No. _____

In the Supreme Court of the United States

TOVIS ATION RICHARDSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Fourth Circuit and several other circuits apply the U.S.S.G. § 2D1.1(b)(1) enhancement if a firearm is found in any place where a defendant's conspiracy was carried out. Other circuits apply a multi-factor test that requires a stronger connection between the firearm and the defendant's offense conduct. Did the Fourth Circuit err in holding that a section 2D1.1(b)(1) enhancement was properly applied to Mr. Richardson because a shotgun was found in the trunk of a car he had previously driven to carry out drug transactions?

II. In *Hunter v. United States*, 146 S. Ct. 1702 (2026), this Court held that an appeal waiver is unenforceable when enforcing it would result in a miscarriage of justice, while cautioning that "standard-fare errors in misapplying sentencing law" do not suffice. On remand in light of *Hunter*, the Fourth Circuit held, without further analysis, that because a guideline misapplication cannot cancel an appeal waiver, the "follow-on effects" of that misapplication cannot either. Did the Fourth Circuit err in its application of *Hunter* by holding that enforcing Mr. Richardson's appeal waiver would not result in a miscarriage of justice, where failing to correct a guideline error in Mr. Richardson's sentence rendered him ineligible for a sentencing reduction under Amendment 821, which was not a bargained-for benefit of his appeal waiver?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Tovis Ation Richardson. Respondent, appellee below, is the United States of America.

RELATED PROCEEDINGS

United States v. Richardson, No. 5:22-cr-00313-D-1 (E.D.N.C.) (judgment entered June 2023).

United States v. Richardson, No. 23-4471 (4th Cir.) (published opinion and judgment entered July 28, 2025, reported at 146 F.4th 394; unpublished per curiam opinion on remand entered August 20, 2026).

Richardson v. United States, No. 25-5986 (U.S.) (certiorari granted, judgment vacated, and case remanded June 29, 2026).

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INTRODUCTION

This case returns to the Court after a grant, vacatur, and remand. Last term, the Court granted Mr. Richardson's prior petition, vacated the Fourth Circuit's judgment, and remanded "for further consideration in light of *Hunter v. United States*." *Richardson v. United States*, 146 S. Ct. 2795 (2026) (mem.). On remand, the Fourth Circuit reaffirmed its prior holding in an unpublished per curiam opinion. App. A. It readopted, without change, its erroneous published analysis of the section 2D1.1(b)(1) firearm enhancement, App. A at 3 n.2, and it held that *Hunter* did not alter its conclusion that Mr. Richardson's appeal waiver bars review of the enhancement, App. A at 7–8. Both rulings warrant this Court's review.

Section 2D1.1(b)(1) of the U.S. Sentencing Guidelines provides a two-level enhancement to a defendant's offense level "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). While a two-level enhancement may sound small, for some defendants, a two-level enhancement may raise the guideline range by a matter of years. Currently, the federal courts of appeals use different standards for applying the section 2D1.1(b)(1) enhancement, leading to a situation where defendants with similar offense conduct may face significantly different sentences, depending on the circuits in which their prosecutions arise.

Tovis Ation Richardson pled guilty to one count of conspiracy to distribute and possess with intent to distribute methamphetamine, and one count of possession with intent to distribute methamphetamine. At his sentencing, the district court imposed a section 2D1.1(b)(1) enhancement based on evidence that, at a time when he was not

engaged in drug transactions, a shotgun was found in a vehicle that he previously used to carry out drug transactions. The record did not show, and the government did not claim to have, evidence that the firearm was in Mr. Richardson's car at the time he carried out any drug transactions or any other relevant conduct. Under such circumstances, a different circuit applying a different section 2D1.1(b)(1) standard likely would have come to a different conclusion. Moreover, the Fourth Circuit's lenient approach to section 2D1.1(b)(1) implicates Second Amendment considerations for defendants like Mr. Richardson, who had no scorable criminal history, and no felony convictions, and thus was constitutionally free to possess a firearm.

Below, Mr. Richardson raised an ineffective assistance of counsel claim, based on his counsel's failure to object to the section 2D1.1(b)(1) enhancement. The Fourth Circuit decided the ineffective assistance of counsel claim on the merits, holding that Mr. Richardson could not show ineffective assistance because the section 2D1.1(b)(1) enhancement was supported by the record. For the reasons discussed herein, that determination was erroneous.

Mr. Richardson suffers double the effect from the Fourth Circuit's failure to correct the section 2D1.1(b)(1) error. In the months between his plea hearing and sentencing, Amendment 821 to the Sentencing Guidelines enacted section 4C1.1. Section 4C1.1 provides a two-point offense-level reduction for offenders who do not receive any criminal history points and whose offenses did not involve specified aggravating factors, such as possession of a firearm in connection with the offense.

Section 4C1.1 may be applied retroactively, allowing defendants to seek a reduction in sentence if they were sentenced before section 4C1.1 went into effect.

In the alternative to his ineffective assistance claim, Mr. Richardson also argued to the Fourth Circuit that the district court plainly erred by applying the section 2D1.1(b)(1) enhancement, where the record lacked support for it. The Fourth Circuit has twice declined to review that argument based on an appeal waiver in Mr. Richardson's plea agreement.

The advent of Amendment 821 poses an important question: Can an appeal waiver be enforced to bar correction of a guideline error when the plea agreement in which it is contained does not waive the defendant's right to seek a reduction of sentence under a retroactive guideline amendment, but enforcing the appeal waiver to bar correction of a guideline error has the effect of denying him an opportunity to seek a reduction of sentence under that guideline amendment?

In *Hunter*, this Court recognized that an appeal waiver is unenforceable when enforcing it would result in a miscarriage of justice. App. A at 7. On remand, however, the Fourth Circuit read *Hunter*'s caveat about "standard-fare errors in misapplying sentencing law" as a categorical rule, and then extended it in a single sentence to bar consideration of a waiver's "follow-on effects" on separate, unwaived sentencing relief. App. A at 8. That reading converts a caveat into a per se bar and leaves no room for the case-specific inquiry *Hunter* contemplates. Because *Hunter* is new and the lower courts are only beginning to apply it, this Court should grant review to clarify how its miscarriage-of-justice standard applies when enforcing a

waiver extinguishes a defendant's eligibility for a retroactive guideline amendment that was not part of his bargain.

OPINIONS AND RULINGS BELOW

The Fourth Circuit's unpublished per curiam opinion on remand affirming the judgment of the district court, 4th Cir. No. 23-4471, DE 72, is reprinted in Petitioner's Appendix A ("App. 1a-8a"). The Fourth Circuit's judgment on remand, 4th Cir. No. 23-4471, DE 73, is reprinted at Appendix B ("App. 9a-11a"). The Fourth Circuit's original published opinion, 4th Cir. No. 23-4471, DE 61, reported at 146 F.4th 394, is reprinted at Appendix C ("App. 12a-29a"). This Court's order granting certiorari, vacating, and remanding, No. 25-5986, is reported at 146 S. Ct. 2795 (2026) (mem.).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its decision on remand on August 20, 2026. App. A. This petition is timely filed within 90 days of that date. Sup. Ct. R. 13.1. Mr. Richardson invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES, RULES, AND STATUTORY PROVISIONS INVOLVED

Section 2D1.1(b)(1) of the U.S. Sentencing Guidelines provides:

> If a dangerous weapon (including a firearm) was possessed, increase [the offense level] by 2 levels.

U.S.S.G. § 2D1.1(b)(1).

Section 4C1.1 of the U.S. Sentencing Guidelines provides that if

> (1) the defendant did not receive any criminal history points from Chapter Four, Part A; [and] . . .

> (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense . . .
>
> decrease the offense level determined under Chapters Two and Three by 2 levels.

U.S.S.G. § 4C1.1(a).

Section 3582(c)(2) of Title 18 of the U.S. Code provides that:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

Section 1B1.10(a)(3) of the Sentencing Guidelines provides that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3).

Finally, Federal Rule of Criminal Procedure 11(b)(1)(N) provides:

> CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: . . .
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence[.]

Fed. R. Crim. P. 11(b)(1)(N).

STATEMENT OF THE CASE

A. Following a traffic stop, Mr. Richardson accompanies officers to his home, where drugs are seized.

In August 2021, the Johnston County Sheriff's Office and Smithfield Police Department received information that Mr. Richardson and two other individuals were distributing narcotics in Johnston County, North Carolina. JA74. From August 26, 2021, to October 1, 2021, a confidential informant, either by himself or while accompanied by one of Mr. Richardson's coconspirators, purchased methamphetamine from Mr. Richardson on multiple occasions. JA74–75.

Investigators stopped Mr. Richardson pursuant to a "traffic stop" on October 8, 2021.[1] JA75. There is no indication that Mr. Richardson was involved in drug sales on the day of the traffic stop. *See* JA75. Following the traffic stop, Mr. Richardson agreed to lead the investigators to his home, where law enforcement executed a search warrant. JA75. Mr. Richardson was detained and released that same day. JA71.

