FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DEON'TE REED, *Defendant-Appellant.*	No. 20-17315 D.C. Nos. 2:17-cv-00769-KJD 2:08-cr-00164-KJD-GWF-1 OPINION

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

Filed September 14, 2022

Before: Kenneth K. Lee and Daniel A. Bress, Circuit Judges, and Sidney A. Fitzwater,[*] District Judge.

Opinion by Judge Lee

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

SUMMARY[**]

28 U.S.C. § 2255

The panel affirmed the district court's denial of 28 U.S.C. § 2255 relief to Deon'te Reed, whom a jury convicted of using a firearm in relation to a crime of violence or a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951, and conspiracy to obtain and distribute cocaine in violation of 21 U.S.C. § 846.

Reed was caught in a government sting operation, having agreed to rob a fake drug stash house to obtain cocaine. When the jury found Reed guilty of the § 924(c) firearm offense, it did not specify whether he had used a firearm in relation to the robbery conspiracy or the drug trafficking conspiracy (or both). It is now clear, following *United States v. Davis*, 139 S. Ct. 2319 (2019), and the government concedes, that conspiracy to commit Hobbs Act robbery cannot serve as a predicate for a 924(c) conviction. But conspiracy to distribute cocaine remains a valid § 924(c) predicate. Reed sought relief from his § 924(c) conviction under § 2255, arguing that the jury had used the now-invalid Hobbs Act robbery conspiracy to convict him under § 924(c).

The panel held that where the jury is instructed on both a valid and an invalid predicate offense and fails to specify which predicate forms the basis for a § 924(c) conviction, a court should use harmless-error review under *Brecht v.*

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Abrahamson, 507 U.S. 619 (1993), to determine whether relief is appropriate.

Applying the harmless error standard to this case, the panel held that the instructional error did not have a substantial and injurious effect on the jury because the two conspiracies were inextricably intertwined such that the jury must have used the valid drug trafficking predicate to convict Reed of the § 924(c) offense.

COUNSEL

Cristen C. Thayer (argued) and Ellesse Henderson, Assistant Federal Public Defenders; Rene L. Valladares, Federal Public Defender; Office of the Federal Public Defender, Las Vegas, Nevada; for Defendant-Appellant.

Peter H. Walkingshaw (argued), Assistant United States Attorney; Elizabeth O. White, Appellate Chief; Christopher Chou, Acting United States Attorney; United States Attorney's Office, Reno, Nevada; for Plaintiff-Appellee.

OPINION

LEE, Circuit Judge:

Deon'te Reed was caught in a government sting operation, having agreed to rob a fake drug stash house to obtain cocaine. Because he and his co-conspirators brought guns with them to rob the stash house, they were charged with using a firearm in relation to a crime of violence *or* a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A). Reed was also charged with conspiracy to commit Hobbs Act robbery and conspiracy to obtain and distribute cocaine. The jury found him guilty on both conspiracy counts. But when the jury found Reed guilty of the § 924(c) firearm offense, it did not specify whether he had used a firearm in relation to the robbery conspiracy or the drug trafficking conspiracy (or both). It is now clear, following *United States v. Davis*, 139 S. Ct. 2319 (2019), that conspiracy to commit Hobbs Act robbery cannot serve as a valid predicate for a § 924(c) conviction, and the government concedes the point. But conspiracy to distribute cocaine remains a valid § 924(c) predicate. Reed has now sought relief from his § 924(c) conviction under 28 U.S.C. § 2255, arguing that the jury had used the now-invalid Hobbs Act robbery conspiracy to convict him under § 924(c). We granted a certificate of appealability.

Our task is two-fold today. First, for convictions under § 924(c)(1)(A), we must determine what approach to use when evaluating on habeas review the error of instructing the jury on both a valid and an invalid theory of guilt if the jury does not then specify which theory it used to convict. We hold that the harmless error standard is the correct one. Second, we must apply the harmless error standard to Reed's case. We hold that the instructional error was harmless because the two conspiracies were inextricably intertwined

such that the jury must have used the valid drug trafficking predicate to convict Reed of the § 924(c) offense. We thus affirm the denial of § 2255 relief.

