Petitioner's Appendices

92 F.4th 1038
United States Court of Appeals, Eleventh Circuit.

Eric Robert RUDOLPH, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent- Appellee.

No. 21-12828, No. 22-10135
|
Filed: 02/12/2024

Synopsis

Background: Federal inmate filed motions to vacate, set aside, or correct sentence. The United States District Court for the Northern District of Alabama, Nos. 2:20-cv-08024-CLS, 2:00-cr-00422-CLS-TMP-1, C. Lynwood Smith, Senior District Judge, 551 F.Supp.3d 1270, and the United States District Court for the Northern District of Georgia, Nos. 1:20-cv-02726-CAP, 1:00-cr-00805-CAP-1, Charles A. Pannell, Jr., Senior District Judge, 570 F.Supp.3d 1277, denied motions. Inmate appealed and appeals were consolidated.

Holdings: The Court of Appeals, Grant, Circuit Judge, held that:

inmate's motions fell within scope of appeal waivers in his plea agreements, and

inmate's claims would not qualify for relief under miscarriage of justice exception.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***1039** Appeals from the United States District Court for the Northern District of Alabama, D.C. Docket Nos. 2:20-cv-08024-CLS, 2:00-cr-00422-CLS-TMP-1

Appeals from the United States District Court for the Northern District of Georgia, D.C. Docket Nos. 1:20-cv-02726-CAP, 1:00-cr-00805-CAP-1

Attorneys and Law Firms

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Before Wilson, Grant, and Brasher, Circuit Judges.

Opinion

Grant, Circuit Judge:

***1040** To avoid the death penalty, Olympic bomber Eric Rudolph pleaded guilty to six federal arson charges and four counts of use of a destructive device during and in relation to a crime of violence. As part of his plea deal, Rudolph waived the right to appeal his conviction and his sentence, as well as the right to collaterally attack his sentence in any post-conviction proceeding, including under 28 U.S.C. § 2255.

In spite of the plain language of his plea agreement, Rudolph filed two petitions for habeas corpus, seeking to vacate several of his sentences under 28 U.S.C. § 2255. Those petitions—a result of the evergreen litigation opportunities introduced by the categorical approach—asserted that his convictions for using an explosive during a crime of violence were unlawful in light of new Supreme Court precedent. Whether or not that is true, Rudolph's motions are collateral attacks on his sentences, so his plea agreements do not allow them.

I.

A.

Eric Rudolph committed a series of bombings in Atlanta and Birmingham between 1996 and 1998, killing two people and injuring many others. He used homemade explosives designed to maximize casualties.

His first target was the 1996 Centennial Summer Olympic Games in Atlanta. He specifically selected this location as a

"good target" for his first act of domestic terrorism because "the whole world would be watching." On the night of July 26, 1996, more than 50,000 people were gathered in downtown Atlanta's Centennial Olympic Park. Unbeknownst to them, Rudolph had placed a bomb under a bench near the main stage—three metal plumbing pipes covered with more than five pounds of three-inch cut masonry nails serving as homemade shrapnel. In the early morning hours, the bomb exploded, instantly killing Alice Hawthorne, a 44-year-old woman who had come to Atlanta with her daughter to participate in the Olympic festivities. More than 100 other people were seriously injured, and a cameraman also died after suffering a heart attack during the commotion.

Six months later, Rudolph attacked his next target. He placed one bomb on the ground floor exterior wall outside the operating room of Northside Family Planning Services (an abortion clinic in Sandy Springs, Georgia), and one on the ground under some shrubbery in the corner of the parking lot. The placement of the two bombs was intentional. The first bomb would trigger an evacuation of personnel and prompt the response of law enforcement, who would then be drawn within the blast range of the second. As planned, the first bomb badly damaged the building and the clinic. The second bomb detonated about an hour later, seriously injuring two federal agents, sending five people to the hospital, and causing hearing loss in about fifty others.

Rudolph attacked again five weeks later. This time his target was the Otherside Lounge, an Atlanta nightclub with a "largely gay and lesbian clientele." He again placed two bombs. The first injured five patrons and caused extensive property damage. As for the second, this time an Atlanta police officer noticed a suspicious backpack in the parking lot and quickly initiated "render-safe" procedures. Though the bomb exploded, no one else was hurt. Just hours later, Rudolph mailed letters to four Atlanta news outlets claiming responsibility for the bombings on behalf of the ***1041** "Army of God." The letters explained his targets: the first bombs were for supporters of abortion and homosexuality, and the second bombs were for federal agents. The letters, which concluded with the phrase "DEATH TO THE NEW WORLD ORDER," also warned of more bombings against those targets in the future.

Almost a year later, Rudolph committed what would turn out to be his last bombing. This time, he targeted the New Woman All Women Health Care Clinic—another abortion clinic—in Birmingham, Alabama. He hid the bomb under some shrubbery next to the walkway leading up to the clinic. True to form, this bomb contained over five and a half pounds of nails, but this time Rudolph used a remote-control detonator. He waited until Robert Sanderson, a Birmingham Police Officer, was leaning over the bomb to detonate the device, killing him. Emily Lyons, the clinic's head nurse, was seriously and permanently injured in the explosion. Again, Rudolph sent letters to two Atlanta news outlets claiming responsibility on behalf of the "Army of God" and threatening more violence.

The next morning, Rudolph learned from a nationally televised news conference that he had been identified as a suspect in the Birmingham clinic bombing. He fled into the mountains of western North Carolina where he remained a fugitive until his arrest in May of 2003, five years later.

B.

Rudolph was indicted in the Northern District of Georgia on twenty-one counts relating to the bombings. The indictment included five counts under 18 U.S.C. § 844(i), the federal arson statute. Section 844(i) provides that whoever "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce" shall be imprisoned for between five and twenty years, or between seven and forty years if injury results, and up to life imprisonment or the death penalty if death results. 18 U.S.C. § 844(i). Based on those arson charges, Rudolph was also indicted on five counts of knowingly using and carrying a firearm (the bombs) during and in relation to a crime of violence (the arson) under 18 U.S.C. § 924(c). Additionally, he was indicted under 18 U.S.C. § 844(d) on four counts of transporting an explosive in interstate commerce with the intent that it would be used to kill, injure, and intimidate individuals and to unlawfully damage property. Finally, Rudolph was charged with seven counts of willfully making threats concerning an attempt to kill, injure, and intimidate and to unlawfully damage property with an explosive in violation of 18 U.S.C. § 844(e).