B. Mr. Richardson pleads guilty to drug charges, and his plea is accepted during his arraignment.

On November 21, 2022, Mr. Richardson entered a plea agreement by which he pled guilty to one count of conspiracy to distribute and possess with intent to distribute methamphetamine, "[b]eginning in or about October 2020" through "about October 14, 2021," and one count of possession with intent to distribute

[1] There is no additional information in the record about the basis for this "traffic stop." *See* JA75.

methamphetamine, "[o]n or about October 8, 2021." JA63-64. Mr. Richardson stipulated that a base offense level of 36 applied, pursuant to U.S.S.G. § 2D1.1(c)(2), because the readily provable drug quantity was between 1.5 and 4.5 kilograms. JA65. He also stipulated to a two-point upward adjustment for maintaining a dwelling pursuant to section 2D1.1(b)(12), and the government stipulated to a two or three-point downward adjustment for acceptance of responsibility pursuant to section 3E1.1. JA65–66. Mr. Richardson's plea agreement also included an appeal waiver. JA59. In December 2022, Mr. Richardson was formally charged by information. JA7–9. Later that same month, he provided a written acceptance of responsibility. JA76.

Mr. Richardson's arraignment was held on January 26, 2023. JA28. During the hearing, the district court confirmed that Mr. Richardson waived indictment and consented to prosecution by information. JA44–45. The district court also confirmed that Mr. Richardson agreed to forfeit "one Winchester 1400 MKII 12-gauge shotgun . . . seized on October 8, 2021." JA48. While providing its factual basis for the pleas, the government stated that law enforcement found drugs in Mr. Richardson's home and "the 12-gauge shotgun" in his vehicle on October 8, 2021. *See* JA51–52. The district court approved the plea agreement and accepted Mr. Richardson's pleas. JA53, 66.

C. The presentence report shows nothing more than that a shotgun was seized from Mr. Richardson's vehicle.

Mr. Richardson's presentence report was filed on April 24, 2023. JA70. The presentence report provided that "[a] shotgun was retrieved from the trunk of

[Mr.] Richardson's vehicle" during the October 8, 2021 search. JA75. Mr. Richardson stated that the "shotgun" had been given to him by his late father. JA75–76. The presentence report referenced no other information about this shotgun, such as whether it was loaded or even operational.[2] *See* JA70–87. Beside the shotgun, nothing else—including drugs or paraphernalia—was found in Mr. Richardson's vehicle. JA75. Nonetheless, the presentence report concluded that Mr. Richardson was "responsible for possession of a firearm *during* his drug trafficking activities." JA76 (emphasis added).

The presentence report, pursuant to the plea agreement, applied a base offense level of 36 and a two-point enhancement under U.S.S.G. § 2D1.1 (b)(12) for maintenance of a dwelling for drug trafficking. JA83. It also applied a two-point enhancement pursuant to section 2D1.1(b)(1). JA83. Pursuant to section 3E1.1(a), the presentence report applied a two-point reduction for acceptance of responsibility and an additional one-point reduction, pursuant to section 3E1.1(b), for "timely notifying authorities of the intention to enter a plea of guilty." JA84. The resulting total offense level was 37. JA84.

[2] The presentence report stated that a box of ammunition, "of various calibers and gauges," was found in Mr. Richardson's home (*i.e.*, in a different place from the shotgun found in Mr. Richardson's vehicle). JA75. Mr. Richardson informed law enforcement that, in addition to the "shotgun," his father had given him the ammunition found in the home and a separate "rifle," which Mr. Richardson had given to his brother. JA75–76. The presentence report did not state that the ammunition matched the shotgun found in the vehicle, nor that it matched the rifle now owned by Mr. Richardson's brother. *See* JA75–76.

The presentence report calculated a criminal history score of zero, which resulted in a criminal history category of I. JA77. The resulting guideline range was 210 to 262 months. JA84. Neither the government nor Mr. Richardson's trial counsel objected to the presentence report. JA87.

D. Mr. Richardson is sentenced to twenty years.

Mr. Richardson's sentencing hearing was held on June 26, 2023. JA89. After stating that Mr. Richardson "possessed a firearm during drug trafficking," JA100; *see also* JA100 ("[T]here was a search, October 8th, 2021, where these -- the cash and the gun and the drugs are recovered . . . ."), the district court imposed a 20-year sentence, followed by five years' supervised release. JA101. The court again noted that the sentence imposed was based, in part, on Mr. Richardson's "possession of a firearm." JA102.

E. Between Mr. Richardson's two hearings, the U.S. Sentencing Guidelines are amended.

Amendment 821 to the U.S. Sentencing Guidelines was submitted to Congress on April 27, 2023—three months after Mr. Richardson's January 26, 2023 plea hearing and two months before his June 26, 2023 sentencing hearing. *See* "Amendments to the Sentencing Guidelines," *United States Sentencing Commission* (April 27, 2023).[3] This amendment enacted U.S.S.G. § 4C1.1, which provides a two-point offense-level decrease for offenders who did not receive any criminal history points and whose offenses did not involve specified aggravating factors. *Id.* at 79.

[3] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

One of the aggravating factors that would make an otherwise qualifying defendant ineligible for the two-point decrease is if the defendant "possess[ed] . . . a firearm . . . in connection with the offense." *Id.* at 87.

A proceeding for a reduction of sentence under a guideline amendment is not a full resentencing, which means the district court cannot revisit findings that supported guideline enhancements that applied during the original sentencing. U.S.S.G. § 1B1.10(a)(3).

Section 4C1.1 was made retroactive in August 2023. "Amendment to the Sentencing Guidelines," *United States Sentencing Commission* (August 31, 2023).[4] It went into effect on November 1, 2023. *See* U.S.S.G. § 4C1.1 (historical note).

F. Mr. Richardson appeals his sentence, and the Fourth Circuit affirms in a published decision.

Mr. Richardson appealed to the Fourth Circuit. JA23–24. Mr. Richardson argued that the district court plainly erred in applying a section 2D1.1(b)(1) sentencing enhancement on the sole basis of the presence of a shotgun, where there was no established connection between said shotgun and the drug offenses. 4th Cir. No. 23-4471, DE 21 at 17–23. Mr. Richardson argued, alternatively, that his trial counsel rendered ineffective assistance by not objecting to the enhancement. 4th Cir. No. 23-4471, DE 21 at 23–26.

After oral argument, the Fourth Circuit issued a published opinion affirming Mr. Richardson's sentence. App. C. As to section 2D1.1(b)(1), the Fourth Circuit

[4] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202308_RF-retro.pdf.

concluded that, because "[t]he shotgun was . . . discovered in a place where [his] conspiracy was carried out," the district court did not err in applying the sentence enhancement. App. C at 11. Thus, the Fourth Circuit held that Mr. Richardson could not show ineffective assistance of counsel. App. C at 16–18.

The Fourth Circuit did not reach Mr. Richardson's plain error argument, concluding that his appeal waiver precluded his appeal of that issue. App. C at 4–7. The Fourth Circuit acknowledged that it had the authority to "refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice," but only for a "narrow class of claims." App. C at 6 (quotations omitted). As examples of such claims, the Fourth Circuit cited to *United States v. Smith*, 134 F.4th 248, 261 (4th Cir. 2025), in which the district court "had a regular practice of 'omitting necessary information in both plea and sentencing hearings,'" and *United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016), in which the defendant had made a "valid claim of actual innocence." App. C at 6. The Court concluded that Mr. Richardson's "alleged 'miscarriage of justice' is merely a re-packaged Guidelines claim that aims to re-bargain the terms of his waiver." App. C at 6–7.

G. This Court grants certiorari, vacates, and remands in light of *Hunter*.

Mr. Richardson petitioned for a writ of certiorari, presenting the two questions addressed above. On June 29, 2026, this Court granted Mr. Richardson's motion for leave to proceed in forma pauperis and his petition, vacated the Fourth Circuit's judgment, and remanded "for further consideration in light of *Hunter v. United*

States, 608 U.S. 713 (2026)." *Richardson v. United States*, 146 S. Ct. 2795 (2026) (mem.).

H. On remand, the Fourth Circuit again affirms in an unpublished per curiam opinion.

On August 20, 2026, the same panel affirmed again, this time in an unpublished per curiam opinion. App. A. The court readopted its prior ineffective-assistance analysis—and, with it, its holding that the section 2D1.1(b)(1) enhancement was supported—reasoning that *Hunter* "does not change the binding case law that informed our prior assessment." App. A at 3 n.2.

