Appendix B

In the

United States Court of Appeals

For the Seventh Circuit

No. 23-3140

MICHAEL COBBS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Central District of Illinois.
No. 3:22-cv-3141 — **Sue E. Myerscough**, *Judge.*

ARGUED FEBRUARY 27, 2025 — DECIDED JUNE 26, 2025

Before ST. EVE, LEE, and MALDONADO, *Circuit Judges.*

LEE, *Circuit Judge.* Michael Cobbs pleaded guilty in 2017 to three crimes: attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951; using, carrying, or brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The attempted Hobbs Act robbery served as the predicate crime of violence for the § 924(c) charge.

Four years after the entry of the judgment, Cobbs returned to the district court to collaterally attack his 25-year prison sentence under 28 U.S.C. § 2255. His theory is that his § 924(c) conviction is invalid based on *United States v. Taylor*, where the Supreme Court held that an attempted Hobbs Act robbery is not a crime of violence for purposes of § 924(c). 596 U.S. 845 (2022). The district court denied Cobbs's petition. Because Cobbs admitted to facts that support a conviction on the § 924(c) count as alleged in the indictment before us, we affirm.

I

Early in the morning of September 11, 2017, Cobbs entered the Brickstone Restaurant in Bourbonnais, Illinois, with a semiautomatic pistol. He was on supervised release for a previous armed robbery conviction at the time.

Once inside the restaurant, Cobbs used duct tape to bind the hands of several Brickstone employees and took at least one of their cell phones. He then came upon Brickstone's owner, who was in his office counting the proceeds. Cobbs bound the owner with duct tape as well and put the money into the backpack he was carrying. All the while, Cobbs was brandishing the pistol.

As Cobbs was trying to flee the restaurant, he ran into Brickstone's manager, Matthew Offerman. When Offerman tried to use his cell phone to call for help, Cobbs grabbed the cell phone from his hand, and a struggle ensued. Cobbs eventually broke free and ran out the door, but Offerman pursued him. At some point, Offerman tried to tackle Cobbs and was able to wrestle the backpack away from him. But Cobbs escaped.

A short time later, law enforcement officers found Cobbs hiding in a nearby dumpster. He had a roll of duct tape as well as a cell phone belonging to one of Brickstone's employees.

A grand jury charged Cobbs in a three-count indictment. Because the precise language in the indictment is important for our analysis, we recount it here.

Count 1, entitled "Attempted Obstructing of Commerce by Robbery," charged Cobbs under 18 U.S.C. §§ 1951 and 1952 (also known as the Hobbs Act). It alleged that Cobbs, on September 11, 2017:

> unlawfully obstructed, delayed, and affected, and attempted to obstruct, delay, and affect commerce ... by robbery ... in that [Cobbs] unlawfully took and obtained, and attempted to take and obtain, personal property, including but not limited to, cellular phones and United States Currency, from the persons and in the presence of the owners of the property, against their will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said persons, that is [Cobbs] brandished a firearm as he bound the owners of the property with duct tape and took the property.

Count 2 charged Cobbs with violating 18 U.S.C. § 924(c)(1)(A)(ii). It alleged that Cobbs, on September 11, 2017:

> possessed and brandished a firearm ... in furtherance of a crime of violence that was a felony ... that is, a violation of Title 18, United States Code, Section 1951, as set forth in Count One of this Indictment.

Lastly, Count 3, not relevant here, charged Cobbs with possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1).

On January 16, 2018, Cobbs appeared before a magistrate judge by consent and pleaded guilty to all three counts. During the hearing, the government recited the elements it had to prove to obtain a conviction for the three counts in the event of a trial. In the process, the government described "[t]he first count being an Hobbs Act robbery in violation of 18 U.S.C. Section 1951, that's obstructing or attempting to obstruct commerce by robbery." The government also specified that it would have to prove that Cobbs "knowingly attempted to obtain money or other property from the victims outlined in the indictment." Cobbs agreed to the government's recitation.

After detailing the penalties associated with the three charges and explaining the sentencing procedure to Cobbs, the magistrate judge discussed Cobbs's appeal rights. The magistrate judge first noted that Cobbs was entering an open plea (that is, Cobbs would plead guilty without the benefit of a plea agreement), and Cobbs's lawyer confirmed that the government had not provided any written plea offers. Then, the magistrate judge told Cobbs that he would have the right to appeal the conviction and the sentence. After that, the government presented the factual basis for the plea. Here too the details matter, and so we present the factual basis here:

> [O]n September 11, 2017, [ ] at approximately 7:45 in the morning, the defendant entered the Brickstone Restaurant in Bourbonnais, Illinois. Once he was inside, he forced two employees into a back utility room; bound their hands with duct tape and put duct tape over their mouths; found another employee, duct taped him, bound him in the same way with duct tape; and then

> found the owner who was counting money in the front office. He pulled the chair out from under the owner, and, again, bound the owner with duct tape, and then proceeded to take the money the owner was counting and stuffed it in a backpack. At the same time he was brandishing a Glock, Model 22, semiautomatic pistol. At the same time he was attempting to flee the restaurant, he encountered the manager who he wrestled with. The bag that the defendant was carrying was wrestled away from the defendant and the defendant fled. Within an hour, the defendant was found in the—approximately—in a dumpster, approximately 300 yards away from the restaurant. He had a roll of duct tape in his possession. Alongside him was a cell phone that belonged to one of the employees of the Brickstone Restaurant.