The government also charged Rudolph in the Northern District of Alabama. There, the charges included one count of maliciously damaging property by means of an explosive resulting in death, in violation of 18 U.S.C. § 844(i), and one count of carrying a firearm during and in relation to that crime of violence, in violation of 18 U.S.C. § 924(c). The

government also filed a notice of its intent to seek the death penalty.

Rudolph entered into simultaneous plea agreements in the Northern District of Georgia and the Northern District of Alabama on April 13, 2005. For the Georgia charges, Rudolph pleaded guilty to all five counts of arson under § 844(i) for the bombings, and to three counts of violating § 924(c) for using a destructive device during and in relation to a crime of violence. The government dropped all of the remaining counts under § 844(d) and ***1042** § 844(e). As for the charges in Alabama, Rudolph pleaded guilty to both counts—the § 844(i) arson and the § 924(c) use of a destructive device in relation to that arson. In exchange, the government agreed not to seek the death penalty.

Each court entered judgment against Rudolph according to the terms of the respective plea agreements, which specified that he would be sentenced to "the maximum term of imprisonment allowed by law" for each count, except that the government agreed not to seek the death penalty. In Georgia, Rudolph was sentenced to four life sentences—one for the § 844(i) arson charge that resulted in Alice Hawthorne's death and three for the § 924(c) charges for using an explosive device during a crime of violence. He was also sentenced to sixty years for the bombings at the Sandy Springs clinic, and another sixty years for the bombings at the Otherside Lounge. In Alabama, Rudolph received two more life sentences—one under § 844(i) for the bombing that killed Robert Sanderson, and one for using an explosive device during that crime of violence under § 924(c). All those sentences were to run consecutively, meaning that Rudolph would serve six consecutive life sentences, followed by 120 years imprisonment.

Both plea agreements contain the same appeal waiver provision:

> In consideration of the Government's recommended disposition, the defendant voluntarily and expressly waives, to the maximum extent permitted by federal law, the right to appeal his conviction and sentence in this case, and the right to collaterally attack his sentence in any post-conviction proceeding, including motions brought under 28 U.S.C. § 2255 or 18 U.S.C. § 3771, on any ground.

Rudolph confirmed in both courts that these waivers were voluntary. He also affirmed in writing that he understood both his legal rights and the plea agreements' effects on those rights—including that the waiver would prevent him from appealing his conviction or sentence and from challenging his sentence in any post-conviction proceeding.

C.

Fifteen years came and went. In June 2020, Rudolph filed pro se motions in both the Northern District of Alabama and the Northern District of Georgia. He sought to "vacate his 924(c) sentences pursuant to 28 U.S.C. § 2255 in light of *U.S. v. Davis*, 588 U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019)." In each jurisdiction he was appointed counsel, who then filed an amended motion and reply in Georgia, and a reply in Alabama. These motions all made the same basic argument: Rudolph's sentences for using or carrying a firearm during a crime of violence were unlawful because in the wake of *United States v. Davis*, 588 U.S. ——, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), his arson offenses were no longer crimes of violence under the federal statute.

Rudolph's requested relief included vacatur of the life sentences imposed under § 924(c) and resentencing on his remaining counts: "Mr. Rudolph respectfully requests that this Court grant his 28 U.S.C. § 2255 motion, vacate his conviction under 18 U.S.C. § 924(c), and set this case for a resentencing hearing on the remaining count of conviction." Rudolph characterized these challenges as attacks on his convictions rather than his sentences, presumably in an attempt to avoid the bar set in his plea agreement.

Both district courts denied Rudolph's § 2255 motions. The District Court for the Northern District of Alabama first agreed that, after *Davis*, § 844(i) arson does not qualify as a crime of violence under ***1043** § 924(c). But it also concluded that Rudolph's appeal waiver barred his motion, because it "is not possible to collaterally attack only a *conviction* under 28 U.S.C. § 2255, which provides an avenue to attack the defendant's *sentence*." The District Court for the Northern District of Georgia did not opine on the merits of Rudolph's argument. Instead, that court concluded that his motions were barred because he had procedurally defaulted

by failing to raise the *Davis* issue sooner, or, in the alternative, because he had waived the right to collaterally attack his sentences in the plea agreement. Rudolph appealed both orders, and the cases were consolidated on appeal.

II.

When reviewing a district court's denial of a § 2255 motion, this Court reviews questions of law de novo and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). The scope and validity of an appeal waiver are reviewed de novo. *King v. United States*, 41 F.4th 1363, 1366 (11th Cir. 2022).

III.

"A plea agreement is, in essence, a contract between the Government and a criminal defendant." *Id.* at 1367 (quotation omitted). And because it functions as a contract, a plea agreement "should be interpreted in accord with what the parties intended." *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005) (collecting cases). In discerning that intent, the court should avoid construing a plea agreement in a way that would "deprive the government of the benefit that it has bargained for and obtained in the plea agreement." *United States v. Boyd*, 975 F.3d 1185, 1191 (11th Cir. 2020) (quotation omitted). But make no mistake—the government is not the only party to benefit from these deals. Defendants trade costly trials and the risk of lengthy sentences for the certainty offered by a guilty plea to a lesser set of charges. And confidence about the meaning of terms in a plea agreement helps defendants in the long run by reducing transaction costs and making plea agreements worthwhile for the government to strike. *See King*, 41 F.4th at 1367.

One common provision in such agreements is a defendant's waiver of the right to appeal his sentence or conviction. Likewise for collateral attacks, which are generally brought in a separate proceeding once the direct appeal is complete. *See, e.g.*, *id.* at 1366. A § 2255 motion is one kind of collateral attack, enabling a prisoner who has already run the gamut of direct appeals to later claim the right to be released on separate grounds. Here, Rudolph insists that his § 2255 motions are collateral attacks on his convictions, while the government says that they are (and could only ever be) attacks on his sentences.

The government has the better of the argument. The text of 28 U.S.C. § 2255, the history of that same statute, and the habeas corpus right that it codified, all point in the same direction: § 2255 is a vehicle for attacking sentences, not convictions. Supreme Court precedents show the same, as does Rudolph's requested relief.

A.