As to the appeal waiver, the court reaffirmed that the waiver was valid and that it "clearly and unambiguously applies" to the firearm-enhancement issue. App. A at 5–6. Turning to the miscarriage-of-justice exception, the court recognized that *Hunter* "approved the majority view among the circuits that 'an appeal waiver is unenforceable when it would result in a miscarriage of justice,'" subject to the caveat that "[s]tandard-fare errors in misapplying sentencing law cannot cancel an appeal waiver." App. A at 7 (quoting *Hunter*, 146 S. Ct. at 1713). The court recited the "non-exclusive examples" *Hunter* identified of errors that "would bring the judiciary into disrepute." App. A at 7–8 (quoting *Hunter*, 146 S. Ct. at 1714).

The court then held that Mr. Richardson could not clear the "high bar" because the error he alleges is the type that "a judge could reasonably make." App. A at 8 (quoting *Hunter*, 146 S. Ct. at 1713). It reasoned: "If misapplications of sentencing law cannot cancel an appeal waiver, then it tracks that the follow-on effects to sentencing reductions from misapplied sentencing law cannot cancel an appeal

waiver either." App. A at 8. The court did not address whether Mr. Richardson bargained away eligibility for relief under Amendment 821, or whether he was advised of that consequence under Rule 11. *See* App. A at 6–8.

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Richardson's petition for a writ of certiorari on the two bases below.

First, this Court should grant certiorari to establish uniformity in application of the section 2D1.1(b)(1) firearms enhancement, vacate the decision of the Fourth Circuit on Mr. Richardson's ineffective assistance claim, and remand. Whereas, below, the Fourth Circuit held that the sentence enhancement was warranted based solely on the presence of a shotgun in the trunk of a car that had, on discrete earlier occasions, been used for drug trafficking, use of a multi-factor inquiry applied by other circuits would likely have resulted in no section 2D1.1(b)(1) enhancement and a different guideline range for Mr. Richardson.

Second, the Court should grant certiorari to clarify how *Hunter*'s miscarriage-of-justice standard applies when enforcing an appeal waiver forecloses relief under a retroactive guideline amendment that the defendant never waived. The Fourth Circuit treated *Hunter*'s caveat about "standard-fare" sentencing errors as a categorical bar and extended it, without analysis, to the waiver's collateral effect on separate, unwaived relief. The Court should vacate the Fourth Circuit's decision on the appeal waiver and remand for consideration of Mr. Richardson's plain-error claim.

A. This Court should clarify that the section 2D1.1(b)(1) enhancement requires more than finding a firearm near where the defendant's conspiracy occurred.

According to the commentary to section 2D1.1(b)(1) of the U.S. Sentencing Guidelines, a weapons-based enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." U.S.S.G. § 2D1.1, cmt. n.11(A). The federal courts of appeals, however, have diverged on their understanding of when a weapon is "present."

1. There is a disparity among the circuits in applying section 2D1.1(b)(1).

Some circuits apply a multi-factor test. *See*, *e.g.*, *United States v. Perez*, 5 F.4th 390, 400–401 (3d Cir. 2021) ("[F]actors that will ordinarily matter [are]: (1) the type of gun involved, with handguns more likely to be connected with drug trafficking than hunting rifles; (2) whether the gun was loaded; (3) whether the gun was stored (or, we add, possessed) near the drugs or drug-related items; and (4) whether the gun was accessible." (citing *United States v. Napolitan*, 762 F.3d 297, 308 (3d Cir. 2014))); *United States v. Mosley*, 53 F.4th 947, 966 (6th Cir. 2022) ("Six factors bear on [a section 2D1.1 (b)(1)] determination: (1) the type of gun [the defendant] possessed, (2) its accessibility, (3) the presence of ammunition, (4) the gun's proximity to illegal drugs, cash, or drug paraphernalia, (5) evidence that [the defendant] used the weapon, and (6) whether [the defendant] was engaged in drug trafficking, rather than manufacturing or possession." (quotation omitted)).

Other circuits, including the Fourth, apply the enhancement if the firearm is found in a place where the defendant's offense, conspiracy, or relevant conduct took place. *See, e.g.*, *United States v. Cantero*, 995 F.2d 1407, 1411–12 (7th Cir. 1993) ("[O]ur review is not limited to the evidence dealing with the proximity of the gun and the drugs at the specific time of the arrest, rather, we must determine whether the gun was possessed during the offense, i.e., during the course of the conspiracy."); *United States v. Sanchez-Cruz*, No. 23-1528, 2024 WL 4457233, at *2 (9th Cir. Oct. 10, 2024) ("We apply U.S.S.G. § 2D1.1(b)(1) broadly, and have concluded that the offense in this context refers to the entire course of criminal conduct, not just the crime of conviction. [T]he government simply bears the burden of proving that the weapon was possessed at the time of the offense." (brackets in original) (quotations omitted)); *United States v. Flores*, 149 F.3d 1272, 1280 (10th Cir. 1998) ("This nexus may be established by showing that the weapon was located nearby the general location where drugs or drug paraphernalia are stored or where part of the transaction occurred." (quotation omitted)); *United States v. Moore*, No. 23-50892, 2025 WL 561419, at *4 (5th Cir. Feb. 20, 2025) ("[T]he Government must show that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." (quotations omitted)); *see also Perez*, 5 F.4th at 401 (in which the Third Circuit expressly distinguished its approach from that of the First, Fourth, Fifth, Eighth, and Eleventh Circuits).

In its decision below, reaffirmed on remand from this Court, the Fourth Circuit said that, "[i]f 'the underlying offense is conspiracy to distribute drugs, . . . discovery

of a weapon "in a place where the conspiracy was carried out or furthered" is sufficient to link the weapon to the conspiracy.'" App. C at 10 (quoting *United States v. Bolton*, 858 F.3d 905, 912 (4th Cir. 2017)). With that reasoning, the Fourth Circuit held that a shotgun found in the trunk of Mr. Richardson's car, which was parked at his home, on a day when he was not engaged in drug trafficking, and the fact that he was later charged with conspiracy to distribute were sufficient to warrant application of a section 2D1.1(b)(1) enhancement. *See* App. C at 11–13.

2. Using a different approach would likely result in a different outcome.

If Mr. Richardson's case had come before a circuit applying a multi-factor analysis, such as those employed by the Third and Sixth Circuits, the outcome likely would have been different. These methods would focus on factors such as the following:

- The type of gun at issue, *see Perez*, 5 F.4th at 401, *Mosley*, 53 F.4th at 966—in this case, *a shotgun*, JA75–76; *see also Perez* 5 F.4th at 401 (noting that handguns are "more likely to be connected with drug trafficking than hunting rifles");
- Whether the gun was loaded, *see Perez*, 5 F.4th at 401—which, in this case, is *not addressed* by the record, JA75–76;
- Whether the gun was accessible, *see Perez*, 5 F.4th at 401; *Mosley*, 53 F.4th at 966—in this case, *arguably not, as it was found in the trunk of a vehicle*, JA75–76;

- Whether the gun was stored or possessed near the drugs or drug-related items at issue, *see Perez*, 5 F.4th at 401; *Mosley*, 53 F.4th at 966—here, *no*, JA75–76;
- Whether there was evidence that Mr. Richardson used the weapon, *Mosley*, 53 F.4th at 966—here, *no*, JA75–76.

A court applying this analysis could certainly conclude that these factors weighed against imposing the firearm enhancement in Mr. Richardson's case. *See Perez*, 5 F.4th at 402 ("Our holding here avoids the problem of a drug trafficker who coincidentally has a hunting rifle buried in his closet." (quotation omitted)); *cf. Mosley*, 53 F.4th at 966–67 (concluding district court did not err in applying enhancement where weapon in question was "a small pistol that was not difficult to conceal," the pistol was accessible to the defendant, and the pistol was found "inches away from [the defendant]'s fentanyl stash" and "only a foot and a half away from" other drug "residue").

Conversely, the method employed by the Fourth Circuit relies on speculation, allowing for much more attenuated circumstances to warrant a section 2D1.1(b)(1) enhancement. If it is conceivable that the weapon in question was possessed or used during the course of the conduct in question, that is sufficient to trigger the sentence enhancement. *See* App. C at 11–13.

The more lenient approach applied by the Fourth Circuit and others also raises Second Amendment concerns. Mr. Richardson, as an American citizen, had a constitutional right to possess a firearm. U.S. Const. amend. II; *see also D.C. v.*

Heller, 554 U.S. 570, 619 (2008) ("The right to bear arms has always been the distinctive privilege of freemen." (quotation omitted)). Mr. Richardson had no scorable criminal history, and, before he pled guilty to the instant offenses, was not a felon, which would have barred him from owning a firearm. Allowing this more lenient approach to the section 2D1.1(b)(1) enhancement to stand risks infringing the Second Amendment rights of Americans in a significant portion of the United States.

B. The Fourth Circuit erred in its application of *Hunter* by holding that enforcing Mr. Richardson's appeal waiver would not result in a miscarriage of justice.

1. *Hunter* establishes a miscarriage-of-justice exception grounded in the integrity of the judiciary, not a categorical bar on sentencing-related claims.

