[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 19-15129
Non-Argument Calendar

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D.C. Docket No. 1:16-cv-22155-WPD

RAMON BLANCO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida

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(July 19, 2021)

Before JILL PRYOR, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Ramon Blanco, a federal prisoner, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentences for carrying a firearm during and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(c), and conspiracy to carry a firearm during a crime of violence and in relation to a crime of violence and a drug trafficking crime, in violation of 18 U.S.C. § 924(o). Blanco argues that his convictions for those charges must be vacated because they are based on a duplicitous indictment where the least of the criminalized acts charged is no longer constitutionally valid after *United States v. Davis*, 139 S. Ct. 2319 (2019). The Government asserts that Blanco procedurally defaulted this claim.

A prisoner in federal custody may file a motion to vacate, set aside, or correct his sentence on the basis that, among other things, "the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). When reviewing a district court's denial of a § 2255 motion, we review questions of law *de novo* and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004).

A claim raised under § 2255 may be procedurally defaulted if the petitioner failed to assert it on direct appeal. *Bousley v. United States*, 523 U.S. 614, 622 (1998). A defendant can overcome the default by establishing cause and actual prejudice, or actual innocence. *Id.* at 622. Futility does not constitute cause to the

extent that the movant's argument was merely "unacceptable to that particular court at that particular time." *Id.* at 623 (quotation marks omitted).

In the context of a request to file a second or successive application, a claim that was presented in a prior application must be dismissed. *In re Baptiste*, 828 F.3d 1337, 1341 (11th Cir. 2016). However, we have held that *Davis* announced a new rule of constitutional law, "separate and apart from" *Johnson v. United States*, 576 U.S. 591 (2015), that applies retroactively to cases on collateral review. *In re Hammoud*, 931 F.3d 1032, 1039-40 (11th Cir. 2019).

Under 18 U.S.C. § 924(c), anyone who carries a firearm during and in relation to a "crime of violence" or "drug trafficking crime" shall receive an additional consecutive term of at least five years in prison. 18 U.S.C. § 924(c)(1)(D)(ii). Section 924(o) provides that a person who conspires to carry a firearm during and in relation to a crime of violence or drug trafficking crime shall be sentenced for a term of imprisonment not exceeding 20 years. *Id.* § 924(o).

Section 924(c) defines a "drug trafficking crime" as, among other things, "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)." *Id.* § 924(c)(2). A "crime of violence" is a felony offense that:

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

committing the offense.

*Id*. § 924(c)(3). Subsection (A) is known as the "elements clause," while subsection (B) is known as the "residual clause." *Davis*, 139 S. Ct. at 2324. In *Davis*, the Supreme Court held that the residual clause in subsection (B) was unconstitutionally vague. *Id.* at 2336.

Hobbs Act robbery conspiracy does not qualify as a "crime of violence" under § 924(c)'s elements clause and, thus, would only qualify as a predicate offense under the unconstitutional residual clause. *See Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019). By contrast, conspiracy to possess with intent to distribute a controlled substance and attempt to possess with intent to distribute a controlled substance each qualify as a "drug trafficking crime" for purposes of § 924(c). *See* 18 U.S.C. § 924(c)(2); *In re Cannon*, 931 F.3d 1236, 1239-43 (11th Cir. 2019) (recognizing attempt to possess with intent to distribute a controlled substance as a qualifying predicate for a § 924(c) charge and conspiracy to possess with intent to distribute a controlled substance as a qualifying predicate for a § 924(o) charge).

The Supreme Court has held that any fact, other than the fact of a prior conviction, that increases a defendant's prescribed range of penalties must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Court extended its holding in *Apprendi* to conclude that facts that

increase the mandatory minimum term of imprisonment are elements of the crime that must also be submitted to the jury. *Alleyne v. United States*, 570 U.S. 99, 107-08 (2013).

"On collateral review, the harmless error standard mandates that 'relief is proper only if the court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Granda*, 990 F.3d at 1292 (alteration adopted) (quoting *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015)). "There must be more than a 'reasonable possibility' that the error was harmful." *Davis*, 576 U.S. at 268 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "Put another way, the court may order relief only if the error 'resulted in actual prejudice.'" *Granda*, 990 F.3d at 1292 (quoting *Brecht*, 507 U.S. at 637). We must "ask directly whether the error substantially influenced the jury's decision," and if we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," then we must conclude that the error was not harmless. *Foster v. United States*, 996 F.3d 1100, at 1107 (11th Cir. 2021) (internal quotation marks omitted). We review *de novo* the question of harmlessness. *Granda v. United States*, 990 F.3d 1272, at 1293 (11th Cir. 2021).