We start with the plain language of § 2255, which shows that any motion brought under that provision is necessarily an attack on the movant's sentence:

> A prisoner *in custody under sentence* of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed ***1044** in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose *such sentence*, or that *the sentence* was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed *the sentence* to vacate, set aside or correct *the sentence*.

28 U.S.C. § 2255(a) (emphasis added).

To begin, the statute lists four grounds on which a prisoner in custody "may move the court which imposed the sentence to vacate, set aside or correct *the sentence*." *Id.* (emphasis added). So, right from the start, the statute informs us that a motion filed under this provision challenges a sentence.

The first three clauses each offer the ability to challenge a specific problem with a sentence: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; or (3) "that the sentence was in excess of the maximum authorized by law." *Id.* The fourth is a catch-all, allowing a challenge to a sentence that (4) "is otherwise subject to collateral attack." *Id.* Unlike the earlier clauses, this fourth one lacks a subject. But the only logical inference is that this clause refers to the same subject as the last—

the movant's *sentence*. Because the first three enumerated grounds for a motion relate to infirmities with the movant's sentence, and no word besides "sentence" is available to serve as the subject, the fourth clause must be limited to the same class as the first three—problems with sentences. The grammatical structure offers no room for the clause to refer to anything else.

Rudolph has no real response to this text. Instead, his argument rests on the next section of the statute, which outlines a sentencing court's responsibilities once it receives what appears to be a facially valid motion for relief. According to Rudolph, that section extends the sentencing court's habeas jurisdiction beyond sentences and into convictions. Why? Rudolph says it is because § 2255(b) "permits the reviewing court to grant relief if it 'finds that *the judgment* was rendered without jurisdiction ... or that there has been such a denial or infringement of the constitutional rights of the prisoner as to *render the judgment vulnerable to collateral attack*,' and instructs the court 'shall *vacate and set the judgment* aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.' "

It would be remarkable for a statute authorizing a challenge on one basis to give the court the authority to offer relief for a different violation. The fact that § 2255(b) uses the word "judgment" does not change the fact that this motion is ultimately a challenge to a sentence. Again, the only "judgment" the section refers to is the one referenced in the previous section—the judgment imposing the sentence. It would make no sense for the remedies in § 2255(b) to be completely different than the ones that could be requested in the § 2255(a) motion.

A few more clues in the text resolve any residual doubt that attacks under § 2255 are on sentences. The title of a statute is not dispositive, but it can inform the text's meaning. *See Essex Ins. v. Zota*, 466 F.3d 981, 989–90 (11th Cir. 2006). Section 2255's title is one that sheds light: "Federal custody; remedies on motion attacking sentence." 28 U.S.C. § 2255. Plus, only a "prisoner in custody under sentence of a court" can invoke the statute's protections. *Id.* § 2255(a). In other words, a prisoner must still be serving a prison sentence to bring a § 2255 challenge; no ***1045** motion can be filed after release, which makes perfect sense for a challenge to a sentence. Moreover, the first line of the statute says the prisoner is "claiming the right to be released" from a sentence on one of the enumerated grounds. *Id.* This provision likewise makes sense only in the context of a challenge to a sentence—not a conviction.

The text of § 2255 points to one conclusion. These motions are collateral attacks on a movant's sentence—the exact thing that Rudolph waived the right to do. [1]

1 Rudolph points to two decisions (one unreported) of our sister circuits, both concluding that § 2255 enables a collateral attack on a conviction separately from a collateral attack on a sentence. *See United States v. Loumoli*, 13 F.4th 1006, 1009–10 (10th Cir. 2021); *In re Brooks*, No. 19-6189, 2020 U.S. App. LEXIS 6371, at *3 (6th Cir. Feb. 28, 2020). Both of these decisions are under reasoned, and we are convinced that the textual and historical arguments outlined here justify departing from them.

B.

Lacking support in § 2255's text, Rudolph turns to precedent. His primary argument is that *Davis v. United States* says that § 2255 can be used to challenge convictions rather than just sentences. 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974). But neither *Davis* nor the history it cites are on Rudolph's side.

First, *Davis*. The issue there was not whether § 2255 could be used to attack a conviction. Instead, the Court was deciding whether a change in a circuit court's case law was enough to attack "the sentence imposed," or whether the error needed to be of a "constitutional dimension." *Id.* at 341–43, 94 S.Ct. 2298. The majority thought a legal error was sufficient; the dissent thought habeas relief was available only to remedy a constitutional error. So the dispute was over the available grounds for attacking a sentence under § 2255. What the Court was *not* deciding was whether § 2255 is a vehicle for collaterally attacking sentences, convictions, or both.

Davis established that inmates have a right to attack their sentences by showing a legal-but-not-constitutional infirmity in the convictions that led to those sentences. Rudolph focuses not on this holding, but on one sentence that suggests a different implication from the case: "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions." *Id.* at 344, 94 S.Ct. 2298. This, he says, is enough to prove

that § 2255 can be used to challenge not just his sentence, but his conviction too.

To start, this part of the *Davis* opinion has little to do with the Court's holding. As a rule, "a statement that neither constitutes the holding of a case, nor arises from a part of the opinion that is necessary to the holding of the case" is dicta. *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (quotation omitted). And dicta is "not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010). Both of these points are crucial—not only to letting courts decide the cases before them, but also to avoiding the risk that stray language will take on importance in a new context that its drafters could not have anticipated.

That is also why we "cannot read a court's opinion like we would read words in a statute." *See Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325, 1332 (11th Cir. 2023). Instead, we consider opinions in their context, including the questions presented and the facts of the case. *Id.* Here, the context shows that the Court was responding to the dissenting opinion's attempt ***1046** to confine the nature of the allowed challenge to constitutional errors—not addressing whether § 2255 motions attack convictions or sentences. *See Davis*, 417 U.S. at 343–44, 94 S.Ct. 2298. An understanding had developed that prisoners could challenge their sentences by showing that the convictions that led to them were unlawful. And *Davis* resolved the debate about whether those infirmities needed to be constitutional ones.

Rudolph argues that we should also rely on *Davis*'s reference to the history of habeas corpus. We have no argument there—but the history does not support his expansionary view of the statute. Section 2255 maintained the historical rule of habeas corpus as a remedy for unlawful imprisonment.