BACKGROUND

I. A Sting Operation Leads to Reed's Arrest for Conspiring to Rob a Drug Stash House.

In September 2007, the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") opened a fake storefront in Las Vegas operating as a tattoo shop called Hustler's. ATF aimed to identify people in Las Vegas involved in the illegal firearm and narcotics trade. The government's plan was to propose to them an armed robbery of a drug stash house and then prosecute those who agreed to commit the crime.

ATF Special Agent Peter McCarthy played the role of the tattoo shop owner. Paid confidential informant Jamie Pedraza played the tattoo artist. And ATF Special Agent Richard Zayas played the role of a disgruntled drug courier.

Informant Pedraza brought Deon'te Reed to the tattoo shop. At the shop, Reed sold Agent McCarthy a pistol. Reed explained that he had more guns that he wanted to sell. Over the next weeks, the ATF decided it would approach Reed with the opportunity to rob the drug stash house. The decision was based in part on information the ATF had about Reed's involvement in several burglaries, his movement of $200,000 worth of stolen goods through pawn shops, and a pending charge in state court for conspiracy to commit armed robbery.

Agent McCarthy then directed informant Pedraza to bring Reed to the fake tattoo shop. Pedraza told Reed that

he should come to the tattoo shop if he was interested in doing a "lick," slang for a robbery. On April 17, Agent McCarthy, along with several other undercover ATF agents, met with Reed in the back office of the tattoo shop. Reed brought with him two other individuals, Justin Spentz and Demonte Bratcher. Agent McCarthy told them that his "homey" (Agent Zayas playing the drug courier) had a "pretty good hit" (meaning opportunity for robbery) and that it would be up to them and Agent Zayas to handle the details of the robbery. While waiting for Agent Zayas to arrive, Agent McCarthy and Reed spoke about possible gun sales.

Once Agent Zayas arrived, Agent McCarthy left the room. Agent Zayas told Reed, Spentz, and Bratcher that he was a drug courier for some "Mexicanos, from the East Bay over near San Francisco." Agent Zayas expressed frustration that he was not being paid enough to transport the drugs and that was why he wanted to rob the stash house. He explained the normal protocol for picking up the cocaine: he would receive a call providing him the location of the stash house, which was always a different location, after which he would have only a short time to drive to the house and get the cocaine. Inside the house there would be two men, Carlos and Francisco. Francisco would be armed. Agent Zayas said that in past pickups he had observed between 22 and 39 kilograms of cocaine stored at the stash house.

Agent Zayas asked Reed whether that was "something you guys can handle?" Reed responded, "Yeah." Reed also asked if there would be cash inside the stash house, to which Agent Zayas answered that he had "never seen cash" and that "I'm not going to lie to you and tell you there's a lot of money in there." Reed then described his proposed plan for robbing the stash house. When Agent Zayas got to the stash house and knocked on the door, Reed and his men would

emerge and "lay down" the person who answered along with Zayas. They might kick Agent Zayas to make it appear as though he was not part of the robbery, and then tape or tie up those whom they encountered. Reed continued, "then like we'll have somebody go around to the back to get the other dude. Lay him down, too." They would then steal the cocaine and escape. The meeting concluded with Agent Zayas stating, "And we're going to split it even. Is that cool?" to which Reed responded, "Yeah." Agent Zayas told Reed that he would come back to Las Vegas on May 12th, and they could meet then.

Next month, Agent McCarthy spoke with Reed over the phone. Reed was calling to make sure everything was "still up to date." Reed explained that he was eager to ensure the robbery would take place because he had an upcoming court date: "I got to finish paying off the rest of this lawyer, and I'm trying to come up with the money for that."