Cobbs then acknowledged that he did what the government said he did.

In the end, the district court sentenced Cobbs to one day of imprisonment as to Count 1 and Count 3 to run concurrently, and 300 months of imprisonment on Count 2 to run consecutively to the one-day sentence for Counts 1 and 3. Cobbs did not appeal.

Four years later, the Supreme Court decided *Taylor*, 596 U.S. at 852, where it held that "attempted Hobbs Act robbery does not qualify as a crime of violence" under § 924(c). *See* 18 U.S.C. § 924(c)(3)(A). The following month, Cobbs filed the instant petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. In it, he asserts that the *Taylor* decision renders invalid his § 924(c) conviction in Count 2 for brandishing a firearm during a crime of violence. As Cobbs

sees it, his § 924(c) conviction was predicated on his admission of an attempted Hobbs Act robbery under Count 1. Therefore, he claims, after *Taylor*, his guilty plea to Count 1 does not support his conviction of the § 924(c) violation charged in Count 2.

The district court denied Cobbs's petition. In doing so, the court determined that Cobbs had procedurally defaulted his claim that attempted Hobbs Act robbery does not qualify as a predicate crime of violence under § 924(c). The district court also found no cause for Cobbs's procedural default, and it concluded that he failed to show actual innocence excusing that default. The district court nevertheless granted Cobbs a certificate of appealability, and this appeal followed.

II

Section 2255(a) permits a federal prisoner to petition for relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). When reviewing a denial of a § 2255 petition, we review the district court's legal conclusions *de novo* and its factual findings for clear error. *See Bridges v. United States*, 991 F.3d 793, 799 (7th Cir. 2021) (citing *Martin v. United States*, 789 F.3d 703, 705 (7th Cir. 2015)).

On appeal, Cobbs contests the district court's determination that he procedurally defaulted his *Taylor*-based claim, as well as the district court's conclusion that the default cannot be excused. There is no question that Cobbs procedurally defaulted his current claim—he did not directly appeal his conviction or sentence. *See White v. United States*, 8 F.4th 547, 554 (7th Cir. 2021) (citing *McCoy v. United States*, 815 F.3d 292, 295 (7th Cir. 2016)) ("A claim not raised on direct appeal generally

may not be raised for the first time on collateral review and amounts to procedural default."). Thus, we are left to review whether the procedural default should be excused.

A

A petitioner can overcome procedural default by showing "either cause for the default and actual prejudice from the alleged error, or that he is actually innocent." *Yang v. United States*, 114 F.4th 899, 912 (7th Cir. 2024) (quoting *White*, 8 F.4th at 554), *cert. denied*, 145 S. Ct. 1182 (2025); *see also Bousley v. United States*, 523 U.S. 614, 622 (1998). On appeal, Cobbs does not dispute the district court's conclusion that he failed to establish cause.[1] We thus confine our analysis to the actual innocence excuse.[2]

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[1] Having found no cause for his procedural default, the district court refrained from separately analyzing whether Cobbs was prejudiced. Cobbs likewise does not argue that he was prejudiced on appeal.

[2] Cobbs argues, in the alternative to actual innocence, that his procedural default should be excused to correct a miscarriage of justice. The problem is he did not make this argument to the district court and thus waived it by raising it for the first time on appeal. *See McCoy*, 815 F.3d at 295. Moreover, even assuming that Cobbs had preserved the argument, it is unclear how the argument is distinct from his protestation of actual innocence. Actual innocence and miscarriage of justice are intertwined concepts when it comes to excusing procedural default. *See, e.g., Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) ("We emphasized that the miscarriage of justice exception is concerned with actual as compared to legal innocence[.]"); *Dixon v. Williams*, 93 F.4th 394, 403 (7th Cir. 2024) ("A habeas petitioner may use a claim of actual innocence to overcome a procedurally defaulted and time-barred habeas claim, as a way to prevent a miscarriage of justice."), *reh'g denied*, No. 21-1375, 2024 WL 1510579 (7th Cir. Apr. 8, 2024).

Here, Cobbs's claim of actual innocence is based on the Supreme Court's decision in *Taylor*, which resulted in a change in the law underlying Cobbs's conviction in Count 2 under 18 U.S.C. § 924(c). Specifically, in *Taylor*, the Supreme Court held that attempted Hobbs Act robbery does not qualify as a crime of violence under § 924(c)(3)(A). 596 U.S. at 851. This subsection, commonly referred to as "the elements clause," defines a crime of violence as a felony offense that has as an element "the use, attempted use, or threatened use of physical force against the person or property of another." *See* 18 U.S.C. § 924(c)(3)(A).