The "glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful." 3 William Blackstone, *Commentaries* *133. And though the complete origins of habeas corpus are obscured by history, the writ is naturally connected with "those clauses of Magna Carta which prohibited imprisonment without due process of law." 9 William S. Holdsworth, *A History of English Law* 111 (1926); *see also* George F. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179, 180–81 (1948). Here too, release from an illegal sentence was understood to be the reason for habeas corpus: "The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision." *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101, 2 L.Ed. 554 (1807). Relief from illegal detention, in short, has long been a defining feature of the Anglo-American legal landscape.

To be sure, what qualifies as illegal detention for these purposes has broadened over time. At the Founding, a conviction in a court of competent jurisdiction was sufficient evidence that due process had been given and imprisonment was lawful. *See* 3 William Blackstone, *Commentaries* *131–32. Courts considering habeas petitions thus examined only the power and authority of the court to imprison the petitioner, *not* the correctness of that court's legal conclusions. *See, e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–03, 7 L.Ed. 650 (1830); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449–53, 2 L.Ed. 495 (1806). "If the point of the writ was to ensure due process attended an individual's confinement, a trial was generally considered proof he had received just that." *Brown v. Davenport*, 596 U.S. 118, 128, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022).

In the latter half of the nineteenth century and into the early twentieth, however, this jurisdictional inquiry expanded into a more searching review for constitutional defects in the underlying conviction—but it did so within the original jurisdictional framework. In short, a constitutional defect at the trial level acted to rescind the jurisdiction of that court, rendering the sentence vulnerable to attack. So as the Court explained in *Ex parte Siebold*, a conviction under an unconstitutional law "is not merely erroneous, but is illegal and void, and *cannot be a legal cause of imprisonment*." 100 U.S. 371, 376–77, 25 L.Ed. 717 (1879) (emphasis added); *see also Ex parte Lange*, 85 U.S. (18 Wall.) 163, 178, 21 L.Ed. 872 (1873) (writ granted because sentence "was pronounced without authority, and he should therefore be discharged"); *Ex parte Wilson*, 114 U.S. 417, 429, 5 S.Ct. 935, 29 L.Ed. 89 (1885) (writ granted because trial court "exceeded its jurisdiction, and he is therefore entitled to be discharged"). But the courts never wavered from understanding habeas corpus ***1047** as a remedy for an illegal sentence—not a second round of appeals for the purpose of vindicating an improper conviction. *See* George F. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179, 188–90 (1948).

Enter § 2255, passed during an era of increased codification. *See generally* Guido Calabresi, *A Common Law for the Age of Statutes* (1982). The Judicial Conference of the United States

recommended two bills: one intended to curb abuse of the writ, and the other jurisdictional—enabling federal prisoners to bring collateral attacks in the courts that sentenced them, rather than the courts where they were confined.[2] *United States v. Hayman*, 342 U.S. 205, 214–15, 72 S.Ct. 263, 96 L.Ed. 232 (1952). Indeed, the Conference underlined the fact that this second proposal (the precursor to § 2255) was about challenging *sentences*:

> This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, but much broader than, coram nobis. The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus.

Comm. on the Judiciary, *Regulating the Review of Judgments of Conviction in Certain Criminal Cases*, S. Rep. No. 80-1526, at 2 (1948).

2 This new habeas corpus statute offered a solution to the discrete problem that habeas corpus petitions could be filed only in the district of a prisoner's confinement. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385; *see also United States v. Hayman*, 342 U.S. 205, 212–13, 72 S.Ct. 263, 96 L.Ed. 232 (1952). That presented a problem in the modern era, with its interstate federal prison system. Relevant records remained in the original court of conviction and could be difficult to obtain, a practical difficulty magnified by the fact that most federal prisons were located in a handful of states. *Hayman*, 342 U.S. at 212–14, 72 S.Ct. 263. That meant district courts in those states were flooded with a disproportionate number of habeas petitions, "far from the scene of the facts, the homes of the witnesses *and the records of the sentencing court*." *Id.* at 214, 72 S.Ct. 263 (emphasis added).

"As broad as habeas corpus" does not mean "broader than habeas corpus," which was always understood to be an attack on illegal imprisonment. Section 2255 fundamentally remains a procedure for prisoners to challenge their sentences. That is no less true when the method of attack is to show that a conviction was illegal. Even then, a motion under § 2255 is "a collateral attack on the proceeding or process of detention." George F. Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179, 190 (1948).

This understanding of § 2255 pervaded the Supreme Court's entire opinion in *Jones v. Hendrix*, a recent case considering the scope of § 2255(e)'s so-called savings clause. 599 U.S. 465, 143 S.Ct. 1857, 216 L.Ed.2d 471 (2023). In that opinion the Court noted that "Congress created § 2255 as a separate remedial vehicle specifically designed for federal prisoners' collateral attacks on their *sentences*"; that § 2255 reroutes "federal prisoners' collateral attacks on their *sentences* to the courts that had sentenced them"; and that § 2255 provides the "venue for a federal prisoner's collateral attack on his *sentence*." *Id.* at 473, 474, 479, 143 S.Ct. 1857 (emphasis added); *see also id.* at 469, 477, 478, 490, 492, 143 S.Ct. 1857. We agree.

C.

As a practical matter, it is clear that Rudolph's § 2255 motions are exactly what his appeal waiver was intended to prevent. In fact, the waiver specifically contemplates ***1048** motions under § 2255: Rudolph waived "the right to collaterally attack his sentence in any post-conviction proceeding, including motions brought under 28 U.S.C. § 2255 or 18 U.S.C. § 3771, on any ground."

Though he claims to be challenging the validity of his underlying convictions, the relief Rudolph sought in the district courts was tied entirely to his sentences. To start, he asked for the life sentences imposed for the § 924(c) convictions to be vacated. He also asserted that "because the multi-count sentence was negotiated and imposed as a package," the courts should "set the case for resentencing" and "unbundle the sentencing package of the original judgment and revisit the prison terms on the remaining counts." Rudolph thus sought to collaterally attack his sentences under § 2255—a right that he expressly waived in his plea agreement.

D.

Alternatively, Rudolph argues that his appeal waivers are unenforceable because he did not know that he was giving up the right to collaterally attack his convictions when he entered into his plea agreements. If he had only known, he says, he would never have agreed to waive this right. But as we have already shown, Rudolph's § 2255 motions are not collateral attacks on his convictions—they are collateral attacks on his sentences.