Agent Zayas met with Reed at the tattoo shop three days later. They again went over Reed's plan to rob the stash house, essentially repeating the details proposed during the April meeting. When Agent Zayas asked if Spentz and Bratcher would still be participating, Reed replied that Bratcher had broken his legs, so Reed's brother Leonard Jackson would replace Bratcher. Reed reassured Agent Zayas that he would bring along "riders," meaning people who could be trusted to carry out the robbery. Reed stated that they had guns. Zayas also re-confirmed that they would split the cocaine evenly, with Reed agreeing.

Two days later, Agents Zayas and McCarthy met with Reed and Jackson in a parking lot to tell them that the robbery would occur the next day at 6 pm. Agent Zayas told them that he had arranged for the use of a rental van so that the vehicle used in the robbery would not trace back to them.

They all agreed to meet at the same parking lot the next day to carry out the robbery.

It was game time. Everyone met in the parking lot. Agent McCarthy testified that he and Agent Zayas "huddled" with Reed, Jackson, Spentz, and Steve Golden (who had come along with Spentz) in the parking lot to go over the plan. In the huddle, Agent Zayas explained the robbery plan again, that there would be 22 to 39 kilograms of cocaine, and that the people in the stash house would be armed. Agent Zayas said that "we're going to split it even." Agent McCarthy said, "When we hit it, go back to the shop and split it." Agent Zayas, trying to convey that the defendants could still back out, asked, "Cool?" to which Reed responded, "Yeah."

The group then drove in their cars to the location of the rental van. When they arrived and exited their cars, Agent Zayas signaled for a SWAT team to move in and arrest the defendants. The government recovered a Taurus PT145 pistol in Reed's car.

II. The Jury Convicts Reed on All Counts Using a General Verdict Form.

In June 2008, Reed, Jackson, Spentz, and Golden were charged with conspiring to interfere with commerce by robbery in violation of 18 U.S.C. § 1951 (Count One); conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 (Count Two); and possessing a firearm during and in relation to a crime of violence or drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (Count Three). Both Counts One and Two named Reed, Spentz, and Golden, and charged that they conspired "with each other, and with others known and unknown."

A jury convicted Reed on all three counts. The jury was instructed that to convict Reed on Count Three, the § 924(c) charge of using or carrying a firearm during and in relation to a crime of violence or a drug trafficking offense, the government had to prove beyond a reasonable doubt that:

> Defendant committed either Conspiracy to Obtain or Take Property by Means of Actual or Threatened Force or Conspiracy to Possess with Intent to Distribute Cocaine, as charged in Count One or Two of the Indictment, with all of you agreeing as to which crime defendant committed.

The verdict form filled out by the jury did not specify which underlying count (One or Two or both) formed the basis for Count Three. The district court then sentenced Reed to 240 months' imprisonment and five years of supervised release.

Reed appealed, and this court affirmed. *See United States v. Reed*, 459 F. App'x 644 (9th Cir. 2011).

Reed then moved to vacate under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The district court denied the motion and the certificate of appealability. Reed filed a motion in this court for a certificate of appealability, which we denied.

Reed later sought permission to file a second or successive motion to vacate under 28 U.S.C. § 2255, arguing that conspiracy to commit Hobbs Act robbery was not a valid predicate for a § 924(c) conviction. We granted the application. The district court denied the motion. Reed timely appealed. The district court denied him a certificate

of appealability. Reed then moved this court for a certificate of appealability, which we granted.

STANDARD OF REVIEW

This court reviews a denial of a § 2255 motion de novo. *United States v. Jones*, 877 F.3d 884, 886 (9th Cir. 2017) (per curiam).

ANALYSIS

I. The Harmless Error Standard Under *Brecht* Applies in Assessing the Error of Allowing the Jury to Consider Hobbs Act Conspiracy as a Predicate Offense Under § 924(c).

Section 924(c) punishes anyone "who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). The statute defines "crime of violence" as an offense that is a felony and

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

Id. § 924(c)(3). The first clause is known as the "elements" clause (or "force" clause). The second clause is called the "residual clause." To determine whether a conviction qualifies as a § 924(c) predicate offense, we apply the

categorical approach, analyzing the elements of the crime of conviction and not the facts underlying the offense. *See, e.g.*, *United States v. Mathews*, 37 F.4th 622 (9th Cir. 2022).

The Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the residual clause of § 924(c) was unconstitutionally vague. Therefore, conspiracy to commit a Hobbs Act robbery cannot qualify as a predicate offense under that clause. And the government concedes that conspiracy to commit a Hobbs Act robbery also fails to qualify as a predicate offense under the elements clause. This concession is warranted. Since *Davis*, other circuits have held that conspiracy to commit Hobbs Act robbery is not a "crime of violence" under the elements clause because it does not categorically "necessitate[] the existence of a threat or attempt to use force." *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019); *see also United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019). We concur with this conclusion. Reed's conspiratorial cooperation to commit a Hobbs Act robbery could, in theory, "manifest itself in any one of countless non-violent ways." *Brown*, 942 F.3d at 1075. Applying the categorical approach in the wake of *Davis*, we must conclude that conspiracy to commit Hobbs Act robbery is not a "crime of violence."

Though conspiracy to commit Hobbs Act robbery cannot serve as a predicate offense for a § 924(c) enhancement—under either the elements or residual clause—the parties agree that conspiracy to obtain and distribute cocaine can serve as a predicate offense because it is a "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A); *see also id.* at § 924(c)(2) (defining "drug trafficking crime"). The question, then, is whether Reed's § 924(c) conviction was based on conspiracy to commit Hobbs Act robbery, an invalid

predicate, or conspiracy to possess cocaine with intent to distribute, a valid one.

Reed argues that when the jury found him guilty of violating § 924(c), it did not specify in its verdict whether Count One (conspiracy to commit Hobbs Act robbery) or Count Two (conspiracy to possess cocaine with intent to distribute) or both were the predicate(s) for his § 924(c) conviction. And because the jury did not specify that it found Count Two (the drug trafficking charge) to be the basis for the § 924(c) conviction, then the jury possibly—and impermissibly—convicted him using the now-invalid predicate of Hobbs Act conspiracy offense.

As we have noted, the government agrees with Reed that the jury should not have relied on the Hobbs Act conspiracy to convict him on the § 924(c) charge. But the parties dispute what standard we should apply to evaluate the error when a jury returns a general verdict on a § 924(c) charge (that is, one that does not specify the predicate for conviction) after being instructed that both a valid and an invalid predicate may be used to convict. Reed contends that we should adopt a categorical approach, limiting the inquiry to select documents establishing that the § 924(c) conviction rested on a predicate offense necessarily including the elements required to constitute a crime of violence. *See Shepard v. United States*, 544 U.S. 13, 24–25 (2005). The government, in contrast, maintains that this court should apply harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

We agree with the government and hold that an instructional error in this circumstance is prejudicial (and thus § 2255 relief appropriate) if the error "had substantial and injurious effect or influence in determining the jury's

verdict." *Id.* at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

The Supreme Court has held that instructional errors are generally subject to harmless error review. For instance, in *Hedgpeth v. Pulido*, 555 U.S. 57, 58 (2008) (per curiam), the Court recognized that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." But in considering whether such error was "structural" or instead subject to harmless error review, the Court traced a string of cases that established "that various forms of instructional error are not structural but instead trial errors subject to harmless-error review." *Id.* at 60 (citing *Neder v. United States*, 527 U.S. 1 (1999); *California v. Roy*, 519 U.S. 2 (1996) (per curiam); *Pope v. Illinois*, 481 U.S. 497 (1987); *Rose v. Clark*, 478 U.S. 570 (1986)).

The Court added that cases in which harmless error review would *not* apply "are the exception and not the rule." *Id.* at 61 (quoting *Rose*, 478 U.S. at 578). So harmless error should apply so long as the error does not undermine all the jury's findings. And an instructional error arising from multiple theories of guilt does not undercut a jury's findings any more than other errors in which harmless error review applies. *Id.* The Court thus remanded to the lower court with instructions to apply *Brecht*'s "substantial and injurious effect" harmless error standard. *Id.* at 62. The Court later "confirmed . . . that errors of the *Yates*[1] variety are subject to

[1] *Yates v. United States*, 354 U.S. 298, 327 (1957), held that a constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory.

harmless-error analysis." *Skilling v. United States*, 561 U.S. 358, 414 (2010).

