 2020. (JA 181).

On February 13, 2020 the district court sentenced Howard in case number 1:18 CR 380-1 for possession with intent to distribute heroin and fentanyl to a term of 132 months imprisonment, 5 years of supervised release, and a \$100 special assessment. (JA 214)

On February 13, 2020 the district court sentenced Howard in case number 1:19CR491-1 for possession of a stolen firearm to a term of 120 months imprisonment, three years of supervised release, and a \$100 special assessment. All but six months of this 120 month term of imprisonment was to run concurrently with the sentence imposed in case number 1:18CR380-1. (JA 222)

Judgments in both cases were entered on March 26, 2020. (JA 214, 222)

Notice of appeal in case number 1:19CR491-1 was entered on April 3, 2020. (JA 230)
Notice of Appeal in case number 1:18CR380-1 was entered on April 14, 2020. (JA 232).

The Fourth Circuit Court of Appeals issued its opinion and judgment on March 23, 2023 affirming the judgments of the district court in case numbers 20-4264 and 20-4237. [Appendix 1a-8a].

Howard is petitioning the United States Supreme Court only as to the Fourth Circuit's affirmation of the district court judgment in case 1:19CR491-1, possession of a stolen firearm, Fourth Circuit case number 20-4264.

REASONS FOR GRANTING THE WRIT

Article VI, United States Constitution guarantees that the accused has the right to be informed both of the nature and cause of the accusation against him.

The question presented is an important question of federal law because district courts frequently defer a finding of a factual basis until sentencing.

The answer to the question presented determines whether the petitioner had an automatic right under Fed. R. Crim. P. 11 (d)(1) to withdraw his plea of guilty.

The issue in Howard's appeal to the Fourth Circuit Court of Appeals and in this Petition is whether a defendant must be informed of a factual basis in open court before the district court can accept the defendant's plea as freely and voluntarily made.

The question presented is an important question of federal law because district courts frequently defer a finding of a factual basis until sentencing.

If the issue is answered in the affirmative, then the district court erred in applying the fair and just reason standard under Fed. R. Crim. P 11 (d)(2)(B) to Howard's motion to withdraw his plea of guilty.

The United States Constitution, 6th Amendment guarantees to Howard and to every defendant the right "to be informed of the nature and cause of the accusation..." against him.

The United States Constitution, 6th Amendment means that before the district court can accept a plea of guilty, the district court must inform the defendant both of the nature of the offense to which the defendant is pleading guilty and must also inform the defendant of the cause of the accusation against him.

The cause of the accusation against him is the same as a factual basis sufficient to support a plea of guilty.

Howard asserts that the right to be informed of both the nature and the cause or factual basis against him attaches before the court accepts the defendant's plea of guilty rather than attaches immediately prior to judgment.

It is error for a trial judge to accept a guilty plea without an affirmative showing that the plea was intelligently and knowingly made. Boykin v. Alabama., 395 U.S. 238 at 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)

A defendant can plead guilty yet protest his innocence but the record before the judge must show strong evidence of actual guilt. North Carolina v. Alford, 400 U.S. 25, at 37, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)

Fed. R. Crim. P. 11 guarantees to Howard and to every defendant to be informed of “the nature of each charge to which the defendant is pleading;...” Fed. R. Crim. P. 11 (b) (1) (G).

Fed. R. Crim. P. 11 is silent as to when the defendant must be informed in open court of a factual basis against him.

Fed. R. Crim. P. 11 (b)(3) just states that the district court must find before judgment a factual basis to support the plea.

Howard was informed at the Rule 11 plea colloquy of the nature of the accusation against him, that he was pleading guilty to the possession of a stolen firearm. He was informed of the elements of the offense of possession of a stolen firearm. (JA 73).

Howard then pled guilty and admitted guilt. (JA 74). The district court found Howard to be competent, that he is aware of the nature of the charges and his plea is knowing and voluntary. (JA 74) [Appendix 9a].

But Howard was not informed at the time of his guilty plea to possession of a stolen firearm of the cause or factual basis of the accusation against him as guaranteed by the 6th Amendment.

The district court asked for a factual basis. (JA 74) [Appendix 10a].

The government responded that discovery which was furnished indicated that at the time the firearm was taken, a person resembling Mr. Howard was present. (JA 75). [Appendix 10a].

Defense counsel responded “There was a gun in the vehicle. I believe it was in the factual basis on this- in this case that my client did not own, nor was there any (indiscernible) he had any

knowledge as to who owned it or where it came from, which would give rise to the fact that he should have known-“ (JA 75) [Appendix 11a]

The district court asked “what’s the evidence that he knew it was stolen? That’s my question. (JA 76) [Appendix 12a].

Howard was not informed of any cause or factual basis at the Fed. R. Crim. P. 11 plea colloquy to support his plea of guilty to possession of a stolen firearm.

Howard’s plea was not a knowing plea without information of the cause or factual basis to support the plea at the Fed. R. Crim. P 11 plea colloquy.

The district court could not accept Howard’s plea of guilty to possession a stolen firearm at the Fed. R. Crim. P. 11 plea colloquy as freely and voluntarily made without Howard having been informed of the cause or factual basis to support the plea.

The district court stated “So the way I’m going to leave this is I’m going to take this factual basis- I mean this plea subject to the filing of an amended factual basis.” (JA 76) [Appendix 11a]

The amended factual basis was filed with the district court about one week after the Rule 11 plea colloquy. (JA 80)

The amended factual basis stated: “Howard denies being the individual who took the firearm; he does, however, admit to being in possession of a firearm which he believed to have been purchased ‘on the street’ and which did not have paperwork associated with it. Therefore, Howard had reason to believe the firearm he possessed was stolen.” (JA 81)

Howard was not shown the amended factual basis until prior to the presentence interview. (JA 141)

On Howard's motion to withdraw his plea of guilty to possession of a stolen gun, the probation officer testified that Howard told the probation officer that he borrowed a friend's truck. He used heroin and Xanax and "he was tore up." Howard indicated that the gun just happened to be in the vehicle on the floor passenger side. (JA 110)

Howard's former defense counsel, who had withdrawn, testified: It was his impression that Howard had admitted to possessing the firearm. (JA 141) Howard's former defense counsel further stated that Howard consistently denied knowing that the gun was in the vehicle. (JA 145)

A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:

- (A) the court rejects a plea agreement under Rule 11(c)(5); or

- (B) the defendant can show a fair and just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d) [Appendix p. 15]

The district court stated that the standard on Howard's motion to withdraw his plea of guilty is Federal Rule 11(d)(2)(B) which states that a defendant may withdraw a plea of guilty after the court accepts the plea of guilty if the defendant can show a fair and just reason for requesting withdrawal. (JA 176)

The district court erred in applying the fair and just reason for withdrawal of a guilty plea because the district court had not accepted Howard's plea as freely and voluntarily made due to the fact that Howard had yet to be informed in open court of a factual basis sufficient to support his plea of guilty.

The district court did not find a factual basis until the sentencing hearing on February 13, 2020. (JA 197)

The Fourth Circuit held in its opinion in Howard’s case “ ‘Federal Rule of Criminal Procedure 11(b)(3) requires the district court to determine whether a factual basis exists before entering judgment on a guilty plea.’ ” Ketchum, 550 F. 3d at 366.

“However, a district court is not required find a factual basis for a defendant’s plea before accepting the plea, and ‘it may defer [that] inquiry until sentencing’”. United States v. Martinez, 277 F. 3d 517, 531 (4th Cir. 2002). United States v. Howard, No. 20-4264, p. 5, 2023, 2023 WL 2610228. [Appendix p. 5a]

Howard does not challenge the Fourth Circuit’s first statement. Howard challenges that the Fourth Circuit’s second statement cannot withstand 6th Amendment scrutiny.

A defendant who is charged in an indictment, who pleads guilty, who is informed of the nature of the charge and the penalties but who is not informed of a factual basis at the plea colloquy cannot freely and voluntarily plead guilty because the plea is an uninformed and unintelligent plea.

The district court cannot accept the plea in such a situation as freely and voluntarily made.

In a case, such as Howard’s wherein the defendant is not informed of a factual basis at the Rule 11 plea colloquy and the plea could not have been accepted as voluntarily made at the Rule 11 plea colloquy, a defendant such as Howard has the automatic right to withdraw his plea of guilty prior to the district court finding a factual basis and accepting the defendant’s plea.

In contrast, in a case where the defendant is informed of a factual basis at the Rule 11 plea colloquy, then the district court may find that the defendant’s plea is freely and voluntarily made and yet the district court may defer its finding of a factual basis in the case of an informed defendant until sentencing.

Two cases cited by the Fourth Circuit in its opinion wherein the Fourth Circuit has affirmed an acceptance of a plea of guilty with a deferred finding of a factual basis are cases where the defendant was aware at the plea colloquy of the factual basis against him. United States v. Battle, 499 F.3d 315 (4th Cir. 2007); United States v. Ketchum, 550 F.3d 363 (4th Cir. 2008)

CONCLUSION

Byron Keith Howard seeks that the United States Supreme Court will issue a Writ of Certiorari to the Fourth Circuit Court of Appeals in order to answer the important federal question as to whether a defendant must be informed at the Rule 11 plea colloquy of a factual basis to support the defendant's plea of guilty before the court can accept the defendant's plea of guilty as freely and voluntarily made.

Respectfully submitted

This the 12 day of May, 2023

GEORGE E. CRUMP, III
Counsel of Record
P.O. Box 1523
Rockingham, NC 28380
(910) 997-5544
georgecrump@bellsouth.net

Counsel for the Petitioner

APPENDIX

TABLE OF CONTENTS

	<u>Page:</u>
Opinion of The United States Court of Appeals for the Fourth Circuit Re: Affirming district court judgments entered March 23, 2023.....	1a
Deferred Finding of Factual Basis by District Court at change of plea hearing 1:19CR491-1	9a
Finding of District Court of a Factual Basis at sentencing hearing 1:19CR491-1	13a
Fed. R. Crim. P 11	15a

UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4264

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BYRON KEITH HOWARD,

Defendant - Appellant,

No. 20-4273

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BYRON KEITH HOWARD,

Defendant - Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:19-cr-00491-WO-1; 1:18-cr-00380-WO-1)

Submitted: August 19, 2022

Decided: March 23, 2023

Before NIEMEYER and HARRIS, Circuit Judges, and MOTZ, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: George E. Crump, III, Rockingham, North Carolina, for Appellant. Sandra J. Hairston, United States Attorney, Ashley E. Waid, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Byron Keith Howard pleaded guilty to possession with intent to distribute heroin and fentanyl, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (“the drug offense”) (No. 20-4273), and possession of a stolen firearm, in violation of 18 U.S.C. §§ 922(j), 924(a)(2) (“the firearm offense”) (No. 20-4264). The district court sentenced Howard to 132 months’ imprisonment on the drug offense and 120 months’ imprisonment on the firearm offense, with all but six months to run concurrently. On appeal, counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that there were no meritorious grounds for appeal but questioning whether the district court abused its discretion by denying Howard’s motion to withdraw his guilty plea to the firearm offense; erred by applying a four-level enhancement to Howard’s advisory Sentencing Guidelines range for possessing a firearm in connection with another felony; or clearly erred by declining to grant Howard a three-level reduction to his Guidelines range for acceptance of responsibility. Howard also filed a pro se brief, arguing that his guilty plea to the firearm offense was not knowing, voluntary, or supported by a sufficient factual basis; the plea agreement for the firearm offense is void; and his attorneys rendered ineffective assistance. Following our review of the record pursuant to *Anders*, we directed the parties to file supplemental briefs addressing whether the district court erred by requiring Howard to establish a fair and just reason for withdrawal of his guilty plea to the firearm offense. We now affirm the criminal judgments.

A guilty plea is valid if the defendant knowingly, voluntarily, and intelligently pleads guilty “with sufficient awareness of the relevant circumstances and likely

consequences.” *United States v. Fisher*, 711 F.3d 460, 464 (4th Cir. 2013) (internal quotation marks omitted). “In evaluating the constitutional validity of a guilty plea, courts look to the totality of the circumstances surrounding it, granting the defendant’s solemn declaration of guilt a presumption of truthfulness.” *United States v. Moussaoui*, 591 F.3d 263, 278 (4th Cir. 2010) (cleaned up). Before accepting a guilty plea, the district court must conduct a plea colloquy in which it informs the defendant of, and determines he understands, the rights he is relinquishing by pleading guilty, the charges to which he is pleading, and the maximum and any mandatory minimum penalties he faces. Fed. R. Crim. P. 11(b)(1). The court also must ensure that the plea is voluntary and not the result of threats, force, or promises not contained in the plea agreement, *id.* 11(b)(2), and that there is a factual basis for the plea, *id.* 11(b)(3). After reviewing the record, we conclude that Howard’s guilty pleas were knowing and voluntary, and the district court did not abuse its discretion by concluding that Howard’s plea to the firearm offense was supported by a sufficient factual basis. *See United States v. Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008) (stating standard of review). We further conclude that Howard’s challenge to the validity of the plea agreement is without merit.

As to Howard’s motion to withdraw his guilty plea to the firearm offense, a defendant may withdraw a plea after a court has accepted it if he “can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B). However, a defendant may withdraw a plea “before the court accepts the plea[] for any reason or no reason.” *Id.* 11(d)(1).

“Federal Rule of Criminal Procedure 11(b)(3) requires the district court to determine whether a factual basis exists before entering judgment on a guilty plea.” *Ketchum*, 550 F.3d at 366. However, a district court is not required find a factual basis for a defendant’s plea before *accepting* the plea, and “it may defer [that] inquiry until sentencing.” *United States v. Martinez*, 277 F.3d 517, 531 (4th Cir. 2002). Thus, Rule 11 does not condition a court’s acceptance of a guilty plea upon the finding of a factual basis. *See United States v. Mobley*, 618 F.3d 539, 545 (6th Cir. 2010). We have not directly addressed the effect of a district court’s deferral of its factual basis finding on a defendant’s subsequent motion to withdraw his guilty plea. However, in *United States v. Battle*, 499 F.3d 315, 321-22 (4th Cir. 2007), we addressed the similar issue of whether a defendant must show a fair and just reason to withdraw his plea when the court has accepted his guilty plea but deferred acceptance of the plea agreement. There, we concluded that the defendant was required to establish a fair and just reason for withdrawal even though the district court had not unequivocally accepted his guilty plea, in part because acceptance of the plea agreement was not a precondition for the court’s acceptance of the plea itself. *See id.*

We conclude that the same principle applies in this case. Although the district court deferred finding a factual basis for Howard’s guilty plea until sentencing, it otherwise fully accepted his plea during the Fed. R. Crim. P. 11 hearing. The district court’s decision to defer the factual basis finding did not affect its ability to accept Howard’s guilty plea during the plea hearing for the purposes of Rule 11. *See Mobley*, 618 F.3d at 545. Thus, the district court did not err by requiring Howard to establish a fair and just reason for withdrawing his guilty plea to the firearm offense. *See Fed. R. Crim. P. 11(d)*. We further

conclude that the district court did not abuse its discretion by denying Howard’s motion under that standard. *See United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991).

As to Howard’s sentences, we review criminal sentences for both procedural and substantive reasonableness “under a deferential abuse-of-discretion standard.” *United States v. McDonald*, 28 F.4th 553, 561 (4th Cir. 2022) (internal quotation marks omitted). “When evaluating a sentencing court’s calculation of the advisory Guidelines range, this [c]ourt reviews the district court’s factual findings, and its judgment regarding factual disputes, for clear error.” *United States v. Medley*, 34 F.4th 326, 337 (4th Cir. 2022) (internal quotation marks omitted).

When reviewing whether a sentence is reasonable, we first “ensure that the district court committed no significant procedural error.” *United States v. Fowler*, 948 F.3d 663, 668 (4th Cir. 2020) (internal quotation marks omitted). “If [we] find no significant procedural error, [we] then consider the substantive reasonableness of the sentence imposed.” *United States v. Arbaugh*, 951 F.3d 167, 172 (4th Cir. 2020) (cleaned up). We look to “the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C.] § 3553(a).” *Id.* at 176 (internal quotation marks omitted). A below- or within-Guidelines sentence is presumptively reasonable. *United States v. Gillespie*, 27 F.4th 934, 945 (4th Cir. 2022), *petition for cert. filed*, No. 21-8089 (U.S. June 8, 2022). A defendant can only rebut that presumption “by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors.” *United States v. Bennett*, 986 F.3d 389, 401 (4th Cir.) (internal quotation marks omitted), *cert. denied*, 142 S. Ct. 595 (2021).

We conclude that Howard's sentences are reasonable. The district court did not clearly err by finding that the firearm Howard possessed had the potential of facilitating the drug offense, and the court therefore did not abuse its discretion by applying the associated four-level increase to Howard's advisory Guidelines range. *See United States v. Bolden*, 964 F.3d 283, 287-88 (4th Cir. 2020). Moreover, the district court did not clearly err by finding that Howard was not entitled to an acceptance-of-responsibility reduction to his advisory Guidelines range. *See United States v. Harris*, 890 F.3d 480, 488 (4th Cir. 2018). Howard has also not established that the district court clearly erred by adopting the factual findings contained in the presentence report, nor has he rebutted the presumption that his below- and within-Guidelines sentences are substantively reasonable.

Finally, Howard argues that his attorneys rendered ineffective assistance before the district court and on appeal. We review *de novo* an ineffective assistance of counsel claim that is made on direct appeal but "will reverse only if it conclusively appears in the trial record itself that the defendant was not provided effective representation." *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (en banc) (cleaned up). After reviewing the record, we conclude that Howard's claims are not cognizable on direct appeal.*

In accordance with *Anders*, we have reviewed the entire record in this case and have found no meritorious grounds for appeal. We therefore affirm the district court's judgments. This court requires that counsel inform Howard, in writing, of the right to

* Howard should bring these claims, if at all, in in a motion brought pursuant to 28 U.S.C. § 2255 to permit sufficient development of the record. *United States v. Jordan*, 952 F.3d 160, 163 n.1 (4th Cir. 2020).

petition the Supreme Court of the United States for further review. If Howard requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on Howard.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

1 IN THE UNITED STATES DISTRICT COURT
 2 MIDDLE DISTRICT OF NORTH CAROLINA

3 UNITED STATES OF AMERICA) Greensboro, North Carolina
 4 vs.) September 9, 2019
) 9:43 a.m.
)
 5 BYRON KEITH HOWARD,)
) Case No. 1:19CR491
 6 Defendant.)
)
 7 _____)

8 TRANSCRIPT OF CHANGE OF PLEA AT ARRAIGNMENT
 9 BEFORE THE HONORABLE WILLIAM L. OSTEEN, JR.
 UNITED STATES DISTRICT JUDGE

10 APPEARANCES:

11 For the Government: WHITNEY SHAFFER, AUSA
 Office of the U.S Attorney
 12 101 S. Edgeworth Street, 4th Floor
 Greensboro, North Carolina 27401

13 For the Defendant: JAMES BLAKELY NORMAN
 14 The Law Office of J. Blake Norman
 203 1/2 N. Church St.
 15 Durham, NC 27701

16
 17
 18
 19
 20
 21 Court Reporter: Joseph B. Armstrong, FCRR
 22 324 W. Market, Room 101
 Greensboro, NC 27401

23 Proceedings reported by stenotype reporter.
 24 Transcript produced by Computer-Aided Transcription.
 25

Change of Plea - September 9, 2019

1 the offense as those facts are described in the indictment?

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** Do you have any questions before I call
4 upon you to enter your plea?

5 **THE DEFENDANT:** No.

6 **THE COURT:** In Case No. 1:19CR491-1, United States
7 versus Byron Keith Howard, how do you plead to the offense
8 charged in the bill of information? Guilty or not guilty?

9 **THE DEFENDANT:** Guilty.

10 **THE COURT:** And are you pleading because you are, in
11 fact, guilty?

12 **THE DEFENDANT:** Yes.

13 **THE COURT:** It is the finding of this Court in
14 Case No. 1:19CR491 Mr. Howard is fully competent and capable of
15 entering an informed plea. The Court further finds that
16 Mr. Howard is aware of the nature of the charges and the
17 consequences of his plea, and his plea of guilty is a knowing
18 and voluntary plea.

19 All right. With respect to the facts, Ms. Shaffer
20 and Mr. Norman, what's the evidence in here that Mr. Howard
21 knew the firearm had been stolen?

22 **MS. SHAFFER:** If Your Honor please, this is included
23 in the discovery, but not in the factual basis. There was a
24 report from the person who owned the firearm indicating that a
25 person looking like Mr. Howard was seen at around the residence

1 at the time that the firearm was taken. If it pleases the
2 Court, I can file an amended factual basis to reflect that
3 information from discovery.

4 **THE COURT:** What do you say to that, Mr. Norman.

5 **MR. NORMAN:** Your Honor, we were under the impression
6 it would be under the arm of should have known under the
7 circumstances that the firearm was stolen, not necessarily that
8 he was responsible for the stealing of the firearm.

9 **THE COURT:** I'm more interested in what facts would
10 support that finding.

11 **MR. NORMAN:** I believe that there was --

12 **THE COURT:** This is what I'm going to do --

13 **MR. NORMAN:** Well, I can tell the Court.

14 **THE COURT:** Go ahead.

15 **MR. NORMAN:** There was a gun in the vehicle. I
16 believe it was in the factual basis on this -- in this case
17 that that my client did not own, nor was there any
18 (indiscernible) he had any knowledge as to who owned it or
19 where it came from, which would give rise to the fact that he
20 should have known --

21 **THE COURT:** Because he had the gun in his vehicle?

22 **MR. NORMAN:** I'm sorry?

23 **THE COURT:** Because he had the gun in his vehicle?

24 **MR. NORMAN:** Well, there was a firearm on the
25 passenger seat -- on the passenger side of the floorboard of

1 the vehicle that he did not own and didn't have any idea
2 necessarily where it came from, but he should have known that
3 this was likely a stolen firearm.

4 **THE COURT:** I mean, but how? I mean -- so there's a
5 gun in the car that's stolen. No question about that. What's
6 the evidence that he knew it was stolen? That's my question.

7 So the way I'm going to leave this is I'm going to
8 take this factual basis -- I mean this plea subject to the
9 filing of an amended factual basis. You all can talk about
10 that and figure out what the facts are that would support a
11 finding by the Court that Mr. Howard did, in fact -- knew or
12 should have known that the firearm was stolen. There's no
13 question he possessed a stolen firearm. There is an element
14 requiring evidence of his knowledge.

15 Mr. Howard, even though I'm deferring making a
16 finding on the factual basis, I will -- which I'll take later,
17 depending on what gets filed -- the case will proceed ahead
18 toward sentencing just as though I entered judgment on this
19 guilty plea, which means that a presentence report will be
20 prepared in your case. You'll be asked to provide information
21 for that report and to submit to an interview. Mr. Norman may
22 be present with you and advise you at all stages of that
23 process.

24 Once that report is prepared, you'll have the
25 opportunity to review the report with Mr. Norman and file any

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA) Greensboro, North Carolina
) February 13, 2020
vs.) 1:07 p.m.
)
BYRON KEITH HOWARD,)
) Case No. 1:18CR380-1
)
Defendant.) 1:19CR491-1
)

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE WILLIAM L. OSTEEN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: WHITNEY SHAFFER, AUSA
Office of the U.S Attorney
101 S. Edgeworth Street, 4th Floor
Greensboro, North Carolina 27401

For the Defendant: SETH ALLEN NEYHART
331 W. MAIN STREET, STE. 401
DURHAM, NC 27401-2544

Court Reporter: Joseph B. Armstrong, FCRR
324 W. Market, Room 101
Greensboro, NC 27401

Proceedings reported by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

Sentencing - February 13, 2020

1 **MR. NEYHART:** I personally do not wish to be heard.
2 I'm not sure if Mr. Howard would.

3 **THE COURT:** Well, you're his attorney.

4 **MR. NEYHART:** I'm his attorney.

5 **THE COURT:** So I'm going to take a factual basis. I
6 will find, in Case No. 19CR491-1, that there does exist an
7 independent basis in fact containing each of the essential
8 elements of the offense. His plea is, therefore, accepted, and
9 Mr. Howard is now adjudged guilty of the offense charged in
10 Case No. 19CR491-1.

11 And in taking the factual basis, I have relied on the
12 amended written factual basis presented by the Government as
13 well as the facts that are set out in the presentence report --
14 let me see -- to include in terms of -- with respect to
15 knowledge or reasonable belief that the firearm had been
16 stolen, that is addressed in the written factual basis that was
17 presented to the Court as well as -- let me see one other
18 thing -- paragraph 11 indicating the firearm had been stolen,
19 the defendant's admission that it was purchased under those --
20 under circumstances that would support a reasonable belief that
21 the firearm had been stolen.

22 Does the Government wish to be heard with respect to
23 sentencing?

24 **MS. SHAFFER:** Briefly, Your Honor. Mr. Howard has an
25 extensive prior criminal history that involves a litany of

Rule 11. Pleas

(a) ENTERING A PLEA.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under [18 U.S.C. §3553\(a\)](#);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) PLEA AGREEMENT PROCEDURE.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition

of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA.** A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) **FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set

aside only on direct appeal or collateral attack.

(f) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) RECORDING THE PROCEEDINGS. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.