There may be mechanisms by which Rudolph can collaterally challenge his convictions, but § 2255 is not one of them. Our precedent confirms that "28 U.S.C. § 2255 was not enacted to provide the exclusive remedy for a prisoner to obtain postconviction *habeas corpus* relief in all circumstances," and that "federal courts may properly fill the interstices of the federal postconviction remedial framework through remedies available at common law." *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (quoting *United States v. Ayala*, 894 F.2d 425, 428 (D.C. Cir. 1990)). Thus, as the government confirmed, there are "ways to collaterally attack a conviction that are not 2255 motions. Arguably, Mr. Rudolph wouldn't be prohibited from bringing those given the text of his plea agreement." Habeas corpus may be the Great Writ, but it isn't the only writ.

E.

In a last-ditch effort, Rudolph urges us to adopt the so-called miscarriage of justice exception to the general rule that appeal waivers are enforceable. We have repeatedly declined to adopt that exception. Even if we were inclined to change course here—which we are not—Rudolph would not qualify for relief for any number of reasons.

Our Circuit has long held that knowing and voluntary waivers of the right to appeal are enforceable, and we have "never adopted a general 'miscarriage of justice' exception to the rule that valid appeal waivers must be enforced according to their terms." [3] *King*, 41 F.4th at 1368 n.3. Some of our sister circuits have adopted such an exception—overriding a valid waiver where "denying a right of appeal would work a miscarriage of justice"—but this exception has proved "infinitely variable." ***1049** *United States v. Teeter*, 257 F.3d 14, 25 & n.9 (1st Cir. 2001); *see also United States v. Andis*, 333 F.3d 886 (8th Cir. 2003) (applying the miscarriage of justice exception to an "illegal sentence").

3 Though we have not adopted the miscarriage of justice exception, we have recognized that "there are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers." *United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993). Such landmarks include, to start, the inviolability of statutory maximum sentences.

Rudolph has suggested that we should adopt a miscarriage of justice exception and apply it to him because he is "actually innocent" of the § 924(c) crimes which charged him with using a destructive device while committing arson. That contention is preposterous. Rudolph argues that, for technical reasons, his arson convictions did not meet the categorical definition of a crime of violence under 18 U.S.C. § 924(c) because *someone else*, theoretically, could be convicted for setting a fire on their own property, or for committing arson with recklessness rather than intent, neither of which would qualify as violent crimes.

That is a far cry from actual innocence. To establish actual innocence in the procedural default context, a prisoner must show that "it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quotation omitted). And "actual innocence" means "factual innocence, not mere legal insufficiency." *Id.* In cases like Rudolph's where the Government has forgone other, more serious charges in the course of plea bargaining, the petitioner must show that he is actually innocent of the forgone charges as well. [4] *Id.* at 624, 118 S.Ct. 1604.

4 There has been some disagreement as to whether a petitioner must show that he is also innocent of equally serious dropped charges, in addition to more serious charges, to defend against procedural default. *See, e.g.*, *United States v. Caso*, 723 F.3d 215, 221–22 (D.C. Cir. 2013). Because we reject the invitation to create an exception for Rudolph either way, we refrain from weighing in on the scope of actual innocence in this context.

We cannot, in good conscience, seriously suggest that Eric Rudolph is "actually innocent" of using an explosive device during and in relation to a crime of violence under 18 U.S.C. § 924(c). Let alone actually innocent of the dropped charges, which included four counts under 18 U.S.C. § 844(d) for transporting an explosive in interstate commerce with intent

to kill, injure, and intimidate individuals and to unlawfully damage property, and seven counts under 18 U.S.C. § 844(e) for willfully making threats concerning an attempt to kill, injure, and intimidate and to unlawfully damage property with an explosive. It would defy all reason to contend that he is factually, rather than (potentially) legally, innocent of that crime for the purposes of habeas corpus. We decline to create this exception, or to apply it for Rudolph.

* * *

Eric Rudolph is bound by the terms of his own bargain. He negotiated to spare his life, and in return he waived the right to collaterally attack his sentences in any post-conviction proceedings. We will not disrupt that agreement. Because Rudolph's § 2255 motions are collateral attacks on his sentences, they are barred by his plea agreement.

AFFIRMED.

All Citations

92 F.4th 1038, 30 Fla. L. Weekly Fed. C 665

End of Document

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12828

ERIC ROBERT RUDOLPH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent- Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 2:20-cv-08024-CLS

No. 22-10135

ERIC ROBERT RUDOLPH,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent- Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-02726-CAP

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for

Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, v. ERIC ROBERT RUDOLPH, Defendant.	CRIMINAL ACTION NO. 1:00-CR-0805-CAP

ORDER

Eric Robert Rudolph was indicted on November 15, 2000, on charges related to the bombing at Centennial Olympic Park in Atlanta, Georgia during the 1996 Summer Olympics.[1] Alice Hawthorne died from injuries sustained during the bombing, and over one hundred other individuals were injured. Rudolph was also indicted on charges related to bombings at three other locations: Northside Family Planning Services located in the Sandy Springs Professional Building in Sandy Springs, Georgia on January 16, 1997, The Otherside Lounge in Atlanta, Georgia on February 21, 1997, and the New Woman All Women Heath Care Clinic in Birmingham, Alabama on

[1] Although the indictment was issued in November 2000, Rudolph remained a fugitive for years despite significant efforts by law enforcement to locate him. He did not make his initial appearance in this court until April 13, 2005. [Doc. No. 18].

January 29, 1998. No deaths resulted from the bombings at Northside Family Planning Services and The Otherside Lounge,[2] however, several individuals were injured at each location. Birmingham police officer Robert Sanderson was killed during the bombing at the New Woman All Women Health Care Clinic in Birmingham, AL. Emily Lyons, a nurse, was seriously injured.

Rudolph pled guilty on April 13, 2005, to eight counts of the twenty-one-count indictment. This was a binding plea with an appeal waiver. On the same day, he pled guilty in the Northern District of Alabama to a two-count indictment for the bombing at the New Woman All Women Health Care Clinic in Birmingham, AL, and for using an explosive device in that bombing.[3] That was also a binding plea with an appeal waiver.

The court in the Northern District of Alabama sentenced Rudolph on July 18, 2005, to two life sentences, to be served consecutively to each other. On August 22, 2005, this court sentenced Rudolph to four life sentences, to

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[2] There were two bombs at each of these locations. The second bomb at each location was designed to detonate after a delayed period, when emergency responders would have arrived on the scene.

