

## **Petitioner's Appendices**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 20-12706-F

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RICO BLACKWELL,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Georgia

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ORDER:

To merit a certificate of appealability, an appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Rico Blackwell's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

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/s/ Andrew L. Brasher  
UNITED STATES CIRCUIT JUDGE

FILED IN CHAMBERS  
U.S.D.C. Atlanta

SEP 02 2020

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

James M. Hansen, Clerk

By *JM Hansen*  
Deputy Clerk

UNITED STATES OF AMERICA

CRIMINAL CASE NO.

v.

1:13-CR-72-1-ODE

RICO BLACKWELL

ORDER

This closed criminal case is before the Court on Defendant Rico Blackwell's Notice of Appeal [Doc. 37]. On March 13, 2013, Defendant Rico Blackwell ("Blackwell") pleaded guilty to "conspiracy to commit bank robbery" under 18 U.S.C. § 371, and "use, carrying and possession of a firearm during a crime of violence" under 18 U.S.C. § 924(c)(1)(A)(ii) [Doc. 2; Doc. 9]. On August 20, 2013, this Court sentenced Blackwell to fifty-four (54) months of imprisonment on the conspiracy charge, to be followed by eighty-four (84) months on the § 924 charge, for a total sentence of 138 months of imprisonment [Doc. 9 at 2]. On June 21, 2018, Blackwell filed a *pro se* Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [Doc. 11]. The Court denied Blackwell's § 2255 motion on June 30, 2020 [Doc. 34]. Blackwell filed a Notice of Appeal on July 17, 2020, without requesting a Certificate of Appealability [Doc. 37]. In his Notice of Appeal, Blackwell sets forth no grounds to support his appeal.

An appeal may not be taken from the final order in a habeas petition unless the Court issues a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability

may only issue where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard for granting a certificate of appealability "requires an appealing petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." Henry v. Dep't of Corr., 197 F.3d 1361, 1364 (11th Cir. 1999) (internal quotation marks and citations omitted).

Blackwell raises no grounds on which he purports to challenge the Court's conclusion. Rather, Blackwell's Notice of Appeal states only: "defendant gives this Court Notice of Appeal" [Doc. 37 at 1]. Defendant Blackwell is therefore DENIED a Certificate of Appealability.

SO ORDERED this 1 day of September, 2020.

  
ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE

FILED IN CHAMBERS  
U.S.D.C. Atlanta

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

JUN 30 2020

JAMES N. HATTEN, Clerk  
By: *[Signature]* Deputy Clerk

UNITED STATES OF AMERICA : CRIMINAL CASE NO.  
: 1:13-CR-72-1-ODE  
v. :  
: RICO BLACKWELL :  
:

ORDER

This criminal case is before the Court on Defendant Rico Blackwell's Motion Under 28 U.S.C. § 2255 to Vacate his Conviction [Doc. 11]. The Motion was originally filed on June 21, 2018. Pursuant to the Government's request, the case was stayed by order of United States Magistrate Judge J. Clay Fuller on August 20, 2018. Counsel was appointed for Mr. Blackwell on August 30, 2018. After the decision of the United States Court of Appeals in Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc), the Government filed a response to the motion on December 3, 2018 [Doc. 19]. The Government argued Blackwell's motion must fail because he had waived his right to collaterally attack his sentence in his plea agreement and that he had procedurally defaulted his claim by failing to raise it on direct appeal and by failing to show that failure to grant relief would result in a fundamental miscarriage of justice by a showing of actual innocence.

On December 13, 2018 Defendant Blackwell filed a Motion to Stay [Doc. 20] the proceedings pending the United States Supreme Court's decision whether to grant certiorari to resolve Circuit splits on the question whether § 924(c)'s residual clause is unconstitutionally vague. The Government filed a response,

arguing that the motion to stay should be denied because "there are independent and sufficient grounds for denying his motion on the basis of his waiver and procedural default" [Doc. 21 at 1]. Also, the Government's response argued that the motion for stay should be denied on the basis of the Eleventh Circuit en banc opinion in the Ovalles case.

On January 7, 2019, Defendant Blackwell filed a reply [Doc. 20] pertaining to the issue of staying the case, noting that the Supreme Court had granted certiorari in the Davis<sup>1</sup> case and further noting that "the government now authorizes counsel to report that it joins in and consents to Mr. Blackwell's motion to stay his § 2255 motion" [Doc. 22 at 2].

On July 24, 2019, Mr. Blackwell filed a reply to the Government's response to his § 2255 motion [Doc. 22]. He argues that although he voluntarily agreed to the appeal waiver in his plea agreement the waiver does not preclude the instant § 2255 motion, because "[a] defendant cannot knowingly waive a future right to challenge a conviction and sentence, like § 924(c), that is beyond the statutory maximum. . . . Because such a sentence is a miscarriage of justice" [Doc. 23 at 2].

On August 26, 2019, the Government filed a surreply in opposition to Defendant's 28 U.S.C. § 2255 motion [Doc. 25]. The Government's surreply points out that "[u]nder the negotiated plea agreement, the government dismissed the indictment in Case. No. 1:12-CR-338 and Blackwell waived his

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<sup>1</sup>United States v. Davis, 139 S. Ct. 2319 (2019).

right to collaterally attack his sentence through a § 2255 motion" [Doc. 26 at 2].

