**NOT FOR PUBLICATION**

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>STEVEN GOLDEN,<br><br>Defendant-Appellant. | No. 20-17319<br><br>D.C. Nos. 2:17-cv-00751-KJD<br>2:08-cr-00164-KJD-GWF-3<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Argued and Submitted May 18, 2022
Pasadena, California

Before: LEE and BRESS, Circuit Judges, and FITZWATER,** District Judge.

Steven Golden was convicted of conspiracy to commit Hobbs Act robbery, conspiracy to possess cocaine with intent to distribute, and firearms offenses under 18 U.S.C. § 924(c). He now appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside or correct his conviction arising under § 924(c). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

jurisdiction under 28 U.S.C. § 2253(a), and we affirm.

The trial judge instructed the jury that to convict on the § 924(c) charge it had to find Golden possessed a firearm in furtherance of the drug conspiracy or the conspiracy to commit Hobbs Act Robbery, or both. But the jury verdict form for the § 924(c) conviction did not specify which predicate offense the jury relied upon. Following the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), the instruction was erroneous because conspiracy to commit Hobbs Act robbery no longer qualifies as a crime of violence and thus is not a valid predicate offense for the § 924(c) conviction.

1. In the related case *United States v. Reed*, __ F.4th __ (2022), No. 20-17315, we held that where a jury is instructed on both a valid and an invalid predicate offense for a § 924(c) charge, harmless-error review applies. An instructional error is prejudicial and habeas relief is appropriate if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

For the reasons set forth in *Reed*, we decline to apply the categorical approach here. We already know that conspiracy to commit Hobbs Act robbery does not qualify as a predicate offense under § 924(c), while conspiracy to obtain and distribute cocaine does qualify. Our task is to determine whether the error of

instructing the jury on one valid and one invalid theory is grave enough to warrant reversal. Harmless-error review is appropriate.

2. The instructional error in this case was harmless because the conspiracies were inextricably intertwined such that the jury necessarily used both the Hobbs Act conspiracy and the drug conspiracy as predicate offenses for the § 924(c) conviction. The instructional error thus did not have a substantial and injurious effect on the jury because it was not possible for the jury to find Golden guilty of the § 924(c) offense without using the valid drug conspiracy as the predicate offense.

The Hobbs Act robbery conspiracy was inextricably intertwined with the drug trafficking conspiracy because "no rational juror could have found that [Golden] carried a firearm in relation to one predicate but not the other." *United States v. Cannon*, 987 F.3d 924, 948 (11th Cir. 2021). On the day of the planned robbery, for which the jury heard testimony that all participants including Golden were present, Agent Zayas and Agent McCarthy explained that they would split the cocaine stolen from the stash house among the participants. Golden verbally agreed to this plan. By using a firearm to rob the stash house, they were simultaneously using a firearm to further the drug conspiracy because in order to possess and distribute cocaine they first had to obtain cocaine. Therefore, the Hobbs Act robbery and drug conspiracies were so inextricably intertwined that the jury necessarily used both as predicate

offenses for the § 924(c) conviction.

**AFFIRMED.**