Reed's argument for applying the categorical approach misunderstands the purpose of the categorical approach and the issue in this case. The categorical approach is a method to determine whether a conviction under a particular statute qualifies as a predicate offense under the definition of another statute. *See, e.g.*, *Moncrieffe v. Holder*, 569 U.S. 184, 190–93 (2013) (determining whether a state conviction qualifies as an "aggravated felony" under a federal statute). But that is not the inquiry here. Here, we already know that conspiracy to commit Hobbs Act robbery does not qualify as a predicate offense under § 924(c). And we already know that conspiracy to obtain and distribute cocaine *does* qualify as a predicate offense under § 924(c). So there is no need to employ the categorical approach because each offense has already been categorized appropriately. Our task is instead to determine whether the error of instructing the jury on one valid and one invalid theory is grave enough to warrant reversal. For that task, we hold that harmless-error review is appropriate.

We join two other Circuit Courts of Appeals that have applied harmless-error review in assessing jury instruction errors involving valid and invalid predicate offenses under § 924. In *Granda v. United States*, 990 F.3d 1272, 1280 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022), the defendant was convicted on a general verdict that made it impossible to tell whether the jury used a valid drug trafficking predicate or the invalid Hobbs Act conspiracy predicate for the defendant's § 924(o) conviction. The Eleventh Circuit held that harmless error applied, rejecting the defendant's argument "that the categorical approach must apply because determining that the jury did not rely

solely on the Hobbs Act conspiracy predicate to convict would constitute impermissible judicial factfinding in violation of *Alleyne v. United States*, 570 U.S. 99, 114–16, 133 S. Ct. 2151, 186 L.Ed.2d 314 (2013)." *Granda*, 990 F.3d at 1295. The court reasoned that "a judge conducting a *Brecht* harmless error analysis does not find a fact at all; instead, the judge asks *as a matter of law* whether there is grave doubt about whether an instruction on an invalid predicate substantially influenced what the jury already found beyond a reasonable doubt." *Id.* The court thus "decline[d] Granda's invitation to adopt what we see as an unprecedented expansion of the categorical approach." *Id.*

Similarly, in *United States v. Ali*, 991 F.3d 561, 574 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 486 (2021), the Fourth Circuit rejected the use of the categorical approach and instead used plain error[2] in a case in which the jury agreed on a general verdict for a § 924(c) violation without specifying a valid predicate. The court held that advocacy for the categorical approach "fundamentally misunderstands what the categorical approach accomplishes." *Id.* at 574. "The purpose of the categorical (and modified categorical) approach is not to determine what the predicate was—a factual question—but rather whether a particular predicate meets the requirements of a 'crime of violence'—a purely legal question." *Id.* The court had no need for the categorical approach because it already knew that conspiracy to commit Hobbs Act robbery does not meet this requirement, while aiding and abetting does. *Id.* at 574–75. Likewise, in our case, we already know that conspiracy to commit Hobbs Act robbery is not a valid predicate, while

[2] The court applied plain error because the defendant did not object to the instructions at trial. *Ali*, 991 F.3d at 572.

conspiracy to possess cocaine with intent to distribute is valid.

In sum, where the jury is instructed on both a valid and an invalid predicate offense and fails to specify which predicate forms the basis for a § 924(c) conviction, we hold that a court should use harmless-error review under *Brecht* to determine whether relief is appropriate.

II. The Instructional Error in Reed's Case Was Harmless Because the Robbery Conspiracy and the Drug Conspiracy Were Inextricably Intertwined.