Before *Hunter*, this Court had not determined when an appeal waiver should not be enforced because enforcement would effect a miscarriage of justice. *See Garza v. Idaho*, 586 U.S. 232, 239 & n.6 (2019). In *Hunter*, the Court resolved that question, approving "the majority view among the circuits that 'an appeal waiver is unenforceable when it would result in a miscarriage of justice.'" App. A at 7 (quoting *Hunter*, 146 S. Ct. at 1713). The Court explained that "[s]tandard-fare errors in misapplying sentencing law cannot cancel an appeal waiver," and it offered "several non-exclusive examples of the types of errors that 'would bring the judiciary into disrepute.'" App. A at 7 (quoting *Hunter*, 146 S. Ct. at 1714).

Those examples include a sentence exceeding the statutory maximum; a sentence "infected with a blatant constitutional error"; and a sentence "imposed without some minimum of civilized procedure," such as one "in which the judge refused to hold a hearing consonant with basic principles of law." App. A at 7–8

(quoting *Hunter*, 146 S. Ct. at 1714). As the Fourth Circuit acknowledged, the list is "non-exclusive." App. A at 7. The unifying principle is whether enforcing the waiver would bring the judiciary into disrepute—an inquiry that necessarily turns on the nature and consequences of the particular error in the particular case.

2. The Fourth Circuit converted *Hunter*'s caveat into a per se rule and extended it, without analysis, to a waiver's effect on separate, unwaived relief.

The Fourth Circuit's application of *Hunter* consisted of two moves. First, it characterized the firearm-enhancement error as one that "a judge could reasonably make," and therefore a "standard-fare" misapplication of sentencing law. App. A at 8. Second, it reasoned that "[i]f misapplications of sentencing law cannot cancel an appeal waiver, then it tracks that the follow-on effects to sentencing reductions from misapplied sentencing law cannot cancel an appeal waiver either." App. A at 8. The court cited nothing in *Hunter* for that second proposition beyond a general "*see id.*" *Id.* That reasoning misapplies *Hunter* in at least three respects.

First, Mr. Richardson's miscarriage-of-justice argument was never simply that the guideline error itself was egregious. It was that enforcing the waiver to bar correction of the error permanently extinguishes his eligibility for a distinct form of relief—a sentence reduction under retroactive Amendment 821 and 18 U.S.C. § 3582(c)(2)—that his plea agreement did not waive. *See* App. A at 6 (describing Mr. Richardson's argument that the enhancement "could render [him] ineligible for a sentencing reduction" under § 4C1.1). Because a section 3582(c)(2) proceeding is not a full resentencing, the district court cannot revisit the firearm finding in that proceeding. U.S.S.G. § 1B1.10(a)(3). The appeal is therefore the only opportunity to

correct it. By labeling that consequence a mere "follow-on effect," the Fourth Circuit never engaged with the actual harm Mr. Richardson identified.

Second, nothing in *Hunter* suggests that the "standard-fare" caveat forecloses consideration of what enforcement does to rights outside the waiver's bargained-for scope. The caveat addresses whether an error in "misapplying sentencing law" can "cancel an appeal waiver." App. A at 7. It does not address a situation in which enforcement operates to deprive a defendant of a separate statutory avenue for relief that arose after his plea, that neither party contemplated, and that the government never sought to have him waive. The Fourth Circuit's one-sentence extension—"it tracks"—transforms a limitation on the *kind* of error that justifies non-enforcement into a categorical prohibition on considering the *consequences* of enforcement. That approach cannot be squared with *Hunter*'s recognition that its examples are non-exclusive and that the touchstone is whether enforcement would bring the judiciary into disrepute.

Third, the Fourth Circuit's analysis on remand did not consider the Rule 11 dimension of Mr. Richardson's claim. Rule 11 requires the district court to "inform the defendant of, and determine that the defendant understands, . . . the terms of any plea-agreement provision waiving the right to appeal." Fed. R. Crim. P. 11(b)(1)(N). The appeal waiver here did not mention Amendment 821, which had not yet been submitted to Congress when Mr. Richardson pled guilty on January 26, 2023. *See* JA59–66. The plea hearing transcript is likewise silent on the then-forthcoming amendment, even though parties in other cases expressly accounted for the

anticipated amendment during plea negotiations. *See United States v. Harris*, No. 23-6811, 2025 WL 18131, at *1 n.1 (2d Cir. Jan. 2, 2025) (summary order) (noting the parties agreed to a range that "appropriately accounted for the then-anticipated amendment to U.S.S.G. § 4C1.1"). Mr. Richardson did not receive any criminal history points, JA77, and none of the other aggravating factors in section 4C1.1 appears to apply. *See* U.S.S.G. § 4C1.1(a). The record does not show that Mr. Richardson knew that, by agreeing to the appeal waiver, he was effectively surrendering the ability to seek retroactive relief under section 4C1.1—or that the government bargained for that result.

The Fourth Circuit's original opinion characterized this argument as an attempt to "re-bargain the waiver of his right to appeal because of changes in the law." App. C at 7 (quoting *United States v. Copeland*, 707 F.3d 522, 529 (4th Cir. 2013)). But Mr. Richardson does not seek to undo his bargain. He seeks to preserve the benefit of a right that his bargain left untouched. Enforcing an appeal waiver to strip a defendant of unwaived relief—relief that, by operation of U.S.S.G. § 1B1.10(a)(3), can never be recovered—is precisely the kind of result that would bring the judiciary into disrepute.

3. Properly applied, *Hunter* required the Fourth Circuit to decline to enforce the waiver here.

Under a faithful application of *Hunter*, the relevant question is whether enforcing the waiver in these circumstances would bring the judiciary into disrepute. Several features of this case answer that question in Mr. Richardson's favor. The enhancement rests on nothing more than the presence of a shotgun—given to Mr.

Richardson by his late father—in the trunk of a car, with no drugs or paraphernalia in the car and no evidence that the shotgun was present during any drug transaction. JA75–76; App. C at 12–13. The consequence of leaving the enhancement uncorrected is not limited to the two levels it added at sentencing; it also permanently forecloses an additional two-level reduction under a retroactive amendment for which Mr. Richardson otherwise appears eligible. And that consequence was neither disclosed to Mr. Richardson at his plea hearing nor bargained for by the government.

Even before *Hunter*, courts declined to enforce waivers in comparable circumstances, where the plea agreement did not address a significant consequence and the defendant therefore "had no reason to know" of it. *See United States v. Icker*, 13 F.4th 321, 326 & n.3 (3d Cir. 2021) (declining to enforce appeal waiver as not knowing and voluntary where "the Plea Agreement never mentioned any SORNA requirements," and concluding in the alternative that enforcement would be a miscarriage of justice because the error was clear and grave, it presented a legal question, it created a burdensome obligation for the defendant, and "the impact to the Government in correcting this error would be minimal"). The same considerations apply here: the government would lose nothing it bargained for if Mr. Richardson's plain-error claim were heard on the merits.

4. The question is important and warrants review now.

Hunter is new, and the courts of appeals are only beginning to apply it. The Fourth Circuit's decision on remand shows how readily *Hunter*'s caveat may be transformed into a categorical bar that forecloses any inquiry into the consequences of enforcement. If that reading takes hold, defendants whose waivers are enforced to

bar correction of guideline errors will be permanently excluded from retroactive relief that Congress and the Sentencing Commission made available, and that they never agreed to forgo. Amendment 821's zero-point offender reduction is a recurring source of such claims because its eligibility criteria turn on the same findings—such as firearm possession "in connection with the offense"—that are frequently shielded from review by appeal waivers. *See* U.S.S.G. § 4C1.1(a).

Moreover, although the Fourth Circuit issued its remand decision in an unpublished opinion, that court's published decisions continue to describe the miscarriage-of-justice exception as limited to a "narrow class of claims." *See Smith*, 134 F.4th at 261 (quotation omitted); *see also* App. C at 6 (citing *Smith*, 134 F.4th at 261, and *United States v. Adams*, 814 F.3d 178, 183 (4th Cir. 2016)). This Court's guidance is needed to ensure that *Hunter*'s standard is applied uniformly and as the Court intended. *See Heckler v. Turner*, 468 U.S. 1305, 1306 (1984) (Rehnquist, J., in chambers) (noting certiorari granted to resolve conflicting treatment among the courts of appeals). At a minimum, the Court should grant the petition, vacate the judgment, and remand with instructions to apply *Hunter*'s miscarriage-of-justice inquiry to the consequence Mr. Richardson actually identified—the loss of unwaived Amendment 821 relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

This the 17th day of November, 2026.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4471

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOVIS ATION RICHARDSON,

Defendant - Appellant.