Measured against the elements clause is a conviction for attempted Hobbs Act robbery, which requires proof beyond a reasonable doubt that a defendant (1) intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) completed a substantial step toward that end. *See Taylor*, 596 U.S. at 851 (citing *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007)).

Comparing the two, the Supreme Court reasoned that "[w]hatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the elements clause" because an "intention" to take property by force or threat is no more than an intention, and "whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property." *Id.* (emphasis in original).

Cobbs argues that the change in the law announced in *Taylor* excuses his procedural default through the actual innocence exception by effectively nullifying his § 924(c)(1)(A)(ii) conviction. And, as we have held, "[a]ctual innocence, if

proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar ... or ... expiration of the statute of limitations." *Lund v. United States*, 913 F.3d 665, 667 (7th Cir. 2019) (citation modified); *see also Schlup v. Delo*, 513 U.S. 298, 317 (1995) (holding that a petitioner who procedurally defaults his claims can overcome the procedural bar if he successfully raises a claim of actual innocence—that is, if he "raise[s] sufficient doubt about [his] guilt to undermine confidence in the result"). This is because the actual innocence rule is "grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (internal quotation marks omitted). "To establish actual innocence, 'a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *Lund*, 913 F.3d at 667 (quoting *Schlup*, 513 U.S. at 327).

At the outset, Cobbs's invocation of *Taylor* presents two threshold questions. First, can a change in the law—rather than, for example, newly discovered evidence—serve as the basis for the actual innocence gateway to circumvent procedural default? To date, we have declined opportunities to answer this question. *See, e.g.*, *Lund*, 913 F.3d at 667–68 (recognizing that this court has never explicitly held that the actual innocence exception "can be used in situations where a subsequent change to the scope of a law renders the conduct the petitioner was convicted for no longer criminal" and declining to take a position on the issue); *Gladney v. Pollard*, 799 F.3d 889, 897 (7th Cir. 2015) (acknowledging that the petitioner's argument raised a "new question in this circuit" of whether the "actual innocence standard can be satisfied by a change in

law rather than new evidence," but finding that question unnecessary to resolve).

Second, in addition to invoking *Taylor* to circumvent procedural default, Cobbs relies on it to support the merits of his § 2255 petition. This raises the question of whether *Taylor* is available to Cobbs as both his procedural default lifeboat *and* the source of his relief on the merits. Although we have not definitively decided this question either, we have expressed some doubt that actual innocence can serve such double duty where, as here, a habeas petitioner has not presented an underlying constitutional claim. *See Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018); *see also Lund*, 913 F.3d at 668 (noting that the point of the actual innocence exception is "to ensure that federal constitutional errors do not result in the incarceration of innocent persons," which "suggests that the underlying claim must be a constitutional claim, rather than a statutory claim") (citation modified).

As in previous cases, however, we need not answer these thorny questions (neither of which the district court or the parties addressed) to resolve this case. Even assuming, for the sake of argument, that the actual innocence exception is available to Cobbs in the dual manner he suggests, his claim of actual innocence fails (and, thus, cannot excuse procedural default) because Cobbs has not demonstrated his actual innocence as to Count 2 as charged in the indictment.

B

To resolve this case, the parties invite us to decide whether the Supreme Court's holding in *Bousley* applies here. In that case, Kenneth Bousley had pleaded guilty to "using" a

firearm in violation of 18 U.S.C. § 924(c)(1).[3] 523 U.S. at 616. Five years later, the Supreme Court held in *Bailey v. United States* that § 924(c)(1)'s "use" prong requires the government to show "active employment of the firearm" such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire" the weapon. 516 U.S. 137, 146, 148 (1995). "[M]ere possession" will not do. *Bousley*, 523 U.S. at 617 (citing *Bailey*, 516 U.S. at 143).

Citing *Bailey*, Bousley sought habeas relief, arguing that "neither the evidence nor the plea allocution" showed a connection between the firearms found in his bedroom and the drugs found in his garage. *Id.* (internal quotation marks omitted). But, because he had failed to challenge the validity of his plea on direct appeal, Bousley had to overcome the barrier of procedural default by demonstrating "cause and actual prejudice ... or that he is actually innocent." *Id.* at 622 (citation modified).

The Supreme Court easily dispatched with Bousley's cause arguments but observed that the district court had failed to address Bousley's actual innocence. And so, the Supreme Court remanded the case to permit Bousley to attempt to make a showing of actual innocence to overcome the procedural default of his habeas claim. *Id.* at 623.

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[3] The relevant subsection provides, in pertinent part, that "any person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, *uses or carries* a firearm ... shall, in addition to the punishment provided for such crime of violence" be sentenced to certain minimum terms of imprisonment as set forth in the section. 18 U.S.C. § 942(c)(1)(A) (emphasis added).