[3] The charges in the Northern District of Georgia concerning the New Woman All Women Health Care Clinic in Birmingham, Alabama were limited to transportation of the explosive used in that bombing and writing the "Army of God" letters claiming responsibility for the bombing and threatening to commit additional bombings.

run consecutively to each other, along with an additional 120 years of imprisonment, to run consecutively to the life sentences. The sentence that Rudolph received in this district is broken down by count as follows:

Title & Section	Nature of the Offense	Count No.	Sentence
18 U.S.C. § 844(i)	Malicious Damage of Property with an Explosive Device Resulting in Death and/or Personal Injury (the Centennial Olympic Park Bombing, one death resulted)	1	Life
18 U.S.C. § 924(c)	Use of a Destructive Device During and in Relation to a Crime of Violence (*i.e.*, the charge in Count 1, the Centennial Olympic Park Bombing)	2	Life, consecutive
18 U.S.C. § 844(i)	Malicious Damage of Property with an Explosive Device (the first bombing at the Sandy Springs Professional Building that contained the offices of Northside Family Planning Services)	5	20 Years, consecutive
18 U.S.C. § 924(c)	Use of a Destructive Device During and in Relation to a Crime of Violence (*i.e.*, the charge in Count 5, the first bombing at the Sandy Springs Professional Building that contained the offices of Northside Family Planning Services)	6	Life, consecutive

18 U.S.C. § 844(i)	Malicious Damage of Property with an Explosive Device Resulting in Death and/or Personal Injury (the second bombing at the Sandy Springs Professional Building that contained the offices of Northside Family Planning Services – no death resulted, only injury)	7	40 Years, Consecutive
18 U.S.C. § 844(i)	Malicious Damage of Property with an Explosive Device Resulting in Death and/or Personal Injury (the first Otherside Lounge bombing – no death resulted, only injury)	10	40 Years, Consecutive
18 U.S.C. § 924(c)	Use of a Destructive Device During and in Relation to a Crime of Violence (*i.e.*, the charge in Count 10, the first bombing at the Otherside Lounge)	11	Life, consecutive
18 U.S.C. § 844(i)	Malicious Damage of Property with an Explosive Device (the second bombing at the Otherside Lounge)	12	20 Years, consecutive

Rudolph is currently serving this sentence at USP Florence ADMAX, a supermax facility.[4]

I. Rudolph files a motion pursuant to U.S.C. § 2255 to vacate, set aside, or correct his sentence

On June 26, 2020, Rudolph filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. [Doc. No. 30]. This motion is based on the Supreme Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), that the residual clause in 18 U.S.C. § 924(c) is void for vagueness.[5] Pursuant to an Administrative Order from the Chief Judge of this district concerning retroactive application of *Davis* [Doc. No. 32], the Federal Defender Program reviewed Rudolph's case and filed an amended § 2255 motion on his behalf. Specifically, the amended § 2255 motion seeks to vacate the convictions and sentences on the § 924(c) charges in light of the Supreme Court's holding in *Davis* that the definition of the term "crime of violence" contained in 18 U.S.C. § 924(c)(3)(B)[6] is unconstitutionally vague.

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[4] A supermax facility is classified as providing a higher and more controlled level of custody than a maximum-security prison.

[5] Rudolph also filed a similar motion in the Northern District of Alabama. On July 29, 2021, that court denied Rudolph's motion. [Doc. No. 47]. Rudolph has appealed that decision. No. 21-12828-DD (11th Cir. Aug. 18, 2021). On October 18, 2021, that appeal was stayed pending this court's ruling.

[6] This section of the statute is often referred to as the "residual clause."

[Doc. No. 36]. The government has filed a response in opposition [Doc. No. 37], and Rudolph has filed a reply brief [Doc. No. 38]. The motion is now before the court for consideration.

A. The Supreme Court's ruling in *Davis*

Under 18 U.S.C. § 924(c), there is a heightened penalty for anyone adjudicated guilty of using, carrying, or possessing a firearm, or explosive device, in "relation to any crime of violence or drug trafficking crime." The term "crime of violence" is then further defined in two subparts of the statute. Section 924(c)(3)(A) is known as the elements clause and defines "crime of violence" as "an offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Section 924(c)(3)(B), also known as the residual clause, defined "crime of violence" as "an offense that is a felony and 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 an offense." It is this residual clause that the Supreme Court struck down on June 24, 2019, as being unconstitutionally vague because it "provides no reliable way to determine which offenses qualify as crimes of violence." *Davis*, 139 S. Ct. at 2324 (2019). The Eleventh Circuit ruled in *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019), that *Davis* is "retroactively applicable to criminal cases

that became final before *Davis* was announced." Rudolph's pro se § 2255 motion is timely, having been filed within one year of the ruling in *Davis*.[7]

B. Rudolph's argument

Rudolph pled guilty to five counts of violating 18 U.S.C. § 844(i), known as malicious destruction of property with an explosive device, or more commonly, arson. This crime is defined in § 844(i) as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned.

Arson is the predicate crime for Rudolph's 18 U.S.C. § 924(c) charges. Rudolph presents several arguments that the offense defined in § 844(i) does not fit within § 924(c)'s elements clause. Rudolph's argument boils down to the following: that the arson crime charged in § 844(i) can no longer be considered a crime of violence for purposes of § 924(c) following the *Davis* ruling.

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[7] Although Rudolph's pro se motion has a file date of June 26, 2020, it is signed June 20, 2020. "Under the 'prison mailbox rule,' a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *Williams v. McNeil,* 557 F.3d 1287, 1290 n.2 (11th Cir. 2009). "Absent evidence to the contrary," we "assume that [the prisoner's filing] was delivered to prison authorities the day he signed it." *Washington v. United States,* 243 F.3d 1299, 1301 (11th Cir. 2001). The government has not contested the timeliness of Rudolph's motion.

Rudolph seeks to have the life sentences on the three § 924(c) charges vacated (Counts 2, 6, and 11). He then wants the court to "unbundle the sentencing package of the original judgment and revisit the prison terms on the remaining counts." [Doc. No. 36 at 20]. He cites to *United States v. Fowler*, 931 F.3d 1010 (11th Cir. 2014) for the proposition that the court can redesign the sentencing package. The government responds that this sentencing package doctrine is discretionary and does not apply here, because the sentences imposed on each count were not part of any package created by the court but were instead required by the binding plea.[8] [Doc. No. 37 at 17].