We have addressed the issues that Blanco raises in two recent cases, *Granda* and *Foster*. In *Granda*, the petitioner challenged his § 924(o) conviction that was

based on drug trafficking, attempted carjacking, and conspiracy to commit and attempt to commit a Hobbs Act robbery predicates. Like Blanco, Granda had been arrested in a stash house sting operation with guns present. We held alternatively that Granda had procedurally defaulted this claim by not raising it in his direct appeal and that he could not prevail on the merits because the invalid Hobbs Act predicates were inextricably intertwined with the other predicate offenses. 990 F.3d at 1293. We stated:

> There is little doubt that if the jury found that Granda conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he conspired to possess a firearm in furtherance of the other crime-of-violence and drug-trafficking predicates of which the jury convicted him. On this record, there can be no grave doubt about whether the inclusion of the invalid predicate had a substantial influence in determining the jury's verdict

*Id.*

In *Foster*, the petitioner conspired with others to commit an armed robbery of a house he believed held cocaine but was in fact part of a sting operation. While waiting for the call to reveal the location of the stash house, the police moved in and arrested the crew. A loaded firearm was discovered on Foster and another firearm was discovered in the car that the crew was to use. A jury convicted Foster of conspiracy to possess and attempt to possess with intent to distribute five kilograms of cocaine, conspiracy to commit a Hobbs Act robbery as well as violations of § 924(c) and § 924(o). We held that Foster's valid drug trafficking

predicates were inextricably intertwined with the invalid Hobbs Act predicate for the § 924(c) and § 924(o) convictions, making any error harmless. 996 F.3d at 1107-08.

We need not resolve the parties' dispute over whether Blanco's claim is procedurally defaulted because his claim fails on the merits. *Dallas v. Warden*, 964 F.3d 1285, 1307 (11th Cir. 2020) ("As we have said many times and as the Supreme Court has held, a federal court may skip over the procedural default analysis if a claim would fail on the merits in any event."). The Hobbs Act conspiracy for which Blanco was convicted was "inextricably intertwined" with the drug trafficking convictions that remain valid § 924(c) predicate offenses after *Davis*. *Granda v. United States*, 990 F.3d 1272, 1293 (11th Cir. 2021). Thus, "the inclusion of an invalid predicate offense—the Hobbs Act conspiracy—in his indictment and jury instructions was harmless." *Foster v. United States*, 996 F.3d 1100, 1107 (11th Cir. 2021).

We have no grave doubt about whether Blanco's convictions rested on an invalid ground. The jury unanimously found Blanco guilty of conspiracy to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(A), and attempt to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846 and 18 U.S.C. §2, along with the conspiracy and

attempt to commit Hobbs Act robbery. All four of those crimes were inextricably intertwined because all stemmed from the same plan and attempt to rob a load of cocaine that was arriving by airplane from Puerto Rico. At trial, one of Blanco's co-conspirators testified that Blanco instructed the conspirators on how the robbery of the cocaine would happen: one man would rear-end the car carrying the drugs and the others would approach the car, with weapons, and take the drugs. What we stated in *Granda* is true here: "There is little doubt that if the jury found that [Blanco] conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act robbery, it also found that he conspired to possess a firearm in furtherance of the other crime-of-violence and drug-trafficking predicates of which the jury convicted him." Thus the inclusion of the Hobbs Act conspiracy in the instructions for the § 924(c) and § 924(o) counts was harmless.

Relying on *Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931), Blanco also argues that it was improper to rely on the alternative, valid grounds for conviction when conducting a harmless error review. He further argues that we cannot assume that the jury based its conviction on any of the alternative predicates, citing our decision in *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016). And finally he argues that, because the jury returned a general verdict, we should presume that the § 924(c) and § 924(o) were based on the least culpable predicate,

the conspiracy to commit Hobbs Act robbery. However, we have rejected all of these arguments in *Granda*. *See* 990 F.3d at 1293-96.

For the foregoing reasons, the decision of the district court is

AFFIRMED.