The dismissed indictment in Case. No. 1:12-CR-338 charged Blackwell with conspiracy to commit armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (2) and Section 2 (Count One), armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and Section 2 (Count Four), and using a firearm during the armed bank robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count Five). Blackwell's guilty plea was to a two-count information, Case No. 1:13-CR-072, which charged him in one count with conspiring to take money from a bank by force, violence and intimidation in violation of 18 U.S.C. § 371 and in the second count, with knowingly using and carrying a firearm during and in relation to the conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii). The negotiated plea agreement, which was filed together with the superseding information, contained Blackwell's agreement to waive his right to collaterally attack his sentence through a § 2255 motion [Doc. 3-1] and to forgo the right to appeal his sentence if he was sentenced within the guideline range. The plea agreement contained the Government's commitment to dismiss the indictment in Case No. 1:12-CR-338.

At the sentencing hearing on August 19, 2013, this Court sentenced Defendant Blackwell to 54 months' imprisonment on the Count One conspiracy charge, to be followed by 84 months' imprisonment on the § 924(c) charge. Defendant did not object to the sentence and did not appeal. The Government moved to

dismiss the indictment in Case No. 1:12-CR-338 and the motion was granted [Docs. 200, 202].

After the sentencing hearing this case remained dormant until June 22, 2018 when Mr. Blackwell filed the instant motion under 28 U.S.C. § 2255 [Doc. 11].

On January 24, 2019 the United States Supreme Court announced its decision in United States v. Davis, 139 S. Ct. 2319, holding that conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under § 924(c)'s residual clause.

On September 9, 2019, Mr. Blackwell filed a Reply to Government's Response to Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [Doc. 27]. He asserts in the Reply that his § 924(c) challenge survives the collateral attack waiver in his plea agreement and that his failure to appeal his sentence does not bar his instant motion. The Reply states "the government admits that Mr. Blackwell is now guilty of no crime at all. And that he is serving an 84-month, consecutive prison sentence for conduct that does not violate federal law. The government has wisely chosen, post-Davis, not to ask courts to enforce collateral-waivers in other § 924(c) cases based on conspiracy predicates. So why has it chosen Mr. Blackwell for special treatment?" [Doc. 27].

On November 13, 2019, the Government filed a Notice of Supplemental Authority, acknowledging the United States Supreme Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019). In addition, it acknowledged that in Brown v. United States, 942 F.3d 1069 (11th Cir. 2019) the United States Court

of Appeals for the Eleventh Circuit held that conspiracy to commit Hobbs Act robbery is not categorically a crime of violence under § 924(c)'s elements clause because the statutory elements of Hobbs Act conspiracy do not require the existence of a threat or an attempt to use force.

The Government states that in Brown, 942 F.3d 1069, "the government exercised its prosecutorial discretion and did not raise defendant's collateral attack waiver or procedural default, instead moving jointly with the defendant for reversal of the district court's denial of his motion" [Doc. 30 at 1]. However, the Government's Notice of Supplemental Authority points out that "[b]y contrast, in this case, the government has properly raised both Blackwell's collateral attack waiver and his procedural default" [Doc. 30 at 2]. Accordingly the Government reiterates its position that Mr. Blackwell is not entitled to relief because he waived the right to bring this collateral attack and procedurally defaulted his claim. The Government points out that its plea agreement with Blackwell included its agreement to dismiss Count Four of the indictment--Armed Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and Section 2, a serious felony which carries a maximum custodial penalty of 20 years, and a § 924(c) charge based on the armed robbery charge--both of which are still viable after Davis and Brown. Furthermore, the plea colloquy established that Blackwell and his codefendants had all carried semi-automatic weapons into the bank and brandished the guns to force the bank employees to turn over the money and to otherwise cooperate with the robbers. Therefore, the Government argues it

would be fundamentally unfair for Blackwell to escape prosecution because of the Davis decision.

In Bousley v. United States, 523 U.S. 614 (1998) the Supreme Court held that where the defendant pleaded guilty pursuant to a negotiated plea agreement but then sought relief based on a claim that he had been misinformed at the plea hearing as to the elements of the offense, the defendant's showing of actual innocence not only had to include the charged offense but "[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." Bousley, 523 U.S. at 624. Defendant Blackwell's plea colloquy establishes without doubt that he participated in the armed bank robbery with others, and that he brandished his gun. Therefore, Defendant Blackwell cannot establish that he is "actually innocent," and further, his plea agreement bars his motion under 28 U.S.C. § 2255. His failure to appeal his sentence is also a procedural bar to his § 2255 motion.

In summary, Defendant's motion [Doc. 11] is DENIED. Defendant's motion to expedite [Doc. 32] is DISMISSED.

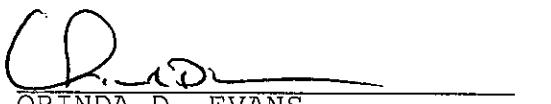
SO ORDERED, this 29 day of June, 2020.

  
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ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE

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SO ORDERED this 1 day of September, 2020.

  
ORINDA D. EVANS  
UNITED STATES DISTRICT JUDGE