II. Is Rudolph's § 2255 motion procedurally barred?

"A federal criminal defendant who fails to preserve a claim by objecting at trial or raising it on direct appeal is procedurally barred from raising the claim in a § 2255 motion, absent a showing of cause and prejudice or a fundamental miscarriage of justice." *Rivers v. United States,* 476 F. App'x 848, 849 (11th Cir. 2012) (citing *Jones v. United States,* 153 F.3d 1305, 1307 (11th Cir. 1998)). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to

[8] The plea required the court to impose a life sentence on each of Counts 1, 2, 6, and 11, as well as the "the maximum term of imprisonment allowed by law" on the remaining counts. [Doc. No. 18-1 at 3].

conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

Here, Rudolph did not raise a vagueness claim concerning his § 924(c) charges at any time prior to filing his § 2255 motion. The government maintains that Rudolph has procedurally defaulted his *Davis* claims. [Doc. No. 44]. Rudolph contends, however, that "the government waived the opportunity to raise the procedural-default defense, so this Court is forbidden to rely on it now." [Doc. No. 45 at 1].

A. Procedural history

Rule 4(b) of the Rules Governing Section 2255 Proceedings provides that "[t]he judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." This rule does not discuss concrete situations that may warrant summary dismissal of a § 2255 motion, however, there is an abundance of decisions establishing the authority of the court to address non-jurisdictional affirmative defenses during this preliminary review. Such defenses include exhaustion, abuse of the writ, the statute of limitations, and procedural

default. Because procedural default is the only such defense of concern in the instant action, the court will limit its discussion to that defense.

Courts across the nation follow the precept that § 2255 claims can be dismissed on the Rule 4(b) review for procedural default. "Summary dismissal under Rule 4(b) is appropriate where the record supports the conclusion that the petitioner cannot make the requisite 'cause' and 'prejudice' showing" for failing to raise an issue on appeal. *Guapacha v. United States*, No. CV–92–5456, 1992 WL 391378, at *1 (E.D. Pa. Dec. 3, 1992) (citing *Abatino v. United States,* 750 F.2d 1442, 1446 (9th Cir. 1985)) (affirming summary dismissal of a § 2255 motion for procedural default because the motion "upon its face shows no grounds for relief."). *See also Dyer v. United States*, No. 19-CV-1694-JPS, 2020 WL 2042777, at *2 (E.D. Wisc. Apr. 28, 2020) ("Upon an initial Rule 4 review, the Court will analyze whether the movant has complied with the statute of limitations, avoided procedural default, and set forth cognizable claims.").

In *United States v. Gagliardi*, No. 10–480, 2011 WL 1362620, at *4-5 (E.D. Penn Apr. 6, 2011), a district court denied a petitioner's Rule 60(b) motion for relief from the order dismissing his § 2255 claims as procedurally defaulted without considering them on the merit and expressly rejected the argument "that Rule 4(b) of the Rules Governing Section 2255 Proceedings

required us to consider on the merits the seven claims that he raised or could have raised on direct appeal." Other courts have also summarily dismissed § 2255 claims for procedural default after the Rule 4(b) review. *Dominguez v. United States*, No. 04 Civ. 293(DAB), 95 CR. 942(DAB), 2004 WL 1574717 (S.D. N.Y. July 14, 2004); *United States v. Myrie*, No. 2:06–cr–00239–RCJ–PAL, 2012 WL 2847747 (D. Nev. July 11, 2012) (same); *Escalera v. United States*, Nos. EP-06-CA-0157-DB, EP-04-CR-2333-DB, 2006 WL 1341017 (W.D. Tex. May 11, 2006) (same); *United States v. Gough*, 952 F.2d 1400 (9th Cir. 1992) (unpublished) (affirming district court's summary dismissal of the § 2255 motion because the claims were procedurally defaulted); *United States v. Efthimiatos*, No. 4:15–cv–00045–SMR, 2015 WL 10793427 (S.D. Iowa, June 23, 2015) (summarily dismissing the Fourth Amendment claim in the § 2255 motion on the Rule 4(b) review as barred because the petitioner could not show ineffective assistance of counsel); *United States v. Cofer*, No. 96-2005, 1997 WL 375001, at *1 (7th Cir. 1997) (unpublished) (affirming district court's dismissal of the § 2255 motion "on procedural default grounds pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings").

In *Paez v. Sec'y, Florida Dep't of Corrs.*, 947 F.3d 649, 653-54 (2020), the Eleventh Circuit addressed the authority of the district court to

summarily dismiss a § 2254 habeas petition due to a procedural bar. The Eleventh Circuit stated:

> First, the text of Rule 4 does not restrict summary dismissals to merits-based deficiencies. As we've already noted, the district court must dismiss a § 2254 petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." Rules Governing § 2254 Cases, R. 4. Both a procedural bar and a merits-based deficiency could lead a district court to conclude that the petitioner is "not entitled to relief."

Id. The court determined that this interpretation accorded with the Supreme Court's decision in *Day v. McDonough*, 547 U.S. 198 (2006), that a district court may dismiss a habeas petition as untimely even when the state has not contested timeliness in its answer so long as the district court provides fair notice to the parties, a chance for them to present their positions, and does not override a deliberate waiver by the state. In *Gay v. United States*, 816 F.2d 614, 616 n.1 (11th Cir. 1987) (per curiam), the Eleventh Circuit determined that "the principles developed in habeas cases also apply to § 2255 motions." (citation omitted). Courts in this circuit have thus applied the procedure in *Paez* and *Day* to § 2255 petitions. *See Cooke v. United States*, No. 1:20-00031-KD, 2020 WL 5200645, at * 1 (S.D. Ala. Aug. 6, 2020) adopted by 2020 WL 5166044 (S.D. Ala. Aug. 31, 2020) (dismissing a § 2255 motion after the Rule 4(b) review and affording the parties an opportunity to respond in accordance with the procedure outlined in *Paez*); *Hosely v. United*

States, No. 21-CIV-80112-RAR, 2021 WL 327066, at *1 (S.D. Fla. Jan. 31, 2021) (dismissing § 2255 motion after Rule 4(b) review and providing the parties an opportunity to submit responses containing their positions for *de novo* review); *Evans v. United States*, Nos. CV613–005, CR610–029, 2013 WL 587535, at *2 (S.D. Ga. Feb. 14, 2013), adopted by 2013 WL 839239 (S.D. Ga. March 6, 2013) (recommending the dismissal of five claims in the § 2255 motion as procedurally defaulted after the Rule 4(b) review because "[f]ederal habeas courts are authorized to apply the procedural default defense *sua sponte.*")

