No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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AWEIS HAJI-MOHAMED,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

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**APPENDIX**

*United States of America vs. Aweis Haji-Mohamed v. United States*, Case No. 21-5733
(6th Cir. Feb. 26, 2024)
(Revised opinion affirming district court judgment)

*United States of America vs. Aweis Haji-Mohamed*, Case No. 21-5733
(6th Cir. Sep. 22, 2023)
(Opinion affirming district court judgment)

*United States of America vs. Aweis Haji-Mohamed*, Case No. 3:20-cv-1052
(M.D. Tenn. Dec. 30, 2020)

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Case No. 21-5733

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**FILED**
Feb 26, 2024
KELLY L. STEPHENS, Clerk

AWEIS HAJI-MOHAMED,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

AMENDED OPINION

Before: BATCHELDER, BUSH, and DAVIS, Circuit Judges

STEPHANIE DAWKINS DAVIS, Circuit Judge. Petitioner Aweis Haji-Mohamed is a federal prisoner who seeks to vacate, set aside or correct his conviction and sentence pursuant to 28 U.S.C. § 2255 for two offenses involving the illegal use of firearms. This appeal revolves around a singular mistake that carried through from Haji-Mohamed's guilty plea to his sentencing. Specifically, at his plea hearing, the district court informed Haji-Mohamed, and his plea documents reflected, that he faced a statutory mandatory minimum sentence of 35 years' imprisonment. But this information was wrong. His correctly calculated statutory-minimum sentence was 32 years. Haji-Mohamed pleaded guilty to two of the nineteen counts brought against him after reaching a plea agreement with the government that called for a sentence of 35 years' imprisonment. Consistent with the plea agreement, he received a sentence of 35 years. Haji-Mohamed now claims his attorney was ineffective in failing to (1) raise the minimum-sentence-calculation error during

an earlier motion to withdraw his guilty plea and (2) advise him that the error provided meritorious grounds for appeal. He also insists that his guilty plea was rendered involuntary and unintelligent due to the mistaken information he received about the mandatory-minimum sentence. Because Haji-Mohamed cannot demonstrate the requisite prejudice to sustain his claims and he has procedurally defaulted on the latter claim, he cannot meet his burden for collateral relief. We therefore affirm the decision of the district court.

I.

In the early months of 2015, Haji-Mohamed was involved in a series of criminal episodes in and around two public housing developments in Nashville, Tennessee that ultimately led to charges against him in both state and federal court. In particular, Haji-Mohamed and his confederates perpetrated several armed robberies against individuals and at least one area business, brandishing and in more than one instance, firing pistols during the course of these activities. Things came to a head when local law enforcement arrested Haji-Mohamed for the murder of Isaiah Starks in 2015. A federal grand jury handed down indictments against Haji-Mohamed and others for offenses ranging from robbery and conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, *et seq.*, to a variety of firearm offenses. Altogether, Haji-Mohamed faced nineteen federal felony charges as well as a first-degree murder charge for Starks's death in Tennessee state court.

Following global plea negotiations to resolve both the federal and state charges against him, Haji-Mohamed pleaded guilty to Counts 8 and 13 of the federal indictment. These two counts charged him with discharging a firearm during and in relation to a crime of violence and brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and (ii) respectively. At the plea hearing, the parties submitted a plea petition

and a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C) ("C-Plea").[1] The documents correctly identified the maximum sentence as imprisonment for life for both counts, but they each contained incorrect information about Haji-Mohamed's statutory minimum sentence. Specifically, they recited his statutory mandatory-minimum sentence as 10 years for the discharging count and a consecutive 25 years for the brandishing count—for a total of 35 years.

But, as this court explained in *United States v. Washington*, 714 F.3d 962, 970 (6th Cir. 2013), the rule of lenity applies such that when a defendant faces multiple § 924(c) counts in a single indictment, the count carrying the lowest minimum sentence should be counted first for purposes of administering consecutive penalties. Applying this rule of ordering to Haji-Mohamed's two counts means that the brandishing count, which carried a minimum sentence of 7 years for a first offense, must come before the discharge count, which carried a minimum of 10 years when counted first.[2] When listed second in the ordering, either count (brandishing or discharging) would then carry a consecutive mandatory-minimum term of 25 years. Hence, the total mandatory-minimum sentence was 32 years—three years less than the agreed-to-term stated in the plea documents. This erroneous calculation was repeated during the plea hearing when the district court informed Haji-Mohamed that the statutory mandatory minimum for the discharge count was "at least ten years" and that the penalty for the brandishing count was "a mandatory [minimum] consecutive imprisonment of at least 25 years." (R. 624, PageID 2299, 2300).

While the implications of *Washington* went undetected, the potential effect of relatively contemporaneous statutory changes did not. After Haji-Mohamed's guilty plea, but before his

[1] Under a C-Plea, if the court accepts the parties' agreed-upon sentencing range or specific term of years, then it retains no discretion to depart from the agreed amount.

[2] The minimum sentences here refer to the state of the law at the time Haji-Mohamed committed the charged offenses and pleaded guilty. *See* 18 U.S.C. § 924(c) (2016).

sentencing, Congress passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), which, if applied, would have reduced the mandatory-minimum sentence for the two offenses to which Haji-Mohamed pleaded guilty to 17 years. He filed a motion to withdraw the guilty plea for this reason. The district court held a hearing on the motion, but Haji-Mohamed did not raise the so-called *Washington* error during the hearing. Haji-Mohamed testified at the hearing that he accepted the plea agreement for 35 years because it was his mandatory minimum. He argued that he would not have pleaded guilty and accepted a 35-year sentence if the mandatory minimum was only 17 years. The district court denied the motion and later sentenced him to 35 years imprisonment in accordance with his C-Plea. He did not file a direct appeal.

Haji-Mohamed later filed the instant petition to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that the district court's failure to advise him of the correct minimum sentence violated Fed. R. Crim. P. 11 (b)(1)(I), thus rendering his plea unintelligent and involuntary, and that his trial counsel was ineffective both in his handling of the motion to withdraw his guilty plea and in failing to properly advise him about the decision to appeal. The district court did not hold an evidentiary hearing on the petition. Instead, it considered the following: declarations from Haji-Mohamed and his trial counsel, David Komisar, filed by the parties with their briefing; the plea colloquy; testimony from the evidentiary hearing on the motion to withdraw his guilty plea; and other evidence in the record.

After considering the evidence, the district court concluded that the 35-year agreed-upon sentence was not based on the mandatory minimum. It credited the government's evidence that the parties negotiated an agreement as to the total term of years and then chose the counts to which Haji-Mohamed would plead guilty to match that term of years. The district court also concluded that Haji-Mohamed's lawyer was not ineffective by failing to recognize and raise the minimum-

sentence error in the context of his motion to withdraw his plea. More specifically, the district court found that Haji-Mohamed could not demonstrate the requisite prejudice required under *Strickland v. Washington*, 466 U.S. 668 (1984), because he agreed to serve a term of 35 years under his plea agreement, not to serve whatever the mandatory minimum turned out to be for the charges to which he pleaded guilty. Finally, the court concluded that the failure to raise *United States v. Washington* did not meet the benchmark for ineffectiveness under *Strickland* because the case was not directly applicable given the nature of C-Pleas. As such, the district court concluded it was unreasonable to expect counsel to have raised *Washington*, which established a rule "that applied in an entirely different context." This appeal followed.

II.

Ineffective-assistance-of-counsel claims "may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003). We "review the denial of a § 2255 motion de novo," including the resolution of "claims of ineffective assistance of counsel, which are mixed questions of law and fact." *Wingate v. United States*, 969 F.3d 251, 255 (6th Cir. 2020) (quotation and brackets omitted). We "review the district court's factual findings for clear error." *Id.* The court may address *Strickland*'s prongs in any order and need not address both prongs "if [the movant] makes an insufficient showing on one." *Id.* at 255 (quoting *Strickland*, 466 U.S. at 697).

III.

*Ineffective Assistance of Counsel.* Haji-Mohamed maintains that his trial lawyer was ineffective in failing to recognize and assert, as additional grounds to support his motion to withdraw the guilty plea, that the district court's incorrect advice as to the mandatory-minimum

sentence was an error under Rule 11 that rendered his plea involuntary and unintelligent. He also argues that counsel was ineffective in failing to advise him to file a direct appeal on this issue.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A criminal defendant's Sixth Amendment right to counsel necessarily implies the right to "reasonably effective assistance" of counsel. *Strickland*, 466 U.S. at 687. To succeed on a claim that trial counsel was ineffective under *Strickland*, a petitioner must affirmatively prove both that the attorney's performance was deficient and that petitioner was prejudiced as a result. *Id*. As to deficient performance, the proper inquiry is whether counsel's representation sank to the level of "incompetence under 'prevailing professional norms,'" as opposed to whether counsel simply departed from best, or even common practice. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). And as to prejudice, the court must determine if the petitioner has demonstrated a substantial likelihood of a different outcome were it not for counsel's deficiencies. *Id*. at 112. Applying these standards, we consider Haji-Mohamed's claims in turn.

A. The Motion to Withdraw the Guilty Plea

The general rule is that "failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance." *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003) (citing *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001)). Where a petitioner alleges that his counsel failed to provide such guidance, in particular, that counsel was ineffective in litigating his motion to withdraw a guilty plea, we have found that applying *Strickland* requires a petitioner to show "a reasonable probability that the district court would have granted [the] motion." *United States v. Wynn*, 663 F.3d 847, 852 (6th Cir. 2011).

To withdraw a guilty plea post-acceptance by a district court, a defendant must "show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). And while "a district court's failure to correctly provide the defendant with all the information required by Rule 11 may constitute a 'fair and just reason' to request the withdrawal of a guilty plea[,]" *United States v. Freeman*, 17 F.4th 255, 262 (2d Cir. 2021), on direct appeal, a Rule 11 violation would not amount to a "fair and just reason" to withdraw a guilty plea when it had no impact on the defendant's decision to plead guilty, *United States v. Hogg*, 723 F.3d 730, 752 (6th Cir. 2013). *See id.* at 744 (noting that in the context of a motion to withdraw a guilty plea, "we [] must consider whether this Rule 11 violation was harmless" under Rule 11(h)); *see also United States v. Vonn*, 535 U.S. 55, 72, n.9 (2002) (recognizing that appellate courts "have held that a Rule 11 violation that is harmless under Rule 11(h) does not rise to the level of a 'fair and just reason' for withdrawing a guilty plea") (collecting cases).

As explained in *Hogg*, where the Rule 11 violation was not raised in the district court, as is the case here, rather than conducting a harmless error inquiry (i.e., whether the error had a substantial impact on his rights), plain error review would apply. *Hogg*, 723 F.3d at 737; *see also Williams v. United States*, 47 F. App'x 363, 365–66, 368–69 (6th Cir. Sept. 25, 2002) (applying plain error review and finding no error where the district court stated the incorrect mandatory minimum sentence because the defendant's PSR accurately disclosed the correct minimum sentence and the defendant failed to object to this portion of the report). The plain error standard means, among other things, that a defendant "'must show a reasonable probability that, but for the error, he would not have entered the plea.'" *Hogg*, 723 F.3d at 737 (quoting *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004)). So how do these review standards interact with our inquiry on collateral review—considering that claims for ineffective assistance of counsel should

most frequently be brought through a § 2255 motion instead of a direct appeal? Ignoring this wrinkle would unjustifiably permit defendants to circumvent plain error analysis when we weigh prejudice on collateral review. Thus, for purposes of showing prejudice under *Stickland*, in considering whether there is a reasonable probability that Haji-Mohamed would have prevailed on a motion to withdraw his plea based on a Rule 11 error, we may consider whether there is a reasonable probability that the Rule 11 error caused his decision to plead guilty. *Cf. Ward v. Jenkins*, 613 F.3d 692, 699 (7th Cir. 2010) (ineffectiveness claim on collateral review holding that, "[t]o demonstrate prejudice, [Petitioner] would have to show that (1) there was a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial and (2) there was a reasonable probability that the court would have granted his motion to withdraw his guilty plea.")