In the process, the Supreme Court provided some guidance to the lower courts on remand. First, it noted that actual innocence "means factual innocence, not mere legal insufficiency." *Id.* Accordingly, it permitted the government on remand to rebut Bousley's claim of actual innocence with any admissible evidence of his guilt, "even if that evidence was not presented during petitioner's plea colloquy." *Id.* at 624. The Court then delivered the instruction that is the center of this dispute: "In cases where the Government has forgone more serious charges in the course of plea bargaining, [a] petitioner's showing of actual innocence must also extend to those charges." *Id.* In other words, under *Bousley*, to establish actual innocence, a habeas petitioner must prove his innocence as to *both* the offense of conviction *and* any more serious charge that the government relinquished in the course of plea negotiations. *See Lewis v. Peterson*, 329 F.3d 934, 936 (7th Cir. 2003) (citing *Bousley*, 523 U.S. at 623–24).

Employing this framework, the Supreme Court in *Bousley* found no indication that the government had elected not to charge Bousley with "carrying" a firearm in exchange for his agreement to plead guilty to "using" a firearm in violation of § 924(c)(1). *See Bousley*, 523 U.S. at 624. Accordingly, to show actual innocence, Bousley needed to demonstrate only that he had not "used" a firearm as the Supreme Court had interpreted that term in *Bailey*. *Id.*

After *Bousley*, we have observed that the charge the government abandoned in plea discussions need not be more serious than the charge to which the petitioner pleaded guilty. *See Lewis*, 329 F.3d at 937. Rather, "[i]t is enough that it is as serious." *Id.* The idea behind *Bousley*, we said, is that, had the government foreseen the change in the law, "it would not

have dropped the charge and so the petitioner, who we know wanted to plead guilty, would probably have pleaded guilty to that charge instead." *Id.* at 936. Furthermore, if the abandoned charge was more serious or no less serious than one to which the petitioner pleaded guilty, he "would probably have incurred a lawful punishment no less severe than the one imposed on him." *Id.*

All of this to say, as the law stands, in order to establish the actual innocence exception to procedural default after a guilty plea, a habeas petitioner must show that he was actually innocent of the charge to which he pleaded, *and* he must show that he was actually innocent of any charge that the government dropped during the course of plea discussion so long as the dropped charge was more serious or equally serious to the one that was the subject of the plea.

This discussion brings us to the district court's decision in this case. Applying *Bousley* and *Lewis*, the district court concluded that the actual innocence exception to procedural default did not apply to Cobbs's claim, because he had failed to demonstrate that the result of the criminal proceedings against him would have been different had *Taylor* been decided prior to his guilty plea. As the court reasoned, although Cobbs's conviction and resulting sentence was for an attempted Hobbs Act robbery, Cobbs admitted to facts during his change-of-plea hearing that established the commission of a completed Hobbs Act robbery. In the district court's view, had the government foreseen *Taylor*, it would have amended the indictment, charged a completed Hobbs Act robbery, and secured a conviction based on the facts Cobbs admitted, all of which would have resulted in the same outcome for Cobbs.

But, of course, there is a material difference between the situation before us and those contemplated in *Bousley* and *Lewis*. Here, Cobbs entered an open plea, and there is no evidence that the government forwent any charges in exchange for his plea. Nevertheless, the district court dismissed the petition, relying on the principle from *Bousley* and *Lewis* that a petitioner is not entitled to a "windfall" when he has not shown that the result of his criminal proceedings would have been different had the law changed prior to his guilty plea.

But this distinction makes us hesitant to extend *Bousley* and *Lewis* to the facts of this case. *Bousley* itself contains no indication that its logic reaches beyond the plea-bargaining context, and *Lewis*'s reasoning is tethered to concepts intrinsic to dealmaking. Ideas of what the government would or would not have offered, and to what terms a defendant would or would not have agreed are only relevant in the framework of a negotiation. *See Lewis*, 329 F.3d at 936. Similarly, a defendant can only secure a "windfall" if he receives an outsized benefit compared to what he gave up. *Id.* Here, without evidence of any offer made or deal reached between the parties, the bargain-oriented concepts underpinning *Bousley* and *Lewis* have questionable force.

That said, based on the record before us, it is not necessary to decide the applicability of *Bousley* and *Lewis* to the present facts in order for us to conclude that *Taylor* does not excuse Cobbs's procedural default. Cobbs seeks to vacate his § 924(c) conviction in Count 2, arguing that he is actually innocent of that charge. But Count 2 of the indictment charged Cobbs with a violation of § 924(c), predicated on "a crime of violence that was a felony ... that is, a violation of Title 18, United States Code, Section 1951, as set forth in Count One of this

Indictment." In turn, the body of Count 1 asserted that Cobbs "unlawfully obstructed, delayed, and affected, *and* attempted to obstruct, delay, and affect commerce ... by robbery." In doing so, this language described a completed Hobbs Act robbery as well as an attempted one, and the factual admissions Cobbs made during his plea satisfied both.

Recall that, as part of his plea colloquy, Cobbs acknowledged that he had taken a cell phone from an employee of the Brickstone after binding the individual with duct tape and while brandishing a firearm. By acknowledging these facts, Cobbs admitted that he had taken or obtained personal property from the person of another, against that person's will, by means of actual or threatened force. In other words, he admitted to a completed Hobbs Act robbery. *See* 18 U.S.C. § 1951(b).[4]

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[4] We note that Cobbs's assault of the restaurant's owner and taking of the restaurant's money also arguably would constitute a completed violation of § 1951, which defines "robbery" to be "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). Although he abandoned the backpack with the money, he took the money from the owner with the intent to permanently deprive the owner of the proceeds. *See Smith v. United States*, 291 F.2d 220, 221 (9th Cir. 1961) (explaining that for a bank robbery conviction, which requires the taking and carrying away of property, the "degree of the taking is immaterial, the least removing of the thing taken from the place it was before with intent to steal it being sufficient" (internal quotation marks omitted)); *see also* 2 Wharton's Criminal Law § 26:15 (16th ed.) ("There is an asportation when the actor carries away the property; any carrying away movement, however slight, is sufficient. Given a taking and asportation, a larceny is committed even if immediately thereafter the defendant abandons

Accordingly, Cobbs's guilt as to Count 2 does not depend on whether he pleaded guilty to a completed or attempted Hobbs Act robbery under Count 1. It is enough that the facts he acknowledged satisfied the allegations in Count 2. In other words, Cobbs admitted that he had committed a completed Hobbs Act robbery, a crime of violence that Count 1 of the indictment "set forth."[5] Thus, the Supreme Court's holding in *Taylor* does not disturb Cobbs's conviction as to Count 2.

We recognize that during the change-of-plea hearing, the parties and the magistrate judge at times referred to Count 1 as attempted Hobbs Act robbery. We also appreciate other indicia in the record, including in the judgment and by way of the parenthetical title to the charge in the indictment, that the prosecution concentrated on the attempt aspect of the charge in Count 1. Still, the focus of Cobbs's habeas claim is Count 2, and he must show that he is actually innocent (legally and factually) of Count 2 to survive procedural default. He cannot do so for the reasons explained.

All told, assuming the actual innocence gateway exception can be based on a change in the law, and that a change in statutory law can simultaneously serve as grounds for the

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the property or returns it to the owner, as long as the defendant acted, at the time of the taking and asportation, with the intent to permanently deprive.").

[5] The parties dispute whether Count 1 sufficiently charged Cobbs with completed Hobbs Act robbery in addition to attempted Hobbs Act robbery. To Cobbs, the government's endeavor to recast his guilty plea amounts to a constructive amendment to the indictment, especially after the government, in Cobbs's view, had effectively narrowed the indictment by demonstrating its intent to prove only the inchoate offense. Given the language of Count 2, we need not wade into this issue.

gateway and for relief on the merits, the change in the law announced by *Taylor* does not excuse Cobbs's procedural default. Consequently, Cobbs's petition was properly dismissed.

III

For these reasons, we AFFIRM the district court's denial of Cobbs's 28 U.S.C. § 2255 petition to vacate, set aside, or correct his sentence.

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

MICHAEL W. COBBS,	)	
	)	
Petitioner-Defendant,	)	
	)	
v.	)	Case No. 17-cr-20051
	)	22-cv-3141
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Plaintiff.	)	

ORDER AND OPINION

SUE E. MYERSCOUGH, U.S. District Judge:

Before the Court is Petitioner Michael W. Cobbs' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (d/e 39). Cobbs argues that he is actually innocent of his conviction for brandishing a firearm during a "crime of violence" because, in light of United States v. Taylor, 142 S. Ct. 2015 (2022), his predicate conviction of attempted Hobbs Act Robbery is not a "crime of violence." For the reasons below, the Court DENIES Petitioner's § 2255 Motion (d/39) as procedurally defaulted. However, the Court GRANTS a Certificate of Appealability.

I. BACKGROUND

While on federal supervised release for a previous armed robbery, Cobbs again decided to commit an armed robbery. In October 2017, Cobbs was charged in a three count indictment with attempted obstruction of commerce by robbery in violation of 18 U.S.C. §§ 1951 and 2 (Count One); possession of a firearm in furtherance of robbery, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Count Two); and possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a) (Count Three). With regards to Count One, the charge was titled "attempted" and specifically charged that:

> the defendant, unlawfully obstructed, delayed, and affected, and attempted to obstruct, delay, and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, in that the defendant unlawfully took and obtained, and attempted to take and obtain, personal property, including but not limited to, cellular phones and United States currency, from the persons and in the presence of the owners of the property, against their will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said persons, that is the defendant brandished a firearm as he bound the owners of the property with duct tape and took the property.

See Indictment (d/e 10).

On January 16, 2018, Cobbs entered an open guilty plea to all three counts in the indictment at a hearing before Magistrate Judge Eric I. Long. In reviewing the charges, the Government stated that if it proceeded to trial it would have to prove that the defendant:

> *one, knowingly attempted to obtain money or other property from the victims outlined in the indictment*; two, that the defendant did so by means of [extortion] or by threatened force, as that term's defined under the law; three, that the defendant believed that the victim parted with that money or property because of that extorsion; and, four, that the defendant's conduct affected or would have affected or had the potential to affect interstate commerce.

Plea Tr. (d/e 44) at 12 (emphasis added). The Government also presented the factual basis for the plea:

> [O]n September 11, 2017, [] at approximately 7:45 in the morning, the defendant entered the Brickstone Restaurant in Bourbonnais, Illinois. Once he was inside, he forced two employees into a back utility room; bound their hands with duct tape and put duct tape over their mouths; found another employee, duct taped him, bound him in the same way with duct tape; and then found the owner who was counting money in the front office. He pulled the chair out from under the owner, and, again, bound the owner with duct tape, and then proceeded to take the money the owner was counting and stuffed it in a backpack. At the same time he was brandishing a Glock, Model 22, semiautomatic pistol. At the same time he was attempting to flee the restaurant, he encountered the manager who he wrestled with. The bag that the

> defendant was carrying was wrestled away from the defendant and the defendant fled. Within an hour, the defendant was found in the—approximately—in a dumpster, approximately 300 yards away from the restaurant. He had a roll of duct tape in his possession. Alongside him was a cell phone that belonged to one of the employees of the Brickstone Restaurant.

Id. at 20-21. Cobbs agreed that he "essentially" did what the Government alleged, including that he did "attempt to steal money from the owner." Id. at 22. Cobbs then plead guilty to all three charges. Id. at 23-24. On January 31, 2018, the Court accepted Magistrate Judge Long's Report and Recommendation and adjudged Cobbs guilty of Counts 1, 2, and 3.

The United States Probation Office prepared a Presentence Investigation Report in advance of sentencing. See PSR (d/e 26). The PSR consistently referred to the Count 1 conviction as "Attempted Obstruction of Commerce by Robbery (Hobbs Act)." PSR at 1, 4, 7. Cobbs faced statutory imprisonment ranges of up to twenty years of imprisonment on Count 1, up to ten years of imprisonment on Count 2, and a mandatory twenty-five-year to life consecutive imprisonment sentence on Count 2. The PSR calculated a total offense level of 23 and a criminal history category

of III, resulting an advisory guideline sentence on Counts 1 and 3 of 57 to 71 months imprisonment. PSR ¶86.

At the sentencing hearing, on June 8, 2018, neither party had any objections to the PSR. See S.Tr. (d/e 38) at 24. The Court sentenced Cobbs to one day of imprisonment on Counts 1 and 3 to run concurrently, and 300 months (25 years) on Count 2 to run consecutively. S.Tr. at 42; Judgment (d/e 32). Cobbs was also sentenced to 30 months on his supervised release revocation, to be served concurrently. S.Tr. at 21. Cobbs did not file an appeal.

Cobbs filed this Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (d/e 39) on July 26, 2022. Cobbs argues that he is actually innocent of his conviction for brandishing a firearm during a "crime of violence" (Count 2) because, in light of United States v. Taylor, 142 S. Ct. 2015 (2022), his predicate conviction of *attempted* Hobbs Act Robbery is not a "crime of violence." The Government has filed a response in opposition (d/e 45), and Cobbs has filed a reply (d/e 46). This order now follows.

II. LEGAL STANDARD

Section 2255, "the federal prisoner's substitute for habeas corpus," Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012), permits a prisoner incarcerated pursuant to an Act of Congress to request that his sentence be vacated, set aside, or corrected if "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Relief under § 2255 is appropriate for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Harris v. United States, 366 F.3d 593, 594 (7th Cir. 2004) (quotation marks omitted).

III. DISCUSSION

In United States v. Taylor, 142 S.Ct. 2015 (2022), the Supreme Court held that attempted Hobbs Act robbery does not qualify as a predicate "crime of violence" for purposes of a conviction for using a firearm in furtherance of a "crime of violence." 142 S.Ct. at 2020. Applying that holding here, where Cobbs' indictment, the change of

plea hearing, the PSR, and the judgment all referred to the predicate conviction in Count 1 as attempted Hobbs Act robbery, it would appear straightforward that Cobbs' conviction is now invalid. However, on collateral review, obtaining relief is not often straightforward. The Government argues that Cobbs claim is procedurally defaulted and that his claim fails on the merits because he admitted to facts that establish a completed Hobbs Act robbery. Resp. at 3–4. The Court does not reach the Government's second argument, as the Court agrees that Cobbs' claim is procedurally defaulted and the default cannot be excused.

Claims cannot be raised for the first time in a § 2255 motion if they could have been raised at trial or on direct appeal. Coleman v. United States, 318 F.3d 754, 760 (7th Cir. 2003); McCoy v. United States, 815 F.3d 292, 295 (7th Cir. 2016); Sandoval v. United States, 574 F.3d 847, 850 (7th Cir. 2009). A petitioner must show cause and prejudice or actual innocence to excuse his procedural default. See Bousley v. United States, 523 U.S. 614, 622 (1998).

A. Cause and Prejudice

To show "cause and prejudice, a petitioner must demonstrate both (1) good cause for his failure to raise the defaulted claim before

collateral review and (2) actual prejudice stemming from the violations alleged in the defaulted claim." Delatorre v. United States, 847 F.3d 837, 843 (7th Cir. 2017) (citing Theodorou v. United States, 887 F.2d 1336, 1340 (7th Cir. 1989)). "A change in the law may constitute cause for a procedural default if it creates a claim that is so novel that its legal basis is not reasonably available to counsel." Cross v. United States, 892 F.3d 288, 295 (7th Cir. 2018) (quotation marks omitted); White v. United States, 8 F.4th 547, 556 (7th Cir. 2021) (finding claim was not novel when the "basis and authority" already existed and all that remained was for an "enterprising defendant" to "seize[] upon it"); see also United States v. Vargas-Soto, 35 F.4th 979, 994 (5th Cir. 2022), cert. denied, 143 S. Ct. 583 (2023) ("a claim is not 'novel' where a prisoner could (or where other prisoners did in fact) raise it at time").

Here, Cobbs argues he can establish cause because Taylor was not yet decided at the time he could have appealed. But this claim was not sufficiently novel at the time of his conviction. Cobbs pled guilty on January 16, 2018. By this time, other defendants had raised the argument that attempted Hobbs Act robbery was not

a qualifying crime of violence, albeit unsuccessfully. See, e.g., United States v. St. Hubert, 909 F.3d 335, 351-53 (11th Cir. 2018); See also Kimbrough v. United States, 71 F.4th 468, 475 (6th Cir. 2023) (finding the petitioner who pled guilty in August 2018 could not show that the "Taylor argument was sufficiently novel to constitute cause because it had been previously raised by another litigant" (internal quotation marks omitted)). While it is almost a certainty that Cobbs' claim would have been denied by the Seventh Circuit had he raised it, see, e.g., United States v. Ingram, 947 F.3d 1021, 1026 (7th Cir. 2020) (holding attempted Hobbs Act robbery is a qualifying predicate conviction for a crime of violence for purposes of a § 924(c) conviction), "futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time," Bousley v. United States, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). Finding no cause for his procedural default, the Court declines to separately analyze whether prejudice exists.

B. Actual Innocence

Cobbs has also failed to show actual innocence given the facts to which he admitted at the change of plea hearing. To show

"actual innocence" a petitioner must demonstrate "factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at 623; Sawyer v. Whitley, 505 U.S. 333, 340 (1992) ("A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."). One district court in this circuit found in an unopposed § 2255 motion that a petitioner who committed attempted Hobbs Act robbery as their predicate offense was actually innocent of the § 924(c) conviction in light of Taylor. Garcia v. United States, No. 15-CR-119-JPS, 2023 WL 4181970, at *2 (E.D. Wis. June 26, 2023) ("In light of the Taylor Decision, a jury empaneled today could not find, as a factual matter, that Garcia committed Count Two—a § 924(c) offense predicated upon his attempted Hobbs Act robbery offense." (internal quotations marks omitted)). Cobbs, at least in his reply, argues that the analysis stops here: he was convicted of attempted Hobbs Act robbery and that crime is not a valid "crime of violence" predicate for his 924(c) conviction. Reply at 6.

The Government contends, however, that Cobbs cannot show actual innocence because the facts underlying the offense—and that he admitted to at the change of plea hearing—would have been

sufficient to support a conviction for completed Hobbs Act Robbery. Resp. at 19–23. The Government's argument stems from the Supreme Court's clarification in Bousely that in cases where the defendant pleaded guilty and "the Government has forgone more serious charges," the defendant's showing of actual innocence "must also extend to those charges." 523 U.S. at 624. The Seventh Circuit has extended Bousley's logic to charges that are equally serious. See, e.g., Lewis v. Peterson, 329 F.3d 934, 937 (7th Cir. 2003). As the Seventh Circuit explained,

> The idea behind this rule is that had the government foreseen [the change in law] it would not have dropped the charge and so the petitioner, who we know wanted to plead guilty, would probably have pleaded guilty to that charge instead, and if it was a more serious charge (or we add, no less serious a charge) he would probably have incurred a lawful punishment no less severe than the one imposed on him under the count to which he pleaded guilty

Lewis v. Peterson, 329 F.3d 934, 936 (7th Cir. 2003); see also United States v. Ross, 2017 WL 3769758, at *14 (N.D. Ind. Aug. 31, 2017), aff'd sub nom. Oliver v. United States, 951 F.3d 841 (7th Cir. 2020) (finding actual innocence exception did not apply where the defendant had pled guilty and the government had dropped charges of completed Hobbs Act robbery that could have formed the

predicate offense § 924(c) offenses after previous predicate was determined to be invalid in light of new caselaw).

Here, the situation is slightly different, but not meaningfully so. While Cobbs was convicted and sentenced to attempted Hobbs Act robbery in Count I, in the factual basis of his plea he admitted facts that establish he committed a completed Hobbs Act robbery. While Cobbs did not leave the restaurant with the stolen money due to the manager tackling him and recovering the bag, the Hobbs Act robbery was complete as soon as Cobbs left the owner's office with the cash. See also United States v. Smith, 415 F.3d 682, 689 (7th Cir. 2005), cert. granted, judgment vacated on unrelated grounds, 547 U.S. 1190 (2006) ("Many bank robbers are caught red-handed and never have the chance to escape, and they are rightly convicted of violating the law."). Given these facts, had Cobbs raised his argument at the time of his initial proceedings or had the Government foreseen Taylor, the Government could have amended the indictment and clearly charged a completed Hobbs Act robbery and the result of the proceedings would have been the same. This result is bolstered by the fact that, aside from the title of Count II, the language used in the indictment charged attempted or

completed Hobbs Act Robbery as alternatives.

This case is, of course, somewhat different than the scenario addressed in Bousely or Lewis: Here there was not a different charge that the Government forwent in concession for the plea. Rather, the Government is essentially claiming that at the time of plea it did not matter whether they called the conviction attempted or completed Hobbs Act robbery. And, if they had known it mattered, they would have proceeded and succeeded on a completed Hobbs Act robbery conviction. Nonetheless, the Court finds that the principle remains the same: Cobbs is not entitled to a "windfall" where he has not shown that the result of his criminal proceedings would have been different had Taylor already been decided prior to his guilty plea. See Lewis, 329 F.3d at 936. Therefore, the Court finds that Cobbs has not shown actual innocence either and his procedural default cannot be excused.

IV. CERTIFICATE OF APPEALABILITY

If Cobbs seeks to appeal this decision, he must first obtain a certificate of appealability. See 28 U.S.C. § 2253(c) (providing that an appeal may not be taken to the court of appeals from the final order in a § 2255 proceeding unless a circuit justice or judge issues

a certificate of appealability). A certificate of appealability may issue only if a petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing is made if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, the movant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. Here, while the Court finds that Cobbs has not shown actual innocence sufficient to excuse his procedural default, as explained above, the Court finds some debate might exist on whether the principles from Bousley and Lewis extend to the facts of this case. Accordingly, the Court GRANTS a certificate of appealability.

V. CONCLUSION

For the reasons stated above, the Court DENIES Petitioner Michael W. Cobbs' Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (d/e 39). The Court GRANTS a Certificate of Appealability. The Clerk is DIRECTED to prepare the Judgment and close the accompanying administrative case 22-cv-3141.

Signed on this 10th day of August 2023.

/s/ Sue E. Myerscough
Sue E. Myerscough
United States District Judge

Appendix-D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	17-20051
	)	
v.	)	
	)	Title 18, United States Code,
MICHAEL W. COBBS,	)	Sections 1951, 2, 924(c), 922(g)(1),
	)	924(a)(2), 924(d); Title 28, United
	)	States Code, Section 2461(c)
Defendant.	)	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
(Attempted Obstructing of Commerce by Robbery)

On September 11, 2017, in Kankakee County, in the Central District of Illinois,

MICHAEL W. COBBS,

the defendant, unlawfully obstructed, delayed, and affected, and attempted to obstruct, delay, and affect, commerce as that term is defined in Title 18, United States Code, Section 1951, and the movement of articles and commodities in such commerce, by robbery as that term is defined in Title 18, United States Code, Section 1951, in that the defendant unlawfully took and obtained, and attempted to take and obtain, personal property, including but not limited to, cellular phones and United States currency, from the persons and in the presence of the owners of the property, against their will by means of actual and threatened force, violence, and fear of injury, immediate and future, to said persons,

that is the defendant brandished a firearm as he bound the owners of the property with duct tape and took the property.

All in violation of Title 18, United States Code, Sections 1951 and 2.

COUNT TWO
(Possession of a Firearm in Furtherance of Robbery)

On September 11, 2017, in Kankakee County, in the Central District of Illinois,

MICHAEL W. COBBS,

the defendant, possessed and brandished a firearm, namely a Glock, Model 22, .40 caliber semiautomatic pistol, serial number WXX494, in furtherance of a crime of violence that was a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951, as set forth in Count One of this Indictment.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(ii) and 2.

COUNT THREE
(Possession of a Firearm by a Felon)

On September 11, 2017, in Kankakee County, in the Central District of Illinois,

MICHAEL W. COBBS,

the defendant, having been previously convicted of a crime punishable under the laws of the United States by imprisonment for a term exceeding one year, knowingly possessed, in and affecting commerce, a firearm, that is, a Glock, Model 22, .40 caliber semiautomatic pistol, serial number WXX494.

All in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2).

FORFEITURE ALLEGATIONS

THE GRAND JURY CHARGES:

1. The Grand Jury re-alleges and incorporates by reference the allegations of Counts Two and Three of this Indictment as though fully set forth herein, for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c).

2. On or about September 11, 2017, in the Central District of Illinois, and elsewhere,

MICHAEL W. COBBS,

the defendant, did engage in knowing violations of Title 18, United States Code, Sections 922(g) and 924, thereby subjecting to forfeiture to the United States, pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearms and ammunition involved in the commission of the offenses, including, but not limited to Glock, Model 22, .40 caliber semiautomatic pistol, serial number WXX494, and all ammunition contained therein.

All pursuant to Title 28, United States Code, Section 2461(c) and Title 18, United States Code, Section 924(d).

A TRUE BILL
s/Foreperson

FOREPERSON

s/John Childress

PATRICK D. HANSEN
ACTING UNITED STATES ATTORNEY / CRF

Additional material from this filing is available in the Clerk's Office.