On Remand from the Supreme Court of the United States. (S. Ct. No. 25-5986)

Submitted: July 31, 2026 Decided: August 20, 2026

Before WYNN and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Michelle A. Liguori, Chelsea A. Pieroni, ELLIS & WINTERS, LLP, Raleigh, North Carolina, for Appellant. Michael F. Easley, Jr., United States Attorney, David A. Bragdon, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In 2023, pursuant to a written plea agreement, Tovis Ation Richardson pled guilty to two counts: (1) conspiracy to distribute and possess with intent to distribute methamphetamine; (2) possession with intent to distribute methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 846. He later received a 240-month sentence.

Richardson filed a direct appeal of his sentence raising two issues: (1) whether the district court erred in applying a sentencing enhancement for firearm possession; and (2) whether counsel provided ineffective assistance by failing to object to this enhancement. As to the first issue, we found that we were unable to address its merits because Richardson waived his right to bring the argument.[1] *United States v. Richardson*, 146 F.4th 394, 398–400 (4th Cir. 2025), *cert. granted, judgment vacated*, No. 25-5986, 2026 WL 1855087 (U.S. June 29, 2026). As to the second, we found that it does not conclusively appear in the record that counsel provided ineffective assistance, as is required on direct appeal. *Id.* at 400–05. We ultimately affirmed the judgment of the district court. *Id.* at 405.

[1] In Richardson's opening brief, he identified that "[n]otwithstanding the appeal waiver, the government may choose to address the merits and elect not to seek enforcement of the appeal waiver." Opening Br. at 8 n.2. He noted that the waiver does not apply to claims of ineffective assistance of counsel. In response, the government "elect[ed] to seek enforcement." Resp. Br. at 11. In reply, Richardson argued that the government had not shown that the appeal waiver was enforceable. Thus, prior to reaching the merits of the sentencing enhancement arguments, we had to ascertain whether Richardson's appeal waiver bars his sentencing argument.

Richardson petitioned for certiorari, which the Supreme Court granted. The Supreme Court vacated and remanded the Fourth Circuit's opinion so that we may apply the new appeal waiver test that the Court established in *Hunter v. United States*, 146 S. Ct. 1702 (2026). Now applying the *Hunter* test, we again affirm the judgment of the district court.[2]

I.

In August 2021, police learned that Richardson and two co-conspirators were distributing narcotics in Johnston County, North Carolina. Between August 26, 2021, and October 14, 2021, a confidential informant purchased methamphetamine from Richardson eight times. On at least three of these occasions, Richardson dealt from his car.

On October 8, 2021, investigators pulled Richardson over. He agreed to accompany them to his home, where police executed a search warrant. Police recovered methamphetamine, marijuana, cell phones, $40,590 in cash, a digital scale, and a box of ammunition of various calibers and gauges. Police also recovered a 12-guage shotgun from

[2] The Supreme Court vacated and remanded the Fourth Circuit's opinion to consider *Hunter*, 146 S. Ct. 1702. However, *Hunter* does not change the binding case law that informed our prior assessment of Richardson's claimed ineffective assistance of counsel. *See id.* Therefore, with no change in binding caselaw, on remand we adopt our prior analysis as to the second issue of whether Richardson's counsel provided ineffective assistance. *See Richardson*, 146 F.4th at 400–05. In short, we again conclude that "we see no reason to take the extraordinary step of finding deficient performance at this stage." *Id.* at 405 (citation modified).

the trunk of Richardson's car, which was parked on the property. The shotgun was a gift from his father.

Richardson was subsequently charged in the Eastern District of North Carolina with (1) conspiracy to distribute and possess with intent to distribute methamphetamine and (2) possession with intent to distribute methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 846. He retained counsel and, pursuant to a written plea agreement, pled guilty to both counts.

Important here, Richardson's plea agreement contains an appeal waiver. It states: "The Defendant agrees: . . . To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground . . . excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of [his] guilty plea." J.A. 59.

During Richardson's sentencing, the district court relied on a presentence report (PSR). The PSR calculated zero criminal history points and a base offense level of 36. It then applied two sentencing enhancements: one under U.S.S.G. § 2D1.1(b)(1) for firearm possession; and another under § 2D1.1(b)(12) for "maintain[ing] a premises for the purpose of manufacturing or distributing a controlled substance." Each enhancement increased the base offense level by two points.

The PSR also applied two sentencing reductions: one under § 3E1.1(a) for "acceptance of responsibility"; and another under § 3E1.1(b) for "timely notifying authorities of his intention to enter a plea of guilty." Together, they decreased the base

offense level by three points. The PSR ultimately calculated a total offense level of 37. The corresponding Sentencing Guidelines range was 210-to-262 months.

Neither party objected to the PSR, and both recommended a 240-month sentence. The district court adopted the PSR and imposed a 240-month sentence.

II.

We begin by determining whether Richardson's appeal waiver is enforceable. We conduct this analysis *de novo*. *United States v. Carter*, 87 F.4th 217, 223–24 (4th Cir. 2023) (citing *United States v. Boutcher*, 998 F.3d 603, 608 (4th Cir. 2021)). When, as here, "the government seeks to enforce an appeal waiver and has not breached the plea agreement, we will enforce the waiver if it is valid and if the issue being appealed falls within its scope." *Id.* (quoting *United States v. Beck*, 957 F.3d 440, 445 (4th Cir. 2020)).

A.

First, validity. "A waiver is valid if 'the defendant knowingly and intelligently agreed to waive the right to appeal.'" *United States v. Soloff*, 993 F.3d 240, 243 (4th Cir. 2021) (quoting *United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005)). To analyze these factors, "we consider 'the totality of the circumstances,' including the experience and conduct of the defendant, his educational background, and his knowledge of the plea agreement and its terms." *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir. 2018) (quoting *United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012)). "Generally though, 'if a district court questions a defendant regarding the waiver of appellate rights

during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.'" *Id.* (quoting *Thornsbury*, 670 F.3d at 537). We previously found it uncontested that Richardson's waiver was knowing and intelligent and therefore valid. As binding precedent has not changed, we need not revise this analysis on remand.

B.

Next, scope. "We use traditional principles of contract law to determine whether an issue falls within the scope of a valid waiver." *Carter*, 87 F.4th at 224 (citing *United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013)). Under this framework, we must find the waiver "clearly and unambiguously applicable to the issues raised by the defendant on appeal." *Id.* (quoting *Yooho Weon*, 722 F.3d at 588).

The first issue that Richardson raises is the application of the firearm enhancement, § 2D.1.1(b)(1). Richardson's waiver clearly and unambiguously applies to this issue. His waiver explicitly forecloses appeals "on any ground," including appeals "pursuant to 18 U.S.C § 3742." J.A. 59. Section 3742(a)(2) would otherwise permit an appeal based on "an incorrect application of the sentencing guidelines." This analysis stands on remand.

We next turn to Richardson's argument that the "failure to correct [the firearm enhancement] would result in a miscarriage of justice." Reply Br. at 14. More specifically, he argues that the enhancement "could render [him] ineligible for a sentencing reduction" under § 4C1.1, which became effective after his plea and permits a two-point offense-level reduction for certain defendants with zero criminal history points. *Id.* at 14, 19–20 (discussing § 4C1.1 and its retroactive application).

Richardson is correct that this Court "will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (citing *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005)). We previously held that "Richardson's alleged 'miscarriage of justice' is merely a re-packaged Guidelines claim that aims to re-bargain the terms of his waiver. Therefore, even assuming his eligibility for a sentencing reduction under § 4C1.1, our 'failure to correct' this issue would not result in a miscarriage of justice." *Richardson*, 146 F.4th at 399. The Supreme Court has since clarified its jurisprudence regarding what suffices to establish a "miscarriage of justice," *see Hunter*, 146 S. Ct. at 1713–14, and has remanded this case for us to apply that new framework, *Richardson*, 2026 WL 1855087, at *1.

In *Hunter*, the Court approved the majority view among the circuits that "an appeal waiver is unenforceable when it would result in a miscarriage of justice." 146 S.Ct. at 1713. This new rule comes with a caveat: "[s]tandard-fare errors in misapplying sentencing law cannot cancel an appeal waiver." *Id.* Instead, the Court provides several non-exclusive examples of the types of errors that "would bring the judiciary into disrepute." *Id.* at 1714. First, "a sentence exceeding what the relevant statute allows—most commonly, a term of years above the maximum prescribed." *Id.* Second, "a sentence that is infected with a blatant constitutional error, such as when a judge takes account of a constitutionally impermissible factor (like race) or imposes a constitutionally infirm condition of supervised release (like barring a defendant from becoming pregnant)." *Id.* And third, "a defendant may appeal if his sentence was imposed without some minimum of civilized procedure as in, yes, the twelve orangutans case—or less extravagantly, one in

which the judge refused to hold a hearing consonant with basic principles of law." *Id.* (first citing *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); and then citing *United States v. Behrens*, 375 U.S. 162, 165–66 (1963)).