At first blush, it seems that the court should have looked at procedural default when it conducted the Rule 4(b) review of Rudolph's § 2255 motion. However, when Rudolph's motion was filed, the rulings from this court and many of its brethren on the bench suggested that Rudolph could show cause for any procedural default. Specifically, this court and others had ruled that a movant's challenge to § 924(c)'s residual clause was not available until after the Supreme Court's invalidation of the similarly worded residual clause in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague in *Johnson v. United States*, 576 U.S. 591 (2015), and the subsequent invalidation of § 924(c)'s residual clause in *Davis*. This is because *Johnson* "is the quintessence of a sufficiently clear break with the

past, [such] that an attorney representing the defendant would not reasonably have had the tools for presenting the claim." *Garibo-Carmona v. United States*, 216 F.Supp.3d 1373, 1379 (N.D. Ga. 2016) (internal quotation omitted). After *Johnson*, other clauses with language materially similar to that of the residual clause in § 924(e)(2)(B)(ii) were challenged. For example, it was after *Johnson* that the Supreme Court issued its ruling in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), that the residual clause in 18 U.S.C. § 16 was unconstitutionally vague. That clause, like the residual clause in § 924(e)(2)(B)(ii), "bear[s] more than a passing resemblance to § 924(c)(3)(B)'s residual clause." *Davis* at 2325.

On April 2, 2020, less than three months before Rudolph filed his motion, this court wrote in another case that "the movant lacked a reasonable basis for challenging § 924(c)'s residual clause until long after his conviction was final and he had exhausted his direct appeal—that is, when the Supreme Court issued its opinion several years later in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and then four years after that in *United States v. Davis*, 139 S. Ct. 2319 (2019)." *United States v. Williams*, No. 1:03-cr-0155-CAP-4, Doc. No. 1591 at 7 (N.D. Ga.). As Rudolph points out in his motion, other judges in this court had decided similarly. *See United States v. Watson*, No. 1:04-CR-591-LMM-1, Doc. 428 at 4-7 (N.D. Ga. March 9, 2020); *United States*

v. Bibiano-Vazquez, No. 4:12-CR-9-MLB-2, Doc. 412 at 3-6 (N.D. Ga. May 18, 2020). This position was not limited to just courts in this district, however. Other courts in this circuit and around the nation had also decided similarly. *See Munoz v. United States*, No. 19-25239-CV-MARTINEZ, 2020 WL 9219149, at *3 (S.D. Fla. Dec. 29, 2020) adopted by 2021 WL 1135074 (S.D. Fla. Mar 25, 2021) (finding that "Respondent's procedural default argument is foreclosed . . . because the [*Davis*] claim Movant raises was 'previously unavailable.'"); *Thomas v. United States*, No. 19-23378-CV-SCOLA, 2019 WL 7484696, at *4 (S.D. Fla. Dec. 5, 2019) adopted by 2020 WL 59750 (S.D. Fla. Jan. 6, 2020) (same); *Hammoud v. United States*, No. 8:19-cv-2541-T-27TGW, 2020 WL 3440649, at *3 (M.D. Fla. June 23, 2020) (ruling that "at the time of [the petitioner's] direct appeal, a claim that his § 924(c) conviction was invalid because the statute's residual clause was unconstitutional was so novel that its legal basis [was] not reasonably available to counsel and therefore his failure to raise the claim is sufficiently excusable to satisfy the cause requirement" of the procedural default analysis) (internal quotation omitted); *Carter v. United States*, No. 16-cv-02184, 2019 WL 4126074, at *5 (C.D. Ill. Aug. 29, 2019) (determining that the movant had shown cause for failing to raise his *Davis* claim previously because "while *Davis* might have been anticipated after *Johnson* was decided, at the time of [the petitioner's]

trial and direct appeal, no one could have reasonably anticipated *Davis*"); *Howie v. United States*, No. 3:16-cv-437-RJC, 3:06-cr-50-RJC-1, 2019 WL 4743724, at *5 (W.D. N.C. Sept. 27, 2019) (collecting cases).

Thus, on initial review of Rudolph's § 2255 motion, it was not apparent to the court that his *Davis* claim was procedurally defaulted. As explained above, the court initially considered that he could show cause for the default. As for establishing prejudice, this court has also previously determined in another case that a movant who received a longer sentence than he would have received without the § 924(c) conviction could show prejudice. *Williams v. United States*, 1:03-cr-0155-CAP-4, Doc. 1591 at 9 (N.D. Ga. Apr. 2, 2020). In Rudolph's case, his three § 924(c) convictions amount to an extra three consecutive life sentences, thus his sentence without those convictions would be significantly reduced. After reviewing Rudolph's motion, the court directed the government to file a response. That order did not pose questions to the government and did not mention procedural default; it merely directed the filing of a response by the government and a reply brief from Rudolph. *See* Minute Order dated August 25, 2020.

A primary argument of Rudolph's motion is that the predicate crime for which he pled guilty does not fit within the elements clause of the § 924(c) convictions because the predicate crime requires only a mens rea of

recklessness. [Doc. No. 36 at 13]. At the time the motion was filed, both the Eleventh Circuit and the Supreme Court had pending cases on the issue of whether a predicate crime that can be satisfied by the mens rea of recklessness qualifies as a violent felony under the materially similar elements clause of the ACCA. In *United States v. Moss*, 920 F.3d 752 (11th Cir. 2019), the Eleventh Circuit held that where a predicate crime can be satisfied by a mens rea of recklessness, it cannot qualify as a violent felony under the ACCA. After granting the government's petition for a rehearing *en banc*, the Eleventh Circuit stayed the appeal in *Moss* pending the Supreme Court's ruling in *Borden v. United States*, No. 19-5410 and *Burris v. United States*, No. 19-6186 on the same issue. Rudolph argued that "[t]he outcome in *Borden* and *Moss* will presumably apply, too, to the nearly-identical § 924(c)(3)(A) elements clause." [Doc. No 36 at 14].

The parties then agreed that a stay of the proceedings was warranted pending the Supreme Court's rulings in *Borden* and *Burris* so as to "serve