*Deficiency of Counsel.* The district court found that trial counsel's failure to identify and raise the mandatory-minimum error was not objectively deficient because *Washington* was not directly applicable and the Sixth Amendment did not require counsel to be a "lexicon of all published cases," or at least not those that establish a rule that applies in a different context. (R. 20, PageID.159). But the statute of conviction, not just *Washington*, provides the source of the Rule 11 error. Section 924(c)(1)(A)(ii) expressly provides a mandatory-minimum sentence of seven years for "brandishing" a firearm and § 924(c)(1)(A)(iii) sets forth a mandatory-minimum sentence of 10 years for "discharging" a firearm. Moreover, Rule 11(b)(1)(I) imposed an obligation on the district court to inform the defendant of any mandatory minimum penalty. FED. R. CRIM. P. 11(b)(1)(I). Consequently, the "ordering" of offenses for sentencing discussed in *Washington* is not the entirety of the issue. Rather, the question is whether counsel's failure to identify and raise the error made by the court under Rule 11—to inform Haji-Mohamed that the

mandatory minimum for a § 924(c)(1)(A)(ii) brandishing offense is only seven years and then mis-ordering the offenses to reach the incorrect total of 35 years—constitutes objectively deficient performance.

Notably, "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. Hence, counsel has a duty either to conduct a reasonable investigation or to make a reasonable decision that renders a particular investigation unnecessary. *Id.* Despite misgivings about the wisdom of such action, Komisar decided to move forward with a motion to withdraw Haji-Mohamed's guilty plea based on changes made by the Fair Sentencing Act. He did not pursue withdrawal based on the Rule 11 error.

Here, Komisar simply says that he did not realize that the mandatory minimum for the two counts was 32 years and that even if he had, the parties would have reworked the plea agreement to get to 35 years. Thus, he did not take additional steps to apprise himself of the applicable mandatory minimum and forged ahead with advising his client without that information in hand. It is therefore hard to say that his failure to advise Haji-Mohamed to pursue the Rule 11 violation as part of his motion to withdraw his guilty plea was a conscious decision. To be sure, such circumstances raise serious questions about whether counsel's failure is objectively deficient. *See Smith v. United States*, 348 F.3d 545, 553 (6th Cir. 2003) ("A criminal defendant has a right to expect at least that his attorney will . . . explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available."); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable

performance under *Strickland*."); *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring) ("The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis."). Yet, counsel's overall plea negotiation strategy to reach a global agreement for a term of years that would encompass all charges stemming from Haji-Mohamed's then-pending state and federal charges—irrespective of the mandatory minimum sentence—is hard to second-guess or label objectively unreasonable. In the end, we need not conclude one way or the other on this aspect of counsel's performance because Haji-Mohamed's claim fails on the prejudice prong regardless.

*Prejudice.* On the question of prejudice, we ask but for counsel's Rule 11 error, whether Haji-Mohamed could show a reasonable probability that he would have prevailed on his motion to withdraw his guilty plea under the "fair and just" standard. That standard requires a showing that the misstated mandatory minimum formed the basis for his decision to enter a guilty plea. While Haji-Mohamed declares that he would have declined to plead guilty had he known of the 32-year mandatory minimum, he notably stops short of stating that he would have gone to trial. Enhancing his bargaining position may explain this equivocation. The district court aptly observed that by the time Haji-Mohamed moved to withdraw his guilty plea, the bargaining landscape had shifted: his co-defendant had been acquitted of the Cricket store robbery and a primary witness to the murder charge had died. Thus, "buyer's remorse" was more than a passing theory for his motivation.

True, Haji-Mohamed sought to withdraw his guilty plea upon passage of the Fair Sentencing Act when his mandatory-minimum sentence was potentially cut in half. But this fact, reflecting his subjective judgment in a different, though similar context, even considered together with Haji-Mohamed's declaration is not enough. Like his testimony at the hearing on his motion

to withdraw his guilty plea, Haji-Mohamed's declaration supporting his § 2255 petition states that if he had known the aggregate mandatory-minimum sentence was only 32 instead of 35 years, he would not have pleaded guilty. But this is seemingly in tension with his own admission that he decided to plead guilty and to accept the plea bargain "mainly" because he thought there was a substantial chance that he would be convicted of one of the robbery counts involving the Cricket mobile phone store and one of the other (dismissed) § 924(c) counts. Considering this fact, his further point that he disagreed with Komisar on the strength of the state murder charge does not seem meaningful to the question of whether he would have withdrawn his guilty plea.

For his part, Komisar explained in his declaration that he believed (if Haji-Mohamed did not plead guilty) there was a high probability that Haji-Mohamed would be convicted of the state murder charge given the number of witnesses to that crime, and that he would likely face 51 years in state prison before he would be eligible for parole. According to Komisar, the 51-year number drove the plea process; he told the government's attorney that any plea agreement must include the murder charge. During negotiations, the government first offered a global plea deal of 40 years' imprisonment; Komisar countered with 30 years; and they settled on 35 years. Komisar explained that while Haji-Mohamed was unhappy with the offer, he ultimately seemed to appreciate that a global agreement to 35 years was better than a potential 51-year state penalty plus whatever the federal sentence turned out to be if he did not accept the plea offer. Komisar declared that it did not matter how the parties arrived at 35 years as far as the combination of counts. Picking counts "was simply a device to get to the agreed number of 35 years."

The district court found that Haji-Mohamed's statement that the misstated mandatory minimum motivated his acceptance of the plea offer was not credible. The court based its finding on Haji-Mohamed's prior testimony—including the court's recollection of his demeanor while

testifying, and the evidence in the record showing that the 35 years was driven by factors other than the mandatory minimum. We have previously held that "[i]n the absence of a clear basis in the record for rejecting the district court's credibility determinations, we are bound by those determinations." *United States v. Hudson*, 405 F.3d 425, 442 (6th Cir. 2005). Indeed, "[f]indings of fact anchored in credibility assessments are generally not subject to reversal upon appellate review." *Id.* (quoting *United States v. Taylor*, 956 F.2d 572, 576 (6th Cir. 1992) (en banc)). And we see no clear basis for rejection here. There is no reason to believe that learning the correct mandatory minimum was 32 years rather than 35 years would have motivated him to proceed to trial rather than to remove the "substantial chance" of conviction on the counts he referenced in his declaration.

Moreover, the additional evidence in the record supports the district court's conclusion that Haji-Mohamed did not suffer the requisite prejudice to sustain his claim. In particular, while Haji-Mohamed now says that he was less concerned about the state murder charge, it loomed large over the plea negotiations—so much so that Komisar insisted that the government coordinate its offer with the state prosecutor overseeing the murder case. And tellingly, the parties agreed to the number of years acceptable to both sides *before* settling on which of Haji-Mohamed's 19 counts would be the subjects of the guilty plea. Further, the agreement disposed of 17 other federal counts that were serious felonies. And while Haji-Mohamed expressed frustration about the rapidly-approaching trial date, he ultimately praised the result, stating during the plea hearing, "Mr. Komisar even—regardless of our differences, he's able to still give me this 35." (Case No. 15-cr-00088, R.624, PageID.2306, 2310). Later in the plea colloquy, he confirmed that he was giving up "the right to a trial and all of the defense strategy that [he] could produce and—and could be made on [his] behalf at trial[]." (*Id*. at 2313). Thus, on balance, the contemporaneous evidence of

Haji-Mohamed's preference to plead guilty rather than go to trial undermines his claim to the contrary. *See Lee v. United States*, 582 U.S. 357, 369 (2017) (explaining that guilty pleas should not be upset merely based on a defendant's post hoc assertions that he would not have pleaded guilty but for counsel's errors. Instead, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences."). As a result, he cannot demonstrate a substantial likelihood of a different result and cannot satisfy *Strickland*'s standard for prejudice.

B. Failure to Appeal

With respect to Haji-Mohamed's argument that counsel was ineffective because he failed to advise him to file a direct appeal raising the Rule 11/voluntariness error, we conclude that this argument fails for reasons largely similar to those discussed above.

"In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . the question [is] . . . whether counsel in fact consulted with the defendant about an appeal." *Neill v. United States*, 937 F.3d 671, 676 (6th Cir. 2019) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000)). In this context, "consult" means to advise "the defendant about the advantages and disadvantages of taking an appeal, and [to] mak[e] a reasonable effort to discover the defendant's wishes." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 478). However, counsel only has a constitutional duty to consult when "a rational defendant would want to appeal" or when "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). In all cases, "courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 477) (internal quotation marks omitted).

We observed in *Moody v. United States*, 958 F.3d 485, 492 (6th Cir. 2020), that "defense lawyers need not (and in fact should not) raise every colorable argument they can find." (citing *Davila v. Davis*, 582 U.S. 521, 533 (2017) ("Effective appellate counsel should not raise every nonfrivolous argument[.]"); *Wilson v. McMacken*, 786 F.2d 216, 219 n.3 (6th Cir. 1986) (trial counsel need not make "every colorable objection"). This is because difficult decisions about which issues to pursue and which ones to cast aside lie at the heart of legal advocacy. A lawyer's decision on such issues is deficient only when no reasonable attorney would have made the same call at the time. *See Strickland*, 466 U.S. at 690.

There is no debate that Komisar consulted with Haji-Mohamed about a potential appeal. Thus, the question before the court is not whether the duty to consult was triggered, but whether the consultation itself passes constitutional muster. Komisar's declaration reflects discussions about appealing and the risk that an appeal could void the plea agreement. The government argues that Komisar provided competent, candid advice, despite failing to mention the Rule 11 error with Haji-Mohamed. The government also points out that raising the Rule 11 error on appeal would have carried risks similar to or the same as those attendant to the other issues Komisar did discuss with Haji-Mohamed. Still, Komisar's declaration does not suggest that he discussed the Rule 11 error and the advantages and disadvantages of pursuing an appeal on that issue with Haji-Mohamed, or that he discerned whether Haji-Mohamed wanted to appeal the issue.

We presume prejudice in an ineffective-assistance claim if a defendant can establish a reasonable probability "that, but for counsel's deficient performance, he would have appealed." *Flores-Ortega* at 471, 484; *see also Garza v. Idaho*, — U.S. —, 139 S. Ct. 738, 742 (2019) (prejudice is presumed when an attorney's deficient performance causes a defendant to forgo an appeal that he otherwise would have pursued, even if he has signed an appeal waiver). This is

where Haji-Mohamed's claim once again falters. Neither in the district court nor on appeal does Haji-Mohamed point to any evidence in the record suggesting that he would have pursued an appeal if counsel had advised him that the Rule 11 error provided a meritorious ground for doing so. Not even Haji-Mohamed's self-serving declaration in support of his petition makes this claim.[3] Moreover, he agreed with Komisar's advice to forgo any appeal of the court's denial of his motion to withdraw his guilty plea because he agreed that the risk of resurrecting the murder charge was too great. The same danger existed were he to successfully challenge his guilty plea. As such, we do not presume prejudice here and Haji-Mohamed has not otherwise met his burden to establish its existence. Therefore, he is not entitled to relief.