Under *Brecht*, 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*, 507 U.S. at 623 (quoting *Kotteakos*, 328 U.S. at 776). If "record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict," then the judge should treat the error as if it affected the verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

The task is to evaluate the effect of the error on the jury, rather than merely whether the evidence points to guilt. It requires courts to consider "the record as a whole" and to "take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010) (abrogated on other grounds by *Sansing v. Ryan*, 41 F.4th 1039, 1050 (9th Cir. 2021)) (quoting *Kotteakos*, 328 U.S. at 764) (alteration in original). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos*, 328 U.S. at 765.

In our case, the record as a whole suggests that the instructional error did not have a substantial and injurious effect because the conspiracies were inextricably intertwined such that the jury's verdict on the § 924(c) charge necessarily rested on *both* the Hobbs Act robbery *and* the drug trafficking conspiracies. And because the drug trafficking conspiracy was a predicate offense for the § 924(c) conviction, the instructional error was harmless.

We join the Eleventh Circuit in using the concept of "inextricably intertwined" conspiracies to analyze whether a valid predicate offense served as the basis for a § 924(c) conviction. In *United States v. Cannon*, 987 F.3d 924, 932 (11th Cir. 2021), the defendants brought firearms to rob a fake drug stash house's supply of cocaine. The court held that the Hobbs Act robbery conspiracy was inextricably intertwined with the drug trafficking conspiracy because "no rational juror could have found that Cannon and Holton carried a firearm in relation to one predicate but not the other." *Id.* at 948.

Reed was found guilty beyond a reasonable doubt of the conspiracies for both Hobbs Act robbery and possession with intent to distribute cocaine. He does not challenge his conviction for conspiracy to possess and distribute cocaine. The issue is whether the conspiracies are distinct such that the use of a firearm in the conspiracy to commit robbery also means that a firearm was used in the conspiracy to possess cocaine with intent to distribute. Logic and the record show that they were inextricably intertwined.

First, the charging documents listed the same group of names for both conspiracies: Reed, Spentz, Jackson, and Golden. The jury heard no evidence of Reed or anyone else being part of a separate conspiracy to possess cocaine. The only evidence presented on a drug conspiracy was about the

stash house. It thus cannot be that Reed merely wanted to rob the stash house but did not also want to possess and distribute the cocaine robbed from the stash house.

Second, the objective of each predicate offense was the same: to obtain and to sell the cocaine taken by force from the stash house. The ATF agents repeatedly established that the fruits of the robbery would be cocaine, and they discussed and agreed with the defendants that the drugs would be split evenly among the participants. At the initial meeting, with both Reed and Spentz present, Reed agreed that it was "cool" if they split the drugs evenly. Reed again confirmed that they would split the drugs at a later meeting. And on the day of the planned robbery, Agent Zayas and Agent McCarthy both explained that they would split the cocaine stolen from the stash house among the participants. Each participant, including Reed, heard and agreed that the object of the robbery was to possess cocaine. By using a firearm to rob the stash house, they were simultaneously using a firearm to further the drug conspiracy because to possess and distribute cocaine they first had to obtain cocaine.

Third, the evidence shows that the object of the robbery was to distribute cocaine, not for some other purpose. In the huddle before the robbery in which Reed participated, Agent Zayas explained that there would be 22 to 39 kilograms of cocaine in the stash house. Agent Zayas testified that cocaine in this volume was far too much for personal use. Reed also provided a motive for his desire to sell the cocaine: he needed money to pay his lawyer defending him in another trial. But Reed knew the stash house would contain only drugs and no money because Agent Zayas told him so at their first meeting. The logical conclusion is that Reed

understood they were robbing the stash house to obtain cocaine with the intent to sell it.

We thus hold that instructional error did not have a substantial and injurious effect on the jury. The jury would have had to base the § 924(c) conviction on both the Hobbs Act robbery conspiracy and the drug trafficking conspiracy because they were inextricably intertwined. The § 924(c) conviction rested on a valid predicate offense, and the instructional error was harmless.

CONCLUSION

We **AFFIRM** the denial of § 2255 relief.