Richardson cannot clear the miscarriage-of-justice standard's "high bar" because the error that he alleges is the type that "a judge could reasonably make," and is therefore insufficiently "obvious" and "egregious." *See id.* at 1713. This is a straightforward application of the Supreme Court's caveat that "[s]tandard-fare errors in misapplying sentencing law cannot cancel an appeal waiver." *Id.* If misapplications of sentencing law cannot cancel an appeal waiver, then it tracks that the follow-on effects to sentencing reductions from misapplied sentencing law cannot cancel an appeal waiver either. *See id.* Therefore our "failure to correct" this issue would not result in a miscarriage of justice.

III.

Based on the foregoing, the judgment of the district court is

AFFIRMED.

FILED: August 20, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4471
(5:22-cr-00313-D-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TOVIS ATION RICHARDSON

Defendant - Appellant

J U D G M E N T

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

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

/s/ NWAMAKA ANOWI, CLERK

FILED: August 20, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4471, US v. Tovis Richardson
5:22-cr-00313-D-1

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's website, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4471

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TOVIS ATION RICHARDSON,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C Dever, III, District Judge. (5:22-cr-00313-D-1)

Argued: December 11, 2024 Decided: July 28, 2025

Before WYNN and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Floyd wrote the opinion in which Judge Wynn and Judge Thacker joined.

ARGUED: Michelle Ann Liguori, ELLIS & WINTERS, LLP, Raleigh, North Carolina, for Appellant. Jacob D. Pugh, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Chelsea A. Pieroni, ELLIS & WINTERS, LLP, Raleigh, North Carolina, for Appellant. Michael F. Easley, Jr., United States Attorney, David A. Bragdon, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

FLOYD, Senior Circuit Judge:

In 2023, pursuant to a written plea agreement, Tovis Ation Richardson pled guilty to two counts: (1) conspiracy to distribute and possess with intent to distribute methamphetamine; (2) possession with intent to distribute methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 846. He later received a 240-month sentence.

In this direct appeal, Richardson raises two issues: (1) whether the district court erred in applying a sentencing enhancement for firearm possession; (2) whether counsel provided ineffective assistance by failing to object to this enhancement.

As to the first issue, we are unable to address its merits because Richardson waived his right to bring the argument. As to the second, we find that it does not conclusively appear in the record that counsel provided ineffective assistance, as is required on direct appeal. We therefore affirm the judgment of the district court.

I.

A.

In August 2021, police learned that Richardson and two co-conspirators were distributing narcotics in Johnston County, North Carolina. Between August 26, 2021 and October 14, 2021, a confidential informant purchased methamphetamine from Richardson eight times. On at least three of these occasions, Richardson dealt from his car.

On October 8, 2021, investigators pulled Richardson over. He agreed to accompany them to his home, where police executed a search warrant. Police recovered methamphetamine, marijuana, cell phones, $40,590 in cash, a digital scale, and a box of

ammunition of various calibers and gauges. Police also recovered a 12-gauge shotgun from the trunk of Richardson's car, which was parked on the property. The shotgun was a gift from his father.

Richardson was subsequently charged in the Eastern District of North Carolina with (1) conspiracy to distribute and possess with intent to distribute methamphetamine and (2) possession with intent to distribute methamphetamine. *See* 21 U.S.C. §§ 841(a)(1), 846. He retained counsel and, pursuant to a written plea agreement, pled guilty to both counts.

Important here, Richardson's plea agreement contains an appeal waiver. It states: "The Defendant agrees: … To waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground … excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of [his] guilty plea." J.A. 59.

B.

During Richardson's sentencing, the district court relied on a presentence report (PSR). The PSR calculated zero criminal history points and a base offense level of 36. It then applied two sentencing enhancements: one under U.S.S.G. § 2D1.1(b)(1) for firearm possession; and another under § 2D1.1(b)(12) for "maintain[ing] a premises for the purpose of manufacturing or distributing a controlled substance." Each enhancement increased the base offense level by two points.

The PSR also applied two sentencing reductions: one under § 3E1.1(a) for "acceptance of responsibility"; and another under § 3E1.1(b) for "timely notifying

authorities of his intention to enter a plea of guilty." Together, they decreased the base offense level by three points. The PSR ultimately calculated a total offense level of 37. The corresponding Sentencing Guidelines range was 210-to-262 months.

Neither party objected to the PSR, and both recommended a 240-month sentence. The district court adopted the PSR and imposed a 240-month sentence.

C.

This appeal followed. As previewed, Richardson raises two issues: (1) whether the district court erred in applying a sentencing enhancement under § 2D1.1(b)(1) for firearm possession; (2) whether counsel provided ineffective assistance by failing to object to this enhancement. The government responds: Richardson's appeal waiver covers the first issue; and it does not conclusively appear in the record that counsel provided ineffective assistance, which defeats the second issue.

II.

We begin by determining whether Richardson's appeal waiver is enforceable. We conduct this analysis *de novo*. *United States v. Carter*, 87 F.4th 217, 223–24 (4th Cir. 2023) (citing *United States v. Boutcher*, 998 F.3d 603, 608 (4th Cir. 2021)). When, as here, "the government seeks to enforce an appeal waiver and has not breached the plea agreement, we will enforce the waiver if it is valid and if the issue being appealed falls within its scope." *Id.* (quoting *United States v. Beck*, 957 F.3d 440, 445 (4th Cir. 2020)).

A.

First, validity. "A waiver is valid if 'the defendant knowingly and intelligently agreed to waive the right to appeal.'" *United States v. Soloff*, 993 F.3d 240, 243 (4th Cir. 2021) (quoting *United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005)). To analyze these factors, "we consider 'the totality of the circumstances,' including the experience and conduct of the defendant, his educational background, and his knowledge of the plea agreement and its terms." *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir. 2018) (quoting *United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012)). "Generally though, 'if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.'" *Id.* (quoting *Thornsbury*, 670 F.3d at 537).

Here, Richardson does not contest that his waiver was knowing and intelligent. *See* Oral Arg. 0:45–2:32. Our review of the record supports this concession. His waiver is therefore valid.

B.

Next, scope. "We use traditional principles of contract law to determine whether an issue falls within the scope of a valid waiver." *Carter*, 87 F.4th at 224 (citing *United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013)). Under this framework, we must find the waiver "clearly and unambiguously applicable to the issues raised by the defendant on appeal." *Id.* (quoting *Yooho Weon*, 722 F.3d at 588).

1.

The first issue that Richardson raises is the application of the firearm enhancement, § 2D.1.1(b)(1). Richardson's waiver clearly and unambiguously applies to this issue. His waiver explicitly forecloses appeals "on any ground," including appeals "pursuant to 18 U.S.C § 3742." J.A. 59. § 3742(a)(2) would otherwise permit an appeal based on "an incorrect application of the sentencing guidelines."

In light of this plain language, Richardson pivots to arguing that the "failure to correct [the firearm enhancement] would result in a miscarriage of justice." Reply Br. 14. More specifically, he argues that the enhancement "could render [him] ineligible for a sentencing reduction" under § 4C1.1, which became effective after his plea and permits a two-point offense-level reduction for certain defendants with zero criminal history points. *Id.* at 14, 19–20 (discussing § 4C1.1 and its retroactive application).

Richardson is correct that this Court "will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (citing *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005)). But, for one, we only find miscarriages of justice in "a narrow class of claims." *United States v. Smith*, 134 F.4th 248, 261 (4th Cir. 2025) (quoting *Blick*, 408 F.3d at 171) (finding miscarriage of justice because sentencing court had a regular practice of "omitting necessary information in both plea and sentencing hearings, disregarding proper procedure, and relying on appeal waivers to shield procedurally unreasonable sentences from review"); *see Adams*, 814 F.3d at 183 (finding miscarriage of justice because defendant made "a valid claim of actual innocence").

For another, a defendant "cannot ... ask to re-bargain the waiver of his right to appeal because of changes in the law." *United States v. Copeland*, 707 F.3d 522, 529 (4th Cir. 2013) (quoting *Blick*, 408 F.3d at 170); *see Johnson*, 410 F.3d at 152–53 ("Johnson's contention—that a defendant cannot waive the right to an appeal based on subsequent changes in the law—though reasonable, is foreclosed by Supreme Court precedent" (citing *Brady v. United States*, 397 U.S. 742, 757 (1970))). "A plea agreement, like any contract, allocates risk." *Johnson*, 410 F.3d at 153. "And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea." *Id.* (quoting *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005)).

Applying these principles here, we conclude that Richardson's alleged "miscarriage of justice" is merely a re-packaged Guidelines claim that aims to re-bargain the terms of his waiver. Therefore, even assuming his eligibility for a sentencing reduction under § 4C1.1, our "failure to correct" this issue would not result in a miscarriage of justice.[1]

2.