*Lack of Evidentiary Hearing.* Haji-Mohamed resists this conclusion, arguing that at minimum, the district court was obligated to conduct a hearing on his claims. Section 2255 requires "a hearing on such allegations unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (internal quotation marks omitted); *Ray v. United States*, 721 F.3d 758, 760–61 (6th Cir. 2013). "Stated another way, the court is not required to hold an evidentiary hearing if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or [are] conclusions rather than statements of fact." *Amr v. United States*, 280 F. App'x 480, 485 (6th Cir. 2008). The decision of whether to hold an evidentiary hearing is one committed to the sound discretion of the district court. *Huff v. United States*, 734 F.3d 600,

[3] Notably, the presentence report, which Haji-Mohamed reviewed before sentencing, correctly identified the mandatory minimum for the brandishing count as seven years. He did not question this fact. The parties do not address the extent to which this notice may have factored into the decision-making process; we highlight it here for further context.

607 (6th Cir. 2013) ("A decision not to hold an evidentiary hearing on a motion for relief under 28 U.S.C. § 2255 is reviewed for abuse of discretion.").

Here, the district court made a credibility finding that Haji-Mohamed's claim that the stated mandatory minimum motivated his acceptance of the plea offer was not believable. For reasons previously discussed, we are loath to question this finding. While the district court's credibility determination does not necessarily mean that Haji-Mohamed's statement is "inherently unreliable," coupling it with his declaration accompanying his petition demonstrates an internal inconsistency that contradicts the record. Specifically, as we noted earlier, Haji-Mohamed states in his declaration that he mainly agreed to plead guilty to avoid possible convictions for the Cricket store robbery and another 924(c) count—not because 35 years was the lowest statutory sentence. Irrespective of the evidence offered by the government, therefore, his own account of the foremost motivating factor for his guilty plea is untethered from the error that he claims justifies relief. Consequently, even with the relatively light burden placed on petitioners to justify a hearing, he has failed to carry it and the district court did not abuse its discretion in declining to hold a hearing for his claims.

*Voluntariness of Guilty Plea*. In addition to his ineffective-assistance-of-counsel claims, Haji-Mohamed also makes the independent argument that his guilty plea was constitutionally infirm because it was not voluntary and intelligent and thus violated due process. But Haji-Mohamed did not raise the claim that his plea was unintelligent and involuntary at or before sentencing. Nor, as we have discussed, did he file a direct appeal. Instead, he raised it for the first time in his § 2255 motion. Generally, when a defendant fails to raise an issue on direct appeal, other than ineffective assistance of counsel, that issue is waived and cannot be pursued on collateral review absent a showing of cause and prejudice. *See Huff*, 734 F.3d at 605–06. The hurdle for

such a double default is intentionally high in view of the federal interest in the finality of criminal convictions. *See United States v. Frady*, 456 U.S. 152 (1982). Indeed, "the concern with finality served by limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). And the Court has not hesitated to apply this standard to cases involving claims of unintelligent and involuntary guilty pleas. *See, e.g.*, *Bousley v. United States*, 523 U.S. 614, 622 (1998).

The government may, however, forfeit its right to assert default as a defense by failing to raise it. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). The government has not asserted default in this case. And the district court did not consider its application. Even so, we may raise the issue *sua sponte* where appropriate. *Id.* We acknowledge that ineffective assistance of counsel can provide sufficient cause to excuse a petitioner's failure to raise an issue in the district court or on direct appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (stating that procedural default resulting from ineffective assistance of counsel must be imputed to the state). Nevertheless, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Id.* at 487. Thus, under the facts that Haji-Mohamed has alleged—that counsel missed the involuntary/unintelligent-plea issue in the district court and in considering grounds for appeal—he has not established sufficient cause to excuse the procedural default.

Moreover, having failed to demonstrate prejudice sufficient to sustain his ineffective-assistance-of-counsel claims, he necessarily cannot establish the actual prejudice required to overcome his procedural default. Under such circumstances, where we have thoroughly explored petitioner's posited reason for failing to raise his involuntary/unintelligent-plea claim, we find that

additional briefing is not necessary and *sua sponte* consideration is appropriate. We thus decline further review on the merits of this claim.

IV.

*Request for Remand.* Finally, Haji-Mohamed argues that if this matter is remanded, a different district judge should be assigned. His request is motivated by the fact that the district court made an adverse credibility finding against him. We have accepted the district court's credibility finding and otherwise found that Haji-Mohamed is not entitled to relief. Therefore, there will be no remand and his request is denied as moot.

V.

For the reasons set forth above, the decision of the district court is AFFIRMED.

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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Filed: September 22, 2023

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Re: Case No. 21-5733, *Haji-Mohamed v. United States*
Originating Case No. : 3:20-cv-01052 : 3:15-cr-00088-2

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Laurie A Weitendorf
Opinions Deputy

cc: Ms. Lynda M. Hill

Enclosures

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0412n.06

Case No. 21-5733

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**FILED**
Sep 22, 2023
DEBORAH S. HUNT, Clerk

| | | |
|---|---|---|
| AWEIS HAJI-MOHAMED,<br>Petitioner-Appellant,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br>Respondent-Appellee. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE<br><br>OPINION |

Before: BATCHELDER, BUSH, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. Petitioner Aweis Haji-Mohamed is a federal prisoner who seeks to vacate, set aside or correct his conviction and sentence pursuant to 28 U.S.C. § 2255 for two offenses involving the illegal use of firearms. This appeal revolves around a singular mistake that carried through from Haji-Mohamed's guilty plea to his sentencing. Specifically, at his plea hearing, the district court informed Haji-Mohammad, and his plea documents reflected, that he faced a statutory mandatory minimum sentence of 35 years' imprisonment. But this information was wrong. His correctly calculated statutory-minimum sentence was 32 years. Haji-Mohamed pleaded guilty to two of the nineteen counts brought against him after reaching a plea agreement with the government that called for a sentence of 35 years' imprisonment. Consistent with the plea agreement, he received a sentence of 35 years. Haji-Mohamed now claims his attorney was ineffective in failing to (1) raise the minimum-sentence-calculation error during an earlier motion to withdraw his guilty plea and (2) advise him that the error provided meritorious grounds for

appeal. He also insists that his guilty plea was rendered involuntary and unintelligent due to the mistaken information he received about the mandatory-minimum sentence. Because Haji-Mohamed cannot demonstrate the requisite prejudice to sustain his claims and he has procedurally defaulted on the latter claim, he cannot meet his burden for collateral relief. We therefore affirm the decision of the district court.

I.

In the early months of 2015, Haji-Mohamed was involved in a series of criminal episodes in and around two public housing developments in Nashville, Tennessee that ultimately led to charges against him in both state and federal court. In particular, Haji-Mohamed and his confederates perpetrated several armed robberies against individuals and at least one area business, brandishing and in more than one instance, firing pistols during the course of these activities. Things came to a head when local law enforcement arrested Haji-Mohamed for the murder of Isaiah Starks in 2015. A federal grand jury handed down indictments against Haji-Mohamed and others for offenses ranging from robbery and conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. § 1951, *et seq*., to a variety of firearm offenses. Altogether, Haji-Mohamed faced 19 federal felony charges as well as a first-degree murder charge for Starks's death in Tennessee state court.

Following global plea negotiations to resolve both the federal and state charges against him, Haji-Mohamed pleaded guilty to Counts 8 and 13 of the federal indictment. These two counts charged him with discharging a firearm during and in relation to a crime of violence and brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and (ii) respectively. At the plea hearing, the parties submitted a plea petition

and a plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(C) ("C-Plea").[1] The documents correctly identified the maximum sentence as imprisonment for life for both counts, but they each contained incorrect information about Haji-Mohamed's statutory minimum sentence. Specifically, they recited his statutory mandatory-minimum sentence as 10 years for the discharging count and a consecutive 25 years for the brandishing count—for a total of 35 years. But, as this court explained in *United States v. Washington*, 714 F.3d 962, 970 (6th Cir. 2013), the rule of lenity applies such that when a defendant faces multiple § 924(c) counts in a single indictment, the count carrying the lowest minimum sentence should be counted first for purposes of administering consecutive penalties. Applying this rule of ordering to Haji-Mohamed's two counts means that the brandishing count, which carried a minimum sentence of 7 years for a first offense, must come before the discharge count, which carried a minimum of 10 years when counted first.[2] When listed second in the ordering, either count (brandishing or discharging) would then carry a consecutive mandatory-minimum term of 25 years. Hence, the total mandatory-minimum sentence was 32 years—three years less than the agreed-to-term stated in the plea documents. This erroneous calculation was repeated during the plea hearing when the district court informed Haji-Mohamed that the statutory mandatory minimum for the discharge count was "at least ten years" and that the penalty for the brandishing count was "a mandatory minimum consecutive imprisonment of at least 25 years."

While the implications of *Washington* went undetected, the potential effect of relatively contemporaneous statutory changes did not. After Haji-Mohamed's guilty plea but before his

[1] Under a C-Plea, if the court accepts the parties' agreed-upon sentencing range or specific term of years, then it retains no discretion to depart from the agreed amount.

[2] The minimum sentences here refer to the state of the law at the time Haji-Mohamed committed the charged offenses and pleaded guilty. *See* 18 U.S.C. § 924(c) (2016).

sentencing, Congress passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), which, if applied, would have reduced the mandatory-minimum sentence for the two offenses to which Haji-Mohamed pleaded guilty to 17 years. He filed a motion to withdraw the guilty plea for this reason. The district court held a hearing on the motion, but Haji-Mohamed did not raise the so-called *Washington* error during the hearing. Haji-Mohamed testified at the hearing that he accepted the plea agreement for 35 years because it was his mandatory minimum. He argued that he would not have pleaded guilty and accepted a 35-year sentence if the mandatory minimum was only 17 years. The district court denied the motion and later sentenced him to 35 years imprisonment in accordance with his C-Plea. He did not file a direct appeal.

Haji-Mohamed later filed the instant petition to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that the district court's failure to advise him of the correct minimum sentence violated Fed. R. Crim. P. 11 (b)(1)(I), thus rendering his plea unintelligent and involuntary, and that his trial counsel was ineffective both in his handling of the motion to withdraw his guilty plea and in failing to properly advise him about the decision to appeal. The district court did not hold an evidentiary hearing on the petition. Instead, it considered the following: declarations from Haji-Mohammed and his trial counsel, David Komisar filed by the parties with their briefing; the plea colloquy; testimony from the evidentiary hearing on the motion to withdraw his guilty plea; and other evidence in the record.

After considering the evidence, the district court concluded that the 35-year agreed-upon sentence was not based on the mandatory minimum. It credited the government's evidence that the parties negotiated an agreement as to the total term of years and then chose the counts to which Haji-Mohammed would plead guilty to match that term of years. The district court also concluded that Haji-Mohamed's lawyer was not ineffective by failing to recognize and raise the

minimum-sentence error in the context of his motion to withdraw his plea. More specifically, the district court found that Haji-Mohamed could not demonstrate the requisite prejudice required under *Strickland v. Washington*, 466 U.S. 668 (1984), because he agreed to serve a term of 35 years under his plea agreement, not to serve whatever the mandatory minimum turned out to be for the charges to which he pleaded guilty. Finally, the court concluded that the failure to raise *United States v. Washington* did not meet the benchmark for ineffectiveness under *Strickland* because the case was not directly applicable given the nature of C-Pleas. As such, the district court concluded it was unreasonable to expect counsel to have raised *Washington*, which established a rule "that applied in an entirely different context." This appeal followed.

II.

Ineffective-assistance-of-counsel claims "may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003). We "review the denial of a § 2255 motion de novo," including the resolution of "claims of ineffective assistance of counsel, which are mixed questions of law and fact." *Wingate v. United States*, 969 F.3d 251, 255 (6th Cir. 2020) (quotation and brackets omitted). We "review the district court's factual findings for clear error." *Id.* The court may address *Strickland*'s prongs in any order and need not address both prongs "if [the movant] makes an insufficient showing on one." *Id.* at 255 (quoting *Strickland*, 466 U.S. at 697).

III.

*Ineffective Assistance of Counsel.* Haji-Mohamed maintains that his trial lawyer was ineffective in failing to recognize and assert, as additional grounds to support his motion to withdraw the guilty plea, that the district court's incorrect advice as to the mandatory-minimum

sentence was an error under Rule 11 that rendered his plea involuntary and unintelligent. He also argues that counsel was ineffective in failing to advise him to file a direct appeal on this issue.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. A criminal defendant's Sixth Amendment right to counsel necessarily implies the right to "reasonably effective assistance" of counsel. *Strickland*, 466 U.S. at 687. To succeed on a claim that trial counsel was ineffective under *Strickland*, a petitioner must affirmatively prove both that the attorney's performance was deficient and that petitioner was prejudiced as a result. *Id*. As to deficient performance, the proper inquiry is whether counsel's representation sank to the level of "incompetence under 'prevailing professional norms,'" as opposed to whether counsel simply departed from best, or even common practice. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland*, 466 U.S. at 690). And as to prejudice, the court must determine if the petitioner has demonstrated a substantial likelihood of a different outcome were it not for counsel's deficiencies. *Id*. at 112. Applying these standards, we consider Haji-Mohamed's claims in turn.

A. The Motion to Withdraw the Guilty Plea

The general rule is that "failure to provide professional guidance to a defendant regarding his sentence exposure prior to a plea may constitute deficient assistance." *Moss v. United States*, 323 F.3d 445, 474 (6th Cir. 2003) (citing *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001)). Where a petitioner alleges that his counsel failed to provide such guidance, we have found that applying *Strickland* requires a petitioner to show "(1) that his counsel's performance was objectively deficient; and (2) that but for his counsel's erroneous advice, there is a reasonable probability that he would have [rejected] a plea." *Id.*; *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (the second prong of *Strickland* requires a movant to demonstrate "a reasonable probability

that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (requiring petitioner to show that the outcome of the plea process would have been different with competent advice).

*Deficiency of Counsel.* The district court found that trial counsel's failure to identify and raise the mandatory-minimum error was not objectively deficient because *Washington* was not directly applicable and the Sixth Amendment did not require counsel to be a "lexicon of all published cases," or at least not those that establish a rule that applies in a different context. (R. 20, PageID.159). But the statute of conviction, not just *Washington*, provides the source of the Rule 11 error. Section 924(c)(1)(A)(ii) expressly provides a mandatory-minimum sentence of seven years for "brandishing" a firearm and § 924(c)(1)(A)(iii) sets forth a mandatory-minimum sentence of 10 years for "discharging" a firearm. Moreover, Rule 11(b)(1)(I) imposed an obligation on the district court to inform the defendant of any mandatory minimum penalty. FED. R. CRIM. P. 11(b)(1)(I). Consequently, the "ordering" of offenses for sentencing discussed in *Washington* is not the entirety of the issue. Rather, the question is whether counsel's failure to identify and raise the error made by the court under Rule 11—to inform Haji-Mohammed that the mandatory minimum for a § 924(c)(1)(A)(ii) brandishing offense is only seven years and then mis-ordering the offenses to reach the incorrect total of 35 years—constitutes objectively deficient performance. Notably, "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. Hence, counsel has a duty either to conduct a reasonable investigation or to make a reasonable decision that renders a particular investigation unnecessary. *Id*. Despite misgivings about the wisdom of

such action, Komisar decided to move forward with a motion to withdraw Haji-Mohamed's guilty plea based on changes made by the Fair Sentencing Act. He did not pursue withdrawal based on the Rule 11 error.

Here, Komisar simply says that he did not realize that the mandatory minimum for the two counts was 32 years and that even if he had, the parties would have reworked the plea agreement to get to 35 years. Thus, he did not take additional steps to apprise himself of the applicable mandatory minimum and forged ahead with advising his client without that information in hand. It is therefore hard to say that his failure to advise Haji-Mohamed to pursue the Rule 11 violation as part of his motion to withdraw his guilty plea was a conscious decision. To be sure, such circumstances raise serious questions about whether counsel's failure is objectively deficient. *See Smith v. United States*, 348 F.3d 545, 553 (6th Cir. 2003) ("A criminal defendant has a right to expect at least that his attorney will review the charges with him by explaining the elements necessary for the government to secure a conviction, discuss the evidence as it bears on those elements, and explain the sentencing exposure the defendant will face as a consequence of exercising each of the options available."); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *Lockhart*, 474 U.S. at 62 (White, J., concurring) ("The failure of an attorney to inform his client of the relevant law clearly satisfies the first prong of the *Strickland* analysis."). Yet, counsel's overall plea negotiation strategy to reach a global agreement for a term of years that would encompass all charges stemming from Haji-Mohamed's then-pending state and federal charges—irrespective of the mandatory minimum sentence—is hard to second-guess or label

objectively unreasonable. In the end, we need not conclude one way or the other on this aspect of counsel's performance because Haji-Mohamed's claim fails on the prejudice prong regardless.

*Prejudice.* On the question of prejudice, we ask whether Haji-Mohamed would have withdrawn his guilty plea and insisted on going to trial. We have previously emphasized the objective nature of the second prong:

> This is an objective, not a subjective, test. [*Lockhart*, 474 U.S.] at 60. A defendant's bare recitation that he would have proceeded to trial had he received different advice is not enough; rather, "to obtain relief on this type of claim, a [defendant] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

*Ellis v. United States*, No. 19-6047, 2020 WL 1272625, at *2 (6th Cir. Jan. 30, 2020). As discussed, the prejudice prong generally requires a defendant to show that there is a reasonable probability that the outcome of the plea process would have been different if he had received competent advice. *Thompson v. United States*, 728 F. App'x 527, 531 (6th Cir. 2018) (citing *Lafler*, 566 U.S. at 163). While Haji-Mohamed declares that he would have declined to plead guilty had he known of the 32-year mandatory minimum, he notably stops short of stating that he would have gone to trial. Enhancing his bargaining position may explain this equivocation. The district court aptly observed that by the time of Haji-Mohamed's motion to withdraw his guilty plea, the bargaining landscape had shifted: his co-defendant had been acquitted of the Cricket store robbery and a primary witness to the murder charge had died. Thus, "buyer's remorse" was more than a passing theory for his motivation.

True, Haji-Mohamed sought to withdraw his guilty plea upon passage of the Fair Sentencing Act when his mandatory-minimum sentence was potentially cut in half. But this fact, reflecting his subjective judgment in a different, though similar context, even considered together

with Haji-Mohamed's declaration is not enough. Like his testimony at the hearing on his motion to withdraw his guilty plea, Haji-Mohamed's declaration supporting his § 2255 petition states that if he had known the aggregate mandatory-minimum sentence was only 32 instead of 35 years, he would not have pleaded guilty. But seemingly in tension with this position is his statement that he decided to plead guilty and to accept the plea bargain "mainly" because he thought there was a substantial chance that he would be convicted of one of the robbery counts involving the Cricket mobile phone store and one of the other (dismissed) § 924(c) counts. Considering this fact, his further point that he disagreed with Komisar on the strength of the state murder charge does not seem meaningful to the question of whether he would have withdrawn his guilty plea.

For his part, Komisar explained in his declaration that he believed (if Haji-Mohamed did not plead guilty) there was a high probability that Haji-Mohamed would be convicted of the state murder charge given the number of witnesses to that crime, and that he would likely face 51 years in state prison before he would be eligible for parole. According to Komisar, the 51-year number drove the plea process; he told the government's attorney that any plea agreement must include the murder charge. During negotiations, the government first offered a global plea deal of 40 years' imprisonment; Komisar countered with 30 years; and they settled on 35 years. Komisar explained that while Haji-Mohamed was unhappy with the offer, he ultimately seemed to appreciate that a global agreement to 35 years was better than a potential 51-year state penalty plus whatever the federal sentence turned out to be if he did not accept the plea offer. Komisar declared that it did not matter how the parties arrived at 35 years as far as the combination of counts. Picking counts "was simply a device to get to the agreed number of 35 years."

The district court found that Haji-Mohamed's statement that the misstated mandatory minimum motivated his acceptance of the plea offer was not credible. The court based its finding

on Haji-Mohamed's prior testimony—including the court's recollection of his demeanor while testifying, and the evidence in the record showing that the 35 years was driven by factors other than the mandatory minimum. We have previously held that "[i]n the absence of a clear basis in the record for rejecting the district court's credibility determinations, we are bound by those determinations." *United States v. Hudson*, 405 F.3d 425, 442 (6th Cir. 2005). Indeed, "[f]indings of fact anchored in credibility assessments are generally not subject to reversal upon appellate review." *Id.* (quoting *United States v. Taylor*, 956 F.2d 572, 576 (6th Cir. 1992) (en banc)). And we see no clear basis for rejection here. By his own admission, he was mainly motivated by the possibility of being convicted of one of the Hobbs Act-robbery counts and a third 924(c) count, the latter of which (at the time of the plea negotiations and his change of plea) carried an additional 25-year consecutive mandatory-minimum term. There is no reason to believe that learning the correct mandatory minimum was 32 years rather than 35 years would have motivated him to proceed to trial rather than to remove the "substantial chance" of conviction on the counts he referenced in his declaration.

Moreover, the additional evidence in the record supports the district court's conclusion that Haji-Mohamed did not suffer the requisite prejudice to sustain his claim. In particular, while Haji-Mohamed now says that he was less concerned about the state murder charge, it loomed large over the plea negotiations—so much so that Komisar insisted that the government coordinate its offer with the state prosecutor overseeing the murder case. And tellingly**,** the parties agreed to the number of years acceptable to both sides *before* settling on which of Haji-Mohamed's 19 counts would be the subjects of the guilty plea. Further, the agreement disposed of 17 other federal counts that were serious felonies. And while Haji-Mohamed expressed frustration about the rapidly-approaching trial date, he ultimately praised the result, stating during the plea hearing,

"Mr. Komisar even—regardless of our differences, he's able to still give me this 35." (Case No. 15-cr-00088, R.624, PageID.2306, 2310). Later in the plea colloquy, he confirmed that he was giving up "the right to a trial and all of the defense strategy that [he] could produce and—and could be made on [his] behalf at trial[]." (*Id*. at 2313). Thus, on balance, the contemporaneous evidence of Haji-Mohamed's preference to plead guilty rather than go to trial undermines his claim to the contrary. *See Lee v. United States*, 582 U.S. 357, 369 (2017) (explaining that guilty pleas should not be upset merely based on a defendant's post hoc assertions that he would not have pleaded guilty but for counsel's errors. Instead, judges should "look to contemporaneous evidence to substantiate a defendant's expressed preferences."). As a result, he cannot demonstrate a substantial likelihood of a different result and cannot satisfy *Strickland's* standard for prejudice.

B. Failure to Appeal

With respect to Haji-Mohammed's argument that counsel was ineffective because he failed to advise him to file a direct appeal raising the Rule 11/voluntariness error, we conclude that this argument fails for reasons largely similar to those discussed above.

"In those cases where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . the question [is] . . . whether counsel in fact consulted with the defendant about an appeal." *Neill v. United States*, 937 F.3d 671, 676 (6th Cir. 2019) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000)). In this context, "consult" means to advise "the defendant about the advantages and disadvantages of taking an appeal, and [to] mak[e] a reasonable effort to discover the defendant's wishes." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 478). However, counsel only has a constitutional duty to consult when "a rational defendant would want to appeal" or when "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 480). In all cases, "courts must

judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential." *Id.* (quoting *Flores-Ortega*, 528 U.S. at 477) (internal quotation marks omitted). We observed in *Moody v. United States*, 958 F.3d 485, 492 (6th Cir. 2020), that "defense lawyers need not (and in fact should not) raise every colorable argument they can find." (citing *Davila v. Davis*, 582 U.S. 521, 533 (2017) ("Effective appellate counsel should not raise every nonfrivolous argument[.]"); *Wilson v. McMacken*, 786 F.2d 216, 219 n.3 (6th Cir. 1986) (trial counsel need not make "every colorable objection"). This is because difficult decisions about which issues to pursue and which ones to cast aside lie at the heart of legal advocacy. A lawyer's decision on such issues is deficient only when no reasonable attorney would have made the same call at the time. *See Strickland*, 466 U.S. at 690.

There is no debate that Komisar consulted with Haji-Mohamed about a potential appeal. Thus, the question before the court is not whether the duty to consult was triggered, but whether the consultation itself passes constitutional muster. Komisar's declaration reflects discussions about appealing and the risk that an appeal could void the plea agreement. The government argues that Komisar provided competent, candid advice, despite failing to mention the Rule 11 error with Haji-Mohamed. The government also points out that raising the Rule 11 error on appeal would have carried risks similar to or the same as those attendant to the other issues Komisar did discuss with Haji-Mohamed. Still, Komisar's declaration does not suggest that he discussed the Rule 11 error and the advantages and disadvantages of pursuing an appeal on that issue with Haji-Mohamed, or that he discerned whether Haji-Mohamed wanted to appeal the issue.

We presume prejudice in an ineffective-assistance claim if a defendant can establish a reasonable probability "that, but for counsel's deficient performance, he would have appealed."

*Flores-Ortega* at 471, 484; *see also Garza v. Idaho*, — U.S. —, 139 S. Ct. 738, 742 (2019) (prejudice is presumed when an attorney's deficient performance causes a defendant to forgo an appeal that he otherwise would have pursued, even if he has signed an appeal waiver). This is where Haji-Mohamed's claim once again falters. Neither in the district court nor on appeal does Haji-Mohamed point to any evidence in the record suggesting that he would have pursued an appeal if counsel had advised him that the sentencing-exposure advice provided a meritorious ground for doing so. Not even Haji-Mohamed's self-serving declaration in support of his petition makes this claim.[3] Moreover, he agreed with Komisar's advice to forgo any appeal of the court's denial of his motion to withdraw his guilty plea because he agreed that the risk of resurrecting the murder charge was too great. The same danger existed were he to successfully challenge his guilty plea. As such, we do not presume prejudice here and Haji-Mohamed has not otherwise met his burden to establish its existence. Therefore, he is not entitled to relief.

*Lack of Evidentiary Hearing.* Haji-Mohamed resists this conclusion, arguing that at minimum, the district court was obligated to conduct a hearing on his claims. Section 2255 requires "a hearing on such allegations unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (internal quotation marks omitted); *Ray v. United States*, 721 F.3d 758, 760–61 (6th Cir. 2013). "Stated another way, the court is not required to hold an evidentiary hearing if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or [are] conclusions rather than statements of fact." *Amr v. United States*,

[3] Notably, the presentence report, which Haji-Mohamed reviewed before sentencing, correctly identified the mandatory minimum for the brandishing count as seven years. He did not question this fact. The parties do not address the extent to which this notice may have factored into the decision-making process; we highlight it here for further context.

280 F. App'x 480, 485 (6th Cir. 2008). The decision whether to hold an evidentiary hearing is one committed to the sound discretion of the district court. *Huff v. United States*, 734 F.3d 600, 607 (6th Cir. 2013) ("A decision not to hold an evidentiary hearing on a motion for relief under 28 U.S.C. § 2255 is reviewed for abuse of discretion.").

Here, the district court made a credibility finding that Haji-Mohamed's claim that the stated mandatory minimum motivated his acceptance of the plea offer was not believable. For reasons previously discussed, we are loath to question this finding. While the district court's credibility determination does not necessarily mean that Haji-Mohamed's statement is "inherently unreliable," coupling it with his declaration accompanying his petition demonstrates an internal inconsistency that contradicts the record. Specifically, as we noted earlier, Haji-Mohamed states in his declaration that he mainly agreed to plead guilty to avoid possible convictions for the Cricket store robbery and another 924 (c) count—not because 35 years was the lowest statutory sentence. Irrespective of the evidence offered by the government, therefore, his own account of the foremost motivating factor for his guilty plea is untethered from the error that he claims justifies relief. Consequently, even with the relatively light burden placed on petitioners to justify a hearing, he has failed to carry it and the district court did not abuse its discretion in declining to hold a hearing for his claims.

*Voluntariness of Guilty Plea*. In addition to his ineffective-assistance-of-counsel claims, Haji-Mohamed also makes the independent argument that his guilty plea was constitutionally infirm because it was not voluntary and intelligent and thus violated due process. But Haji-Mohamed did not raise the claim that his plea was unintelligent and involuntary at or before sentencing. Nor, as we have discussed, did he file a direct appeal. Instead, he raised it for the first time in his §2255 motion. Generally, when a defendant fails to raise an issue on direct appeal,

other than ineffective assistance of counsel, that issue is waived and cannot be pursued on collateral review absent a showing of cause and prejudice. *See Huff*, 734 F.3d at 605–06. The hurdle for such a double default is intentionally high in view of the federal interest in the finality of criminal convictions. *See United States v. Frady*, 456 U.S. 152 (1982). Indeed, "the concern with finality served by limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784 (1979). And the Court has not hesitated to apply this standard to cases involving claims of unintelligent and involuntary guilty pleas. *See, e.g.*, *Bousley v. United States*, 523 U.S. 614, 622 (1998).

The government may, however, forfeit its right to assert default as a defense by failing to raise it. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). The government has not asserted default in this case. And the district court did not consider its application. Even so, we may raise the issue *sua sponte* where appropriate. *Id.* We acknowledge that ineffective assistance of counsel can provide sufficient cause to excuse a petitioner's failure to raise an issue in the district court or on direct appeal. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (stating that procedural default resulting from ineffective assistance of counsel must be imputed to the state). Nevertheless, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Id.* at 487. Thus, under the facts that Haji-Mohamed has alleged—that counsel missed the involuntary/unintelligent-plea issue in the district court and in considering grounds for appeal—he has not established sufficient cause to excuse the procedural default. Moreover, having failed to demonstrate prejudice sufficient to sustain his ineffective-assistance-of-counsel claims, he necessarily cannot establish the actual prejudice required to overcome his procedural default. Under such circumstances, where we have thoroughly explored petitioner's posited reason for

failing to raise his involuntary/unintelligent-plea claim, we find that additional briefing is not necessary and *sua sponte* consideration is appropriate. We thus decline further review on the merits of this claim.

IV.

*Request for Remand.* Finally, Haji-Mohamed argues that if this matter is remanded, a different district judge should be assigned. His request is motivated by the fact that the district court made an adverse credibility finding against him. We have accepted the district court's credibility finding and otherwise found that Haji-Mohamed is not entitled to relief. Therefore, there will be no remand and his request is denied as moot.

V.

For the reasons set forth above, the decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-5733

**FILED**
Sep 22, 2023
DEBORAH S. HUNT, Clerk

AWEIS HAJI-MOHAMED,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

Before: BATCHELDER, BUSH, and DAVIS, Circuit Judges.

# JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| **AWEIS HAJI-MOHAMED,** | ) | |
| | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **v.** | ) | **No. 3:20-cv-01052** |
| | ) | **(Crim. No. 3:15-cr-00088-2)** |
| **UNITED STATES OF AMERICA,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**MEMORANDUM OPINION**

Serving a 35 year sentence pursuant to a Rule 11(c) agreement with the Government, Aweis Haji-Mohamed has filed a Motion (Doc. No. 1) and Supplemental Motion (Doc. No. 9-1) to Vacate, Set Aside, or Correct Sentence in accordance 28 U.S.C. § 2255. Both motions have been fully briefed by the parties (Doc. Nos. 1, 9-1, 14, 18), and both will be denied.

## I. Factual and Procedural Background

Haji-Mohamed's prison sentence was the result of his role in a series of crimes committed in and around public housing developments in Nashville, Tennessee. More specifically, Haji-Mohamed was named in 19 of the 39 counts contained in a Third Superseding Indictment returned against him and three others on February 28, 2018.

Haji-Mohamed's alleged crimes included three counts each of (1) conspiring to commit Hobbs Act robbery; (2) Hobbs Act or attempted Hobbs Act robbery; and (3) using carrying, brandishing and discharging a firearm during and in relation to a crime of violence. He was also charged with six counts of being a felon in possession of a firearm, and two counts each of stealing a firearm and possessing a stolen firearm. Even the sheer number and descriptions of those crimes fails to capture the violence and havoc he reaped during the first three months of 2015, particularly

on those in and around the Tony Sudekum and J.C. Napier housing developments in historic South Nashville. Nor does it depict the brazenness and callousness of some of his acts.

The crimes were set out in detail by the Government during Haji-Mohamed's change of plea hearing on April 6, 2018. Those facts, agreed to by Haji-Mohamed during the hearing, generally entail three armed robberies, a theft, shots being fired with abandon, and a cold-blooded murder.

First, on January 10, 2015, Haji-Mohammed, armed with a loaded Beretta .40 semi-automatic pistol, robbed Chris Smith, a street level cocaine dealer, at the Tony Sudekum homes. During the course of the robbery (in which co-defendant Charles Braden participated), Smith's stepson (a juvenile) came outside his residence, whereupon Haji-Mohammed shot at the stepson. Fortunately, the bullet missed, but hit the bricks by the doorway and was later recovered by the police.

Second, and also on January 10, 2018, Haji-Mohammed and Ernest Eddie, robbed Isaiah Starks, another cocaine dealer, at the Tony Sudekum homes.[1] Starks was sitting in the driver seat of the car when Haji-Mohamed armed with the Beretta approach him, and Eddie went to the passenger side where he displayed a Ruger P94 pistol. After announcing the robbery and demanding everything Starks had, Haji-Mohammed fired his pistol into the pavement to show he was serious. Starks turned over a small amount of cash, but kept the drugs and money he had secreted in his clothing. Haji-Mohamed and Eddie then fled the area. Thereafter, Haji-Mohamed made several statements indicating that he wanted to kill Starks.

Third, and less than two weeks later, Haji-Mohamed and Marquis Brandon, another co-defendant, committed an armed robbery of the Cricket Wireless Store located at 13 Lafayette Street, just across the street from the JC Napier homes. In the early afternoon of January 22, 2015, Haji-

[1] Starks did not live in the complex, but he frequented the area to sell his wares.

Mohamed and Brandon entered the Cricket store wearing hooded sweatshirts in an effort to partially cover their faces. Both were armed, with Haji-Mohammed this time carrying an SCCY semiautomatic pistol. Haji-Mohammed brandished the gun at the store clerk and demanded cash from the register. The clerk was then instructed to take off his pants, so as to slow down any possible pursuit. Meanwhile, Brandon saw that the clerk had a Springfield XD .40 caliber near him. That gun and the store cash were taken by Haji-Mohamed and Brandon, who then fled the scene.

Fourth, within the next day or two, Haji-Mohammed got into an argument with Walter Butler, a Bloods gang member and erstwhile confederate, in an apartment at the CWA complex.[2] During the argument, Butler pointed a gun at Haji-Mohamed, but then left the apartment. Haji-Mohamed went outside and saw Thomas Pointer, who was carrying Taurus Millennium .40 caliber handgun. Haji-Mohamed asked to see the gun and Pointer obliged, presumably because both had gang affiliations. Haji-Mohamed then pointed the pistol at Pointer and refused to give it back. Upon later learning that Haji-Mohamed had absconded with a gun that was shared by various gang associates, Butler called him and demanded its return. This incensed Haji-Mohamed and he made threats against Butler and his family. Haji-Mohamed carried out those threats at approximately 9:30 p.m. on January 24, 2015, when he entered Butler's grandmother's home (which was also occupied by several juveniles, including one who was disabled), and fired his Beretta several times. Responding officers found bullet holes in the wall, floor, and above a cabinet.

Fifth, in the wee hours of the morning on February 9, 2015, Haji-Mohamed received a telephone call from a female asking him to come to the area where he had previously robbed Starks. Haji-Mohamed, along with co-defendants Brandon and Reginald Johnson, III arrived at the location.

[2] CWA is near the James A. Cacye Homes, another public housing development in Nashville.

Starks was also present. At the time, Haji-Mohamed was unarmed, but Johnson told Brandon to give Haji-Mohamed the Springfield XD pistol he was carrying. Turning to Starks, Haji-Mohamed said, "bye-bye," and shot Starks in the head, killing him.

After Starks' murder, Haji-Mohamed fled the area and traveled back and forth between Nashville and Atlanta, Georgia. On August 25, 2015, the Metropolitan Nashville Police Department caught up with him and found him hiding in the trunk of a car parked in a garage at Keisha Pollard's residence. Upon being taken into custody, Haji-Mohamed told the officers that he had been on the other side of the front door when they knocked, and he thought about shooting them. He then led officers to a Starfire, 30 MI, 9mm pistol that he had hidden in a drawer in Pollard's bedroom.

Given the scope and breadth of his crimes, Haji-Mohamed faced serious charges and the prospect of substantial time in prison. For each of the six Hobbs Act robbery related charges (Counts 3, 4, 6, 7, 11, 12), he faced a sentence of up to twenty years imprisonment; for each the three carrying and brandishing a firearm charges (Counts 5, 8, 13), he faced mandatory consecutive sentences that began at no less than five years and went to life; and for each of the ten other firearm related charges, he faced the possibility of 10 years in jail. Ultimately, he agreed to plead guilty to Counts 8 and 13, which involved carrying, brandishing, and discharging a firearm during the robbery of Starks on January 10, 2015, and to using and carrying a firearm during the armed robbery of the Cricket Store twelve days later. He also agreed to a 35-year sentence.

By any measure, 35 years in federal prison is a substantial punishment, but it paled in comparison to Haji-Mohamed's exposure were he to go to trial. Not only were 17 other counts dismissed, the State of Tennessee agreed to drop a first-degree homicide case against Haji-Mohamed that would have possibly subjected him to life in prison, which would have required him to serve at

least 51 years.

Notwithstanding his receipt of what can only be described as a sweetheart deal, Haji-Mohamed filed a Motion to Set Aside his plea on February 20, 2019, almost a year after he pled guilty. This was primarily the result of the First Step Act that became effective on December 21, 2019, and reduced the mandatory minimums for certain gun charges. By Haji-Mohamed's calculations, the statutory maximum term for his counts convictions would have been 17 years, specifically 10 years for the discharge offense charged in Count 8 and a consecutive 7 years for the brandishing offense alleged in Count 13. After a hearing, during which Mohamed testified that he would not have pled guilty had he known that the statutory maximum would have only been 17 years under the First Step Act, the Court denied the motion not only because it came way too late, but also because Haji-Mohamed knowingly and voluntarily entered into a plea agreement that called for a 35 year prison sentence.

On December 9, 2019, the Court accepted the Rule 11(c) agreement of the parties, sentenced Haji-Mohamed to 210 months consecutive on Counts 8 and 13 for a total term of 420 months, and dismissed the remaining 17 counts. No appeal was filed.

## II. Legal Discussion

In his motion, Haji-Mohamed raises a number of ineffective assistance of counsel claims along with a claim under United States v. Davis, 139 S. Ct. 2319 (2019). He also asserts that his plea was involuntary and not in accordance Rule 11 of the Federal Rule of Criminal Procedure. Because the alleged involuntariness of plea appears to be his primary claim and it serves as a basis for several others, the Court begins there after first setting forth the basic law governing ineffective assistance of counsel claims.

**A. Ineffective Assistance of Counsel Claims – General Standard of Review**

"[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." Massaro v. United States, 538 U.S. 500, 504 (2003). "Defendants claiming ineffective assistance must establish two things. First, that the attorney's performance fell below 'prevailing professional norms.' And second, that the attorney's poor performance prejudiced the defendant's case." Monea v. United States, 914 F.3d 414, 419 (6th Cir. 2019) (citing Kimmelman v. Morrison, 477 U.S. 365, 381 (1986)). "Proving prejudice is not easy" because the petitioner is confronted with the "high burden" of demonstrating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (citing Davis v. Lafler, 658 F.3d 525, 536 (6th Cir. 2011)). "To show prejudice in the guilty-plea context, a defendant 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead would have insisted on going to trial.'" Hodges v. Colson, 727 F.3d 517, 534 (6th Cir. 2013) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

**B. Rule 11 and Voluntariness of Plea**

"[G]uilty pleas must be entered knowingly, voluntarily, and intelligently in order to be constitutionally effective." Fitzpatrick v. Robinson, 723 F.3d 624, 639 (6th Cir. 2013) (citing Brady v. United States, 397 U.S. 742, 748 (1970)). "Such a determination is made after considering all of the relevant circumstances surrounding the plea or waiver." Id. "For a guilty plea to be valid, the defendant is required to understand the nature of the charges against him and the consequences of pleading guilty, including the possible punishments and loss of other rights." Id. Thus, "[t]he longstanding test for determining the validity of a guilty plea is whether the plea represents a

voluntary and intelligent choice among the alternative courses of action open to the defendant," Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citation omitted), and a voluntary plea occurs when it is "entered by one fully aware of the direct consequences." Brady, 397 U.S. at 748.

Haji-Mohamed insists that his plea was invalid and not entered into knowingly and voluntarily because, in contravention of Rule 11, he was not correctly informed by the Court, the Government, or his own lawyer, as to the penalty for his use of a firearm in relation to Counts 8 and 13. As a consequence, he requests that the Court vacate his convictions and/or allow him to withdraw his guilty plea. Because the Court finds that Haji-Mohamed's guilty plea was unquestionably knowing and voluntary, his request will be denied.

During his plea colloquy, Haji-Mohamed was informed that, for the two counts to which he was pleading guilty, he was subject to a term of imprisonment of 35 years, consisting of a minimum ten years on Count 8 and a consecutive sentence minimum of 25 years on Count 13. Similarly, in the Agreement, Haji-Mohamed was informed that, as to Count 8, the penalty was a "mandatory consecutive term of imprisonment of not less than ten years imprisonment and not more than life," and that, as to Count 13, a "mandatory consecutive term of imprisonment of not less than twenty-five years imprisonment and not more than life[.]" (Case No. 3:15-cr-00088, Doc. No. 573 at 3). This description of the penalties comported with the language of the governing statute,[3] but were wrong according to Haji-Mohamed because it violated what he has labeled the "Washington rule."

In United States v. Washington, 714 F.3d 962 (6th Cir. 2013), defendant was convicted on

[3] The penalty for the first 18 U.S.C. § 924(c) violation is a mandatory consecutive sentence of five, seven, or ten years, depending on whether defendant used, brandished, or discharged a firearm during the crime. 18 U.S.C. § 924(c)(1)(A)(i)-(iii). "In the case of a second or subsequent conviction under [Section 924(c)], the person shall . . . be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. § 924(c)(1)(C)(i).

three counts of carjacking and related firearm offenses. During the first carjacking, defendant discharged his firearm, but in the other two carjackings he merely brandished the firearm. Among the issues on appeal was how the penalties should be calculated. This was important because if the carjacking in which he discharged the firearm was counted as the first conviction, the mandatory minimum would be 10 years plus a consecutive 25 years for each of the subsequent carjackings. But, if one of the brandishing firearms charges was counted first, then the penalty would be a mandatory 7 years for that crime, plus 25 years for each of the subsequent firearm conviction. As a matter of first impression in the Sixth Circuit, the court in Washington followed the Ninth Circuit's decision in United States v. Majors, 676 F.3d 803, 814-15 (9th Cir. 2012) that "the rule of lenity cautions that such doubt be resolved in [a defendant's] favor."

To the extent that Washington announced a "rule," it was a rule related to sentencing. Specifically, "Washington holds that when a defendant is facing multiple convictions for using a firearm while committing a crime of violence under 18 U.S.C. § 924(c)(1)(A), the sentencing court should order the convictions such that the conviction with the lowest mandatory minimum is imposed first." United States v. Randall, No. 1:03-CR-246, 2015 WL 13826724, at *1 (E.D. Tenn. Oct. 26, 2015).

Applying Washington to this case–and ignoring for the moment the agreed-upon 35-year sentence–Haji-Mohamed faced a combined total mandatory sentence of 32 years, instead of 35 years. This is because the conviction for brandishing a weapon during the Cricket Store robbery as charged in Count 13 would be counted first (7 years plus a consecutive 25 years for Count 8 = 32 years), instead of the discharge offense for shooting Starks charged in Count 8 being the designated "first" conviction (10 years plus a consecutive 25 years for Count 13 = 35 years).

Although Washington involved the procedure to be employed at sentencing and not plea proceedings, Rule 11 requires that a defendant be informed of "any maximum possible penalty, including imprisonment." Fed. R. Crim. P. 11. Here, of course, the maximum possible penalty for Haji-Mohamed were he to be convicted on the charges in the Third Superseding Indictment was life, and he was clearly informed of that penalty. Nevertheless, for purposes of his pending Section 2255 motion, the Court will assume what Haji-Mohamed identifies as "Washington error."

"A variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Fed. R. Crim. P 11(h). "To affect 'substantial rights, an error must have 'substantial and injurious effect or influence in determining the . . . verdict." United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004) (citations omitted). In the context of a guilty plea, defendant "must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." Id. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984). Haji-Mohamed has not met that burden.

In support of his Motions, Haji-Mohamed submitted a declaration (attached to his reply) in which he conclusorily states, that had he known the possible penalty for his convictions on Counts 8 and 13 was 32 years, "he would not have accepted the plea bargain for 35 years and . . . would not have entered my guilty plea." (Doc. No. 18-1, Haji-Mohamed Decl. ¶ 3). He also relies heavily on United States v. Hogg, 723 F.3d 730 (6th Cir. 2013).

Hogg involved both a "unique [set of] facts and procedural posture." Id. at 733. There, defendant was charged with trafficking 50 grams or more of cocaine. Under the then-applicable

sentencing scheme, he faced a mandatory minimum of 10 years for trafficking that amount. After his arrest, Congress passed the Fair Sentencing Act, which drastically lowered the minimum penalty for crack offenses such that an offense involving 28 grams or more of crack would trigger a 5-year mandatory minimum, while 280 grams or more would trigger a 10-year mandatory minimum. At the time he pled guilty to the lesser offense of trafficking 5 grams of crack cocaine (while at the same time agreeing that he actually trafficked 50 grams or more), defendant was informed that the potential penalty was either 5 to 40 years, or 10 years to life, depending upon the amount of drugs involved, and whether the Fair Sentencing Act applied.

As it turns out, neither calculation was correct. This was because, after defendant was sentenced to 188 months (the low end of the advisory guideline range), Dorsey v. United States, 567 U.S. 260, 264 (2012) was decided. There, the Supreme Court held that defendants sentenced after the August 3, 2010 effective date of the Fair Sentencing Act of 2010 were entitled to the benefit of its "new, more lenient" statutory penalties. What this meant for defendant was that his actual exposure was from 0 to 20 years. As a consequence, defendant should have been allowed to withdraw his plea.

To be sure, there are several tenets announced in Hogg that help guide the analysis of whether a substantial right has been impaired because of incorrect advice about the maximum possible punishment. However, Hogg is not "indistinguishable," as Haji-Mohamed argues. (Doc. No. 9-1 at 13). One need only look to the language of Hogg to see how different the two cases are. There, "the district court materially overstated the defendant's sentencing exposure" because he "was advised that he faced a five-to-forty year statutory range, [when] his range for the offense of conviction actually was zero to twenty years." 723 F.3d at 749. This misinformation was

compounded because that it had a "ripple effect" on the advisory guideline calculation, decreasing it from an exposure range of 188-235 months, to 151-188 months. Id. It was "evident" that "this is a significant change in the sentencing calculus under which Defendant weighed the Government's plea offer." Id. As the Sixth Circuit explained:

> Under the information disclosed to Defendant in the plea agreement and at the plea hearing, he was to receive a 188–month sentence that was less than half of the forty-year statutory maximum sentence he faced for the offense to which he pled guilty, and that placed him at the very bottom of the 188–to–235–month advisory Sentencing Guideline range determined by the parties. What is more, by securing the Government's agreement to allow him to plead guilty to a lesser-included offense, Defendant believed he had avoided the pre-FSA statutory penalty range of 10 years to life imprisonment he would have faced for the 50–grams–or–more crack cocaine offense charged in the indictment, as well as the resulting base offense level of 37 under the career offender guideline, see U.S.S.G. § 4B1.1(b)(1).
>
> Yet, in the wake of the FSA, this deal looks considerably less advantageous to Defendant. The 188–month sentence imposed by the district court is not far below the twenty-year statutory maximum for the offense to which Defendant pled guilty, particularly when compared to the "discount" of well over half of the forty-year statutory maximum disclosed by the district court and in the plea agreement. Moreover, Defendant's 188–month sentence sits at the upper bound of the post-FSA advisory Sentencing Guideline range of 151 to 188 months, rather than at the lower bound of the 188–to–235–month range set forth in the plea agreement. Against this backdrop, Defendant seemingly did not have a great deal to lose by rejecting the Government's plea offer and going to trial on the fifty-gram-or-more crack cocaine offense charged in Count One of the indictment; under the FSA, the statutory penalty range for this offense is zero to twenty years of imprisonment, and Defendant's advisory Sentencing Guideline range for this offense presumably would have been somewhat below this twenty-year maximum, so that his resulting sentence upon conviction at trial presumably would not have greatly exceeded (if at all) the 188–month sentence called for in the plea agreement.

United States v. Hogg, 723 F.3d 730, 749 (6th Cir. 2013).

The prism through which Haji-Mohamed viewed his plea and the one used by the defendant in Hogg are vastly different. For the crimes in the Third Superseding Indictment, that included the murder of Starks, Haji-Mohamed was looking at life imprisonment. In fact, the advisory guideline

range as subsequently calculated was also life imprisonment. To this, Haji-Mohamed also faced state murder charges, which could add an additional 50 years or more on top of any sentence imposed in this case.

It is true, as Haji-Mohamed points out, that the Sixth Circuit in Hogg observed that: (1) "a district court is [not] permitted to stray beyond the four corners of the specific offense to which a defendant has agreed to plead guilty in determining how to advise him of the statutory penalty range he faces for this offense"; and further that (2) "the Government's claims about offenses it could have proven or relevant conduct to which a defendant has admitted for purposes of Sentencing Guideline calculations have [no] bearing on the pertinent district court obligations under Rule 11(b)(1)(H)-(I)—namely, to accurately inform a defendant of the statutory penalty range for the crime to which he is pleading guilty." Hogg, 723 F.3d at 750. By the same token, however, the Sixth Circuit has observed that, "[w]hen considering a plea agreement, a defendant might well weigh the terms of the agreement against the maximum sentence he could receive if he went to trial." Pitts v. United States, 763 F.2d 197, 201 (6th Cir.1985). Moreover, after making the comment about straying from the four corners of the specific offense involved, the Sixth Circuit in Hogg went on to state:

> The requirements of Rule 11(b)(1)(H)-(I), after all, are not designed to inform a defendant generally of the penalties he would face for any conduct to which he has admitted, nor to advise him of the pertinent penalties for the offenses charged in the indictment in the **absence** of a plea agreement. Rather, these Rule 11 requirements are intended to ensure that the defendant is informed of the penalty range he faces **in light of** the terms governing his specific agreement to plead guilty. The task of the district court, in other words, is not to alert the defendant to the universe of considerations that might be relevant to his plea negotiations with the Government, but to advise him more specifically of the factors bearing on his acceptance or rejection of the particular deal actually offered by the Government and reflected in the parties' plea agreement, so that he may make an informed decision whether to

accept this arrangement and plead guilty in accordance with its terms.

Hogg, 723 F.3d at 751 (emphasis in original). This is in keeping with Hogg's earlier observation that "plea agreements must be interpreted in accordance with ordinary contract principles, with the intent of the parties ascertained primarily through the chosen wording of their agreement, and with any ambiguities construed against the Government." Id. at 744 (citing United States v. Moncivais, 492 F.3d 652, 662 (6th Cir.2007); Smith v. Stegall, 385 F.3d 993, 999 (6th Cir.2004)).

There was no ambiguity in the plea agreement. In exchange for pleading guilty, Haji-Mohamed would serve a 35-year prison sentence. The "factors bearing on his acceptance or rejection of the particular deal actually offered by the Government and reflected by the parties' plea agreement," Hogg, 723 F.3d at 21, was that in exchange for the plea and sentence, the Government would dismiss seventeen other charges, several of which carried a life sentence, and the State of Tennessee would dismiss yet another murder charge.

Notwithstanding the minimal 3-year (8.57%) difference between the penalty stated by the Court and the one supposedly required by the Washington rule, Haji-Mohamed insists that he would have not pled guilty had he known the actual minimum sentence was 32 and not 35 years. In addition to saying so in his Declaration, he claims that other things in the record support his position, none of which the Court finds persuasive.

In his reply brief, Haji-Mohamed identifies "five facts" that supposedly establish his "present assertion is true: Had he known, in light of Washington, that his mandatory minimum was less than 35 years, he would not have accepted the 35-year deal and would have continued to run the risk of the state prosecution." (Doc No. 18 at 11). Some of these are not demonstrable facts at all, but rather beliefs, opinions, or speculation (e.g., he "was only barely persuaded to take the 35-year deal,"

and "the federal case was given precedence" because "the somewhat flimsy § 924(c) charges were a better bet for a conviction than the state murder charge."). (Id.). Regardless, through these "facts" Haji-Mohamed invites the Court down a rabbit hole that it need not explore. This is because the Court had the opportunity to preview whether the statutory minimum – or the actual offered time – was the driving force behind his plea during the proceedings in which he attempted to withdraw it. At the time, the Court also had the opportunity to observe Haji-Mohamed's demeanor and consider his credibility.

With the enactment of the First Step Act, Haji-Mohamed thought he could get his sentence cut in half. So, during the course of the evidentiary hearing on his motion to withdraw plea, he disputed the Government's assertion that the mandatory minimum had nothing to do with the plea, and insisted the mandatory minimum was what prompted him to agree to a 35-year term of imprisonment in the first place. When prompted to explain, Haji-Mohamed testified:

> A. Because I – that was the mandatory minimum I could have got.
>
> Q. Okay.
>
> A. That was – that was – that was my understanding of it, like, this is the lowest you can get. You can't get no lower than the 35, because it would have been ten and then 25 mandatory minimum.

(Case No. 3:15-cr-00088, Doc. No. 706, Tr. at 7).

Quite clearly it was in Haji-Mohamed's interest to testify that the mandatory minimum was what led him to plead, otherwise his First Step Act claim would go nowhere. It was also clear that there were other things driving his request, most notably "buyer's remorse" and the reality that he would face decades in prison. Additionally, were he allowed to withdraw his plea, it didn't hurt that co-defendant Brandon had by then been acquitted of the Cricket store robbery count, and a key

witness had died. Obviously, these factors might help his bargaining position in any subsequent negotiations.

At the time of the hearing on the motion to withdraw, the Court was not called upon to assess Haji-Mohamed's credibility in regard to his testimony that the mandatory minimum is what led him to plead guilty – there were plenty of other reasons to deny the request. See United States v. Sydnor, 762 F. App'x 284, 288 (6th Cir. 2019) ("The idea behind Rule 11 is to provide a rare remedy for 'real confusion or misunderstanding' about the plea agreement, not for buyer's remorse"). Nevertheless, the Court clearly remembers the hearing and clearly remembers Haji-Mohamed. The Court also recalls stating, "I think for the most part you're being forthright with the Court." (Tr. at 40). That observation, however, did not extend to his testimony that his plea was solely the result of his understanding that the mandatory minimum for Counts 8 and 13 was 35 years, as opposed to 35 years being a godsend in light of the number of charges (federal and state), and the very real prospect that he could spend his dying days in prison. Simply put, the Court does not believe his assertion that the 35 years was tied to the mandatory minimum for Counts 8 and 13.

Even though the focus here is from Haji-Mohamed's perspective, other evidence in the record supports this conclusion. For example, during the change of plea, the Court and Haji-Mohamed had the following exchange:

> THE COURT: All right. Then let's go to your plea agreement. In particular, let's go to paragraph 12. Because in paragraph 12 it appears that you and the government have reached an agreement to recommend to the Court that I impose a custody sentence of 420 months, followed by five years of supervised release. Is that your understanding, your agreement with the government?
>
> THE DEFENDANT: Uh-huh.
>
> THE COURT: And you need to –

THE DEFENDANT: Yes. Yes.

THE COURT: And that's the recommendation that you are making to the Court –

THE DEFENDANT: Yeah.

THE COURT: – correct?

THE DEFENDANT: Yes.

(Case No. 3:15-cr-00088, Doc. No. 624, Tr. at 12). At no point during his plea did Haji-Mohamed suggest that the 420 months was agreed to by him because it was based upon a mandatory minimum.

Further, in its response to the Motion to Withdraw Guilty Plea, the Government asserted that the selection of counts was "fortuitous" because the plea "was negotiated by reaching an agreement as to the total term of years, and then choosing various counts to which [defendant] would actually plead guilty." (Case No. 3:15-cr-00088, Doc. No. 876 at 1). Similarly, David Komisar, Haji-Mohamed's trial counsel, has declared under oath that he sought a global settlement for both the federal and state charges. Towards that end, the Assistant United States Attorney first proposed 40 years, he countered with 30 years, and they agreed to split the difference. Thereafter, the Government drafted the plea agreement, calling for a 35 year sentence. It mattered not a whit as to how those years were distributed as to counts, so long as they totaled 35. (Doc. No. 14-1 Komisar Dec. ¶ 7). Moreover, even though Haji-Mohamed did not see eye-to-eye with Komisar on some issues, at his change of plea hearing he applauded counsel's efforts, stating, "[a]nd Mr. Komisar even – regardless of our differences, he's able to still give me this 35." (Case No. 3:15-cr-00088, Doc. No. 624, Tr. at 14).

Accordingly, the Court finds that Rule 11 error, if any, did not violate Haji-Mohamed's substantial rights and his request for relief on this claim will be denied.

**C. Ineffective Assistance of Counsel**

**1. Mandatory Minimum Sentence and Withdrawal of Plea**

Haji-Mohamed's first ineffective assistance claim is based upon counsel's failure to recognize the "Washington rule" and his consequent failure to argue that "rule" when Haji-Mohamed moved to withdraw his plea. This entire argument is a non-starter because Strickland requires a showing of prejudice. As already explained, Haji-Mohamed's sentence was an 11(c) agreement to serve 35 years, not to serve whatever the mandatory minimum could turn out to be for the charges to which he pled. Haji-Mohamed was not prejudice by receiving the benefit of the bargain he struck with the Government.

This claim also fails because, in addition to prejudice, Strickland holds that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or plea proceedings] cannot be relied on as having produced a just result." Id. at 686. Even though, as Haji-Mohamed points out, "Washington was published precedent at the time of [his] plea," the Court disagrees that "it was directly applicable" (Doc. No. at 12) given the very nature of a Rule 11(c) plea. Nor does the Court believe that the Sixth Amendment requires counsel to be a walking lexicon of all published cases, or at least not those that establish a "rule" in an entirely different context.[4]

[4] It is even more of a stretch for Haji-Mohamed to argue that "counsel should have bolstered the existing grounds for withdrawal" by asserting that "in the case of a similarly-situated defendant (Sands), the government had conceded the defendant could withdraw in light of the First Step Act[.]" (Doc. No. 9-1 at 17). Presumably, this a reference United States v. Sands, No. 2:17-cr-261, 2019 U.S. Dist. Lexis 28498 (S.D. Ohio Feb. 22, 2019) cited earlier in Haji-Mohamed's brief. If so, that is an out-of-district case, which is unpublished to boot. Moreover, while the decision appears in Lexis, it does not appear on Westlaw. Besides, why the government chose to concede withdrawal of the plea in Sands is unstated, and in other cases it has objected to withdrawal of a plea notwithstanding the First Step Act. See United States v. Hardy, 838 F. App'x 68, 72 (5th Cir. 2020) (government objected to withdrawal of plea and appeals court found no abuse of discretion in denying defendant's motion to withdraw his 11(c) guilty plea based on the passage of the

The same holds true for Haji-Mohamed's claim that counsel was ineffective because he failed to advise him that he should file a direct appeal on the grounds that the plea was involuntary and in violation of Rule 11 because of the supposed "Washington error." Accordingly, the Court will not vacate Haji-Mohamed's plea, allow him to withdraw it, or restore his right to appeal as he requests.

**2. Imposition of the Sentence**

During the sentencing hearing, the Court stated, "[s]ince I'm accepting your C agreement, the calculation of the guideline is really moot," and imposed the 35 year sentence. When filling out the judgment, the Court indicated that it was accepting the Presentence Report that recommended life imprisonment, that the sentence would be a consecutive 17.5 years on each count, and the 35 years was a downward variance from the Guidelines range. This, according to Haji-Mohamed, violated Section 3553's requirement that "the sentencing court [] state 'in open court' the sentence, its 'reasons for its imposition of the particular sentence,' and whether the sentence falls within the guideline range and any reason for a departure or variance from that range." (Doc No. 9-1 at 17) (quoting 18 U.S.C. § 3553(c)). Haji-Mohamed argues that Komisar was ineffective in failing to somehow challenge the judgment or the Court's procedure.

Even if Haji-Mohamed is correct, none of this impacted his sentence and he accordingly was not prejudiced. Further, with regard to this claim and several others raised by Haji-Mohamed, the following observations from a recent Sixth Circuit case bear repeating:

> The Sixth Amendment "does not guarantee perfect representation" but only "reasonably competent" representation. Harrington v. Richter, 562 U.S. 86, 110, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (cleaned up). Thus, defense lawyers need not (and in fact should not) raise every colorable argument they can find. See Davila v. Davis, —— U.S. ——, 137 S. Ct. 2058, 2067, 198 L.Ed.2d 603 (2017) ("Effective appellate

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First Step Act).

> counsel should not raise every nonfrivolous argument[.]"); Wilson v. McMacken, 786 F.2d 216, 219 n.3 (6th Cir. 1986) (trial counsel need not make "every colorable objection"). Tough judgment calls about what to challenge and what to let slide are part of lawyering. Such decisions only become deficient – that is, incompetent – when no reasonable counsel would have made the same choice at the time. Strickland [v. Washington], 466 U.S. [668] at 690, 104 S.Ct. 2052 [80 L.Ed.2d 674 (1984)]. Here, even if [defendant's] claims could be called colorable, there's simply no argument that they were so strong that every reasonable defense attorney would have run with them.

Moody v. United States, 958 F.3d 485, 492 (6th Cir. 2020).

**D. Void for Vagueness and *Davis***

Haji-Mohamed argues that counsel was ineffective in failing to argue *a la* Johnson v. United States, 135 S.Ct. 1551 (2015) that 924(c) was void-for-vagueness.[5] Relatedly, he asserts that his convictions on Counts 8 and 13 charging section 924(c) violations cannot stand.

Section 924(c) defines a "crime of violence"" in two ways. It is an offense that is a felony and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3). Subsection (A) is often referred to as the force clause, the use-of-force clause, or the elements clause, while Subsection (B) is often referred to as the residual clause or the substantial-risk clause.

In Davis, 139 S. Ct. at 2336, the Supreme Court found the residual clause of Section 924(c)(3) to be unconstitutionally vague. This means that conspiracy to commit Hobbs Act robbery

[5] This issue was not raised until after Haji-Mohamed filed a motion to amend (Doc. No. 9) to add the Davis claim. If the claim should have been so obvious to trial counsel, query why it was not raised in post-conviction counsel's first filing, instead of months later.

is not a crime of violence for purposes of 924(c) because it is based upon the residual clause. United States v. Ledbetter, 929 F.3d 338, 360–61 (6th Cir. 2019). Likewise, this Court has held that attempted Hobbs Act robbery is not necessarily a crime of violence because use-of-force is not an essential element. See Starks v. United States, No. 3:15-CR-00147-5, 2021 WL 351995, at *10 (M.D. Tenn. Feb. 2, 2021). On the other hand, the Sixth Circuit has held that "Hobbs Act robbery constitutes a crime of violence," United States v. Gooch, 850 F.3d 285, 292 (6th Cir. 2017), and this remains true, even post Davis. Porter v. United States, 959 F.3d 800, 804 (6th Cir. 2020).

In this case, Count 8 charged the following:

> On or about January 10, 2015, in the Middle District of Tennessee, [2] AWEIS HAJI-MOHAMED a/k/a SON SON and [5] CHARLES BRADEN a/k/a MANSTINKA did knowingly use, carry, brandish, and discharge firearms during and in relation to a crime of violence, to wit: robbery, attempted robbery, and conspiracy to commit a robbery affecting commerce in violation of Title 18, United States Code, Section 1951, relating to an armed robbery of Isaiah Starks a/k/a Blue, who they believed to be a drug dealer.
>
> All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

(Case No. 3:15-cr-00088, Doc. No. 481 at 6). Count 13 used substantially the same language in relation to the Cricket Store robbery. (Id. at 7-8).

Because Haji-Mohamed was charged with using a firearm in relation to a robbery, attempted robbery and/or a conspiracy to commit robbery, he claims "it was possible that [his] plea was sustained on just the admission to a Hobbs Act conspiracy (or perhaps to a Hobbs Act attempt), rather than to an admission to completed Hobbs Act robbery." (Doc. No. 9-1 at 22). The problem with this argument is that it entirely ignores his agreement to the facts presented at the plea colloquy and those contained in the statement of facts attached to his Plea Agreement. (Case No. 3:15-cr-00088, Doc. No. 527 at 13-18).

With respect to Count 8, Haji-Mohamed admitted that: (1) he, Braden, and another, agreed to rob Starks; (2) he was armed with a Beretta; (3) he demanded drugs and money from Starks; (4) he fired the weapon into the ground to show he was serious; and (4) he stole cash from Starks. With regard to Count 13, Haji-Mohamed admitted that: (1) he and Brandon agreed to commit an armed robbery of the Cricket store; (2) they entered the store while Haji-Mohamed was carrying an SCCY semi-automatic pistol; (3) he pointed his pistol at the store clerk; (4) he demanded money; and (5) he fled with cash from the store, while Braden fled with the clerk's pistol. While those admissions include conspiracy to commit armed robbery, they also show that Haji-Mohamed committed Hobbs Act robbery in relation both to Starks and the Cricket store. For both counts, he admittedly committed a crime of violence.[6] Davis does not hold otherwise.

**E. Certificate of Appealability**

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A prisoner seeking a COA must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). Instead, "'[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment

[6] In this regard, Haji-Mohamed's reliance on Stromberg v. California, 283 U.S. 359, 367-78 (1931) is misplaced. There, the Supreme Court stated that when a jury is instructed on alternative theories, one of which is plainly unconstitutional, a conviction based upon a general verdict must be set aside. Here, the Court is not not dealing with a general verdict, but rather Haji-Mohamed's admission to Hobbs Act robbery of the Cricket Store and Starks. See Burleson v. United States, No. 3:20-CV-487, 2020 WL 7027503, at *3 (M.D. Tenn. Nov. 27, 2020) ("[U]nlike in Stromberg, we can ascertain that Burleson was convicted of both underlying crimes of attempted Hobbs Act robbery and attempted Hobbs Act extortion")

of the constitutional claims debatable or wrong.'" Id. (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). Haji-Mohamed has not made that showing with respect to any of his claims and, accordingly, a certificate of appealability will not issue.

## III. Conclusion

On the basis of the foregoing, Haji-Mohamed's Motion and Amended Motion to Vacate, Set Aside, or Correct Sentence in Accordance with 28 U.S.C. § 2255 (Doc. Nos. 1, 9-1) will be denied. A certificate of appealability will not issue.

An appropriate Order will issue.

WAVERLY D. CRENSHAW, JR.
CHIEF UNITED STATES DISTRICT JUDGE