The second issue that Richardson raises is ineffective assistance—specifically, his counsel's failure to object to the firearm enhancement. His waiver does not cover this

[1] In a footnote, Richardson also claims that he is "actually innocent of the acts required for a firearm enhancement." Reply Br. 20 n.8. "To succeed on actual innocence grounds, however, '[Richardson] must demonstrate actual factual innocence of the offense of conviction,'" not the enhancement. *United States v. Pettiford*, 612 F.3d 270, 282–84 (4th Cir. 2010) (quoting *United States v. Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999)); *see Adams*, 814 F.3d at 182–83 (analyzing same in appeal waiver context).

issue. Although his waiver explicitly bars appeals "on any ground," it carves out two exceptions: claims of "ineffective assistance of counsel or prosecutorial misconduct not known to [Richardson] at the time of [his] guilty plea." J.A. 59. The government does not claim that this issue was known to Richardson at the time of his plea. We therefore assess Richardson's ineffective assistance claim in the next section.

III.

We review a claim of ineffective assistance *de novo*. *United States v. Freeman*, 24 F.4th 320, 326 (4th Cir. 2022) (en banc). To establish ineffective assistance, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

When, as here, the claim is made on direct appeal, it must "*conclusively appear[] in the trial record itself* that the defendant was not provided ... effective representation." *Freeman*, 24 F.4th at 326 (quoting *United States v. Fisher*, 477 F.2d 300, 302 (4th Cir. 1973)); *see United States v. Benton*, 523 F.3d 424, 435 (4th Cir. 2008) ("Ineffective assistance claims are generally not cognizable on direct appeal … 'unless it conclusively appears from the record that defense counsel did not provide effective representation.'" (quoting *United States v. Richardson,* 195 F.3d 192, 198 (4th Cir. 1999))).

A.

We begin by examining the first prong: deficient performance. To establish deficient performance, "the defendant must show that counsel's representation fell below

an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *see Cox v. Weber*, 102 F.4th 663, 672 (4th Cir. 2024) (same).

Richardson claims that counsel's performance was deficient because he failed to object to the firearm enhancement (both when reviewing the PSR and at sentencing). Richardson is correct that "counsel may be constitutionally required to object when there is relevant authority *strongly suggesting* that a sentencing enhancement is not proper." *Freeman*, 24 F.4th at 326 (quoting *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017) (emphasis added)). We therefore consider the merits of this objection.

1.

The firearm enhancement states: "If a dangerous weapon (including a firearm) was possessed, increase [the offense level] by 2 levels." U.S.S.G § 2D1.1(b)(1). To apply this enhancement, the government must show, "by a preponderance of the evidence, that the weapon was possessed in connection with the relevant illegal drug activity." *United States v. Mondragon*, 860 F.3d 227, 231 (4th Cir. 2017) (citing *United States v. Manigan*, 592 F.3d 621, 628, 630 (4th Cir. 2010)). In other words, the government must show that "the defendant possessed a weapon 'in connection with drug activity that was part of the same course of conduct or common scheme as the offense of conviction.'" *United States v. Bolton*, 858 F.3d 905, 912 (4th Cir. 2017) (quoting *Manigan*, 592 F.3d at 628–29).

Significant here: If "the underlying offense is conspiracy to distribute drugs, we have held that discovery of a weapon 'in a place where the conspiracy was carried out or furthered' is sufficient to link the weapon to the conspiracy." *Id.* (quoting *United States v. Apple*, 962 F.2d 335, 338 (4th Cir. 1992)); *see, e.g.*, *United States v. Cabrera*, 837 Fed. Appx. 981, 986 (4th Cir. 2020) (argued but unpublished) (Agee, J.) (same); *United States v. Hairston*, 46 F.3d 1127, 1995 WL 54010, at *7 (4th Cir. 1995) (argued but unpublished) (same). Put differently, while "there must be some geographical and temporal proximity between the weapon and the commission of the offense," "when the offense committed is conspiracy, these proximity conditions are met when the weapon is discovered in a place where the conspiracy was carried out or furthered." *Apple*, 962 F.2d at 338.

Our conspiracy-based holdings do not stand alone. *See, e.g.*, *United States v. Garcia*, 703 F.3d 471, 477 (8th Cir. 2013) ("We have held the government demonstrates the required connection between the weapon and the drug activity when the weapon 'was found in the same location where drugs or drug paraphernalia were stored *or* where part of the conspiracy took place.'" (quoting *United States v. Young*, 689 F.3d 941, 946 (8th Cir. 2012) (emphasis added))); *United States v. Pham*, 463 F.3d 1239, 1246 (11th Cir. 2006) ("conspiracy … permits the application of the § 2D1.1(b)(1) enhancement if the firearms are found in a place where acts in furtherance of the conspiracies took place"); *United States v. Martinez*, 77 Fed. Appx. 490, 500 (10th Cir. 2003) (Henry, J.) (unpublished) (the government need only show that the firearm "was discovered in a place where the conspiracy was carried out or furthered").

Here, the record shows that: (1) Richardson pled guilty to conspiracy to distribute methamphetamine; (2) Richardson used his car to distribute methamphetamine; and (3) police seized a shotgun from the trunk of his car during the conspiracy period. The shotgun was therefore discovered in a place where Richardson's conspiracy was carried out. Under our case law, this is enough for the government to meet its preponderance burden and apply the firearm enhancement. *See Bolton*, 858 F.3d at 912; *Apple*, 962 F.2d at 338.

2.

Richardson, of course, disagrees. He claims that the enhancement was improperly applied and counsel should have objected. We examine his arguments below.

To begin, the parties agree that a successful § 2D1.1(b)(1) objection must show that "it is clearly improbable that the weapon was connected with the offense." *Bolton*, 858 F.3d at 912 (quoting § 2D1.1(b)(1), cmt. n.11(A)). We recognize, however, that this standard (although routinely applied) is taken from the Guidelines commentary. *See id.* In *United States v. Campbell*, we clarified that courts should only look to the commentary when a guideline is "genuinely ambiguous." 22 F.4th 438, 444–45 (4th Cir. 2022) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 574 (2019)). Nevertheless, since *Campbell*, we have continued to apply the "clearly improbable" standard. *See United States v. Banks*, 104 F.4th 496, 524 (4th Cir. 2024).

We see no obvious reason to deviate from this framework, and neither party objects to its use. Therefore, assuming defendants can continue to avoid the firearm enhancement by making a "clearly improbable" showing, we find that, based on the current record,

Richardson would have failed to do so. We examine his three main arguments: (1) the record connects the shotgun to his car, not his drug activities; (2) shotguns are not typically used to aid drug traffickers; and (3) the shotgun may not have been loaded or functional.

a.

First, as to the firearm's location during Richardson's drug activities, again, we have repeatedly held that "discovery of a weapon 'in a place where the conspiracy was carried out or furthered' is sufficient[.]" *Bolton*, 858 F.3d at 912 (quoting *Apple*, 962 F.2d at 338); *see also Mondragon*, 860 F.3d at 232–33 (distinguishing *United States v. McAllister*, 272 F.3d 228 (4th Cir. 2001), which examines possession "on a single date"). As a result, the government need not offer "direct evidence that [the defendant] physically possessed a firearm *during* any drug transaction." *United States v. Gomez-Jimenez*, 750 F.3d 370, 381 (4th Cir. 2014) (emphasis added).

Based on this principle, courts regularly affirm § 2D1.1(b)(1) enhancements where police seize firearms, but no drugs, from conspiracy-connected vehicles. *See*, *e.g.*, *United States v. Perez-Guerrero*, 334 F.3d 778, 783–84 (8th Cir. 2003). In a case strikingly similar to Richardson's, the Fifth Circuit upheld this enhancement after police "found a shotgun in the trunk of [the defendant's] Camry," and "witness testimony established that [he] used the vehicle to transport crack cocaine." *United States v. Brown*, 217 F.3d 247, 261 (5th Cir. 2000), *vacated on other grounds*, 531 U.S. 1136 (2001).

Here, Richardson does not dispute that he used his car to distribute methamphetamine or that police found a shotgun in the trunk of this car. He only disputes

that the shotgun was in his car at the time of his transactions. *See* Reply Br. 4 ("While the presentence report indicates that Mr. Richardson sold drugs in his car on [three specific dates], there is no evidence in the presentence report or elsewhere that the shotgun was in his trunk on any of those dates."). Richardson therefore seeks unnecessary evidence: the government need not connect the shotgun to any particular transaction; the shotgun's presence in his conspiracy-connected car is enough.[2]

b.

Next, as to firearm type, we have acknowledged that "a drug trafficker is much more likely to utilize a handgun—as opposed to a rifle or long gun—due to size and concealability." *Manigan*, 592 F.3d at 629. In fact, like Richardson, we have looked to the Guidelines commentary and acknowledged that "the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the

[2] As noted, Richardson has never contested that the shotgun was seized from the same car that he used to distribute drugs, and we do not consider arguments that Richardson failed to raise in his opening brief. *See United States v. Gallagher*, 90 F.4th 182, 189 n.1 (4th Cir. 2024). But, to the extent that the record *infers* his use of the same car, (1) "the Government is entitled to rely on circumstantial evidence to carry its burden," *Manigan*, 592 F.3d at 629, and (2) we have held that a location's connection to a conspiracy can be inferred. For example, in *Mondragon*, we affirmed a § 2D1.1(b)(1) enhancement based on testimony about the defendant's "possession and display of a revolver pistol while at the house of his closest drug-trafficking associate." 860 F.3d at 232. There was "no direct evidence that [he] was at [the] house to further their drug-trafficking conspiracy," but we found it "reasonable for the district court to infer [as much]." *Id.* We applied the same reasoning in *Banks*. *See* 104 F.4th at 524 (affirming enhancement based on firearm found in defendant's home despite no mention of home's role in conspiracy). That said, if Richardson has reason to believe that a different car was used during his transactions, he could pursue this argument in a 28 U.S.C. § 2255 motion.

closet." *Bolton*, 858 F.3d at 912 (quoting § 2D1.1(b)(1), cmt. n.11(A)). We repeat that courts should only look to the commentary when a guideline is "genuinely ambiguous." *Campbell*, 22 F.4th at 444–45 (quoting *Kisor*, 588 U.S. at 559). However, even assuming such ambiguity, neither this commentary specifically nor Richardson's weapon-type argument generally shows that the enhancement was improper.

We have repeatedly applied § 2D.1.1(b)(1) to defendants who possess shotguns. *See, e.g.*, *Bolton*, 858 F.3d at 909, 913; *United States v. Falesbork*, 5 F.3d 715, 719–21 (4th Cir. 1993); *United States v. Boyles*, 604 Fed. Appx. 261, 263 (4th Cir. 2015) (unpublished); *United States v. Holmes*, 339 Fed. Appx. 334, 338 (4th Cir. 2009) (unpublished); *United States v. Brock*, 253 Fed. Appx. 260, 262 & n.2 (4th Cir. 2007) (unpublished); *United States v. Weymouth*, 45 Fed. Appx. 311, 313 (4th Cir. 2002) (unpublished).

Other courts have done the same. *See, e.g.*, *Brown*, 217 F.3d at 261; *United States v. Rodriguez-Guerrero*, 805 F.3d 192, 196 (5th Cir. 2015); *United States v. Smith*, 308 F.3d 726, 746 (7th Cir. 2002); *United States v. Frazier*, 280 F.3d 835, 853 (8th Cir. 2002); *United States v. Calhoun*, 49 F.3d 231, 236 (6th Cir. 1995). Notably, the Tenth Circuit affirmed a § 2D.1.1(b)(1) enhancement after police discovered an "unloaded shotgun … in an inoperable car parked outside [the defendant's] residence." *United States v. Hall*, 473 F.3d 1295, 1303 (10th Cir. 2007).

Perhaps most tellingly, however, our own case law goes further than this case requires. In *Bolton*, we affirmed a shotgun-based § 2D1.1(b)(1) enhancement despite evidence that the defendant regularly hunted. *See* 858 F.3d at 910, 913. Here, Richardson does not claim to hunt. His argument that shotguns aid hunters therefore does little work.

c.

Finally, as to the shotgun's immediate operability, we have long made clear that § 2D1.1(b)(1) can be applied when a firearm is unloaded. *Manigan*, 592 F.3d at 362 n.10; *United States v. Harris*, 128 F.3d 850, 853 (4th Cir. 1997) ("the mere fact that a weapon is unloaded cannot prevent a court from enhancing a sentence under Section 2D1.1(b)(1)"). In doing so, we have recognized that "[e]ven an unloaded firearm enhances the risk of violence. Others often do not know whether a weapon is loaded or not. The owner may still employ an unloaded weapon to intimidate others, and even an unloaded firearm may encourage others to resort to weapons in response." *Harris*, 128 F.3d at 853.

Relying on this same reasoning, courts have also applied § 2D1.1(b)(1) to inoperable firearms. *See United States v. Leyva*, 916 F.3d 14, 27 (D.C. Cir. 2019) ("the term 'firearm' under USSG 2D1.1(b) includes inoperable as well as operable firearms," and therefore that "this particular pistol was an inoperable collector's item … is of no moment" (citing *United States v. Burke*, 888 F.2d 862, 869 (D.C. Cir. 1989))); *United States v. Peroceski*, 520 F.3d 886, 889 (8th Cir. 2008) ("The gun need not even be operable for it to be connected to the offense."); *United States v. Michael*, 220 F.3d 1075, 1076 (9th Cir. 2000) ("whether an object constitutes a dangerous weapon depends more on the object's ability to incite fear and violence because it appears to be dangerous than on its latent capability," and "the display of an inoperable gun instills fear in the average citizen and establishes the prospect of an immediate, violent response" (citing *United States v. Smith,* 905 F.2d 1296, 1300 (9th Cir. 1990))); *cf. United States v. Hamrick*, 43 F.3d 877,

882–83 & n.8 (4th Cir. 1995) (en banc) (finding inoperable bomb "dangerous" and relying on case law finding inoperable firearms "dangerous").

Simply put: Richardson is correct that the record does not confirm that his shotgun was loaded or operable, but it need not do so for § 2D.1.1(b)(1) to apply. This is especially true when nothing in the record indicates that the shotgun *appeared* inoperable.

3.

In sum, when we analyze Richardson's § 2D.1.1(b)(1) objection, we easily find each of his arguments unpersuasive. And three weak arguments do not create a strong one.

We acknowledge (and emphasize) that, to establish deficient performance, Richardson need not show that his objection would have been successful. But we find this analysis informative as Richardson still faces an undoubtedly high bar. He must show that it "*conclusively appears in the trial record itself*" that counsel was deficient. *Freeman*, 24 F.4th at 326 (quoting *Fisher*, 477 F.2d at 302). And, when analyzing the alleged deficiency, our "scrutiny of counsel's performance 'must be highly deferential.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). "[W]e 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland*, 466 U.S. at 689).

In *Freeman*, we found counsel deficient because he "was unequivocally wrong on the law." *Id.* "[A] cursory 'investigation' would have revealed that [his] conclusion was wrong, and any reasonably competent attorney would not have made the same mistake." *Id.* at 330. Therefore, his failure to object "made no sense or was unreasonable," and the

usual presumption of deference could not apply. *Id.* at 330 (quoting *Vinson v. True*, 436 F.3d 412, 419 (4th Cir. 2006)). Even then, our dissenting colleagues expressed concern over "taking the extraordinary step of finding ineffective assistance of counsel on direct appeal," a step that "almost never happens." *Id.* at 332–33 (Quattlebaum, J., dissenting).

Here, counsel was not "unequivocally wrong on the law." More aptly, there is no "relevant authority strongly suggesting that [the] enhancement is not proper." *Id.* at 326 (majority opinion) (quoting *Carthorne*, 878 F.3d at 466). In fact, our case law investigation revealed the opposite. Therefore, Richardson's counsel could have reasonably concluded that his objection would fail. And reasonable decisions of counsel are not constitutionally deficient decisions. *See Strickland*, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). If we were to find the opposite here, and thereby hold that counsel is constitutionally deficient when he does not raise what is likely a losing objection, we risk setting a dangerously low bar for reasonable performance, especially on direct appeal.

Admittedly, unlike in *Freeman*, the record does not actually tell us why counsel decided not to object. But this lack of evidence does not benefit Richardson. "Without any statement from counsel on the record," we have found it "unfair to adjudicate [deficient performance]." *Freeman*, 24 F.4th at 331 (quoting *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991)). This is because even "seemingly unusual or misguided action by counsel" may have "had a sound strategic motive or was taken because the counsel's alternatives were even worse." *Massaro v. United States*, 538 U.S. 500, 505 (2003).

As a result, we see no reason to take the "extraordinary step" of finding deficient performance at this stage. With "no conclusive evidence of ineffective assistance on the face of this record, we conclude that [Richardson's] claim should be raised, if at all, in a 28 U.S.C. § 2255 motion." *United States v. Faulls*, 821 F.3d 502, 508 (4th Cir. 2016); *Freeman*, 24 F.4th at 331 (acknowledging that we "typically review ineffective assistance of counsel claims on collateral review" so we can "benefit from a fully developed record").

In making this conclusion, we acknowledge that there may be some merit to Richardson's overall claim that he did not receive $25,000 worth of counsel. But, under *Strickland*, defendants cannot baldly assert that counsel was deficient or undeserving of a fee. Instead, they "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690. Here, the sole omission that Richardson advanced on direct appeal does not succeed. *Cf. Williams v. Giant Food Inc.*, 370 F.3d 423, 430 n.4 (4th Cir. 2004) (appellate assertions not supported by argument are deemed abandoned).

B.

Because Richardson's ineffective assistance claim fails to meet the first *Strickland* prong (deficient performance), we need not examine the second (prejudice).

IV.

Based on the foregoing, we affirm the judgment of the district court.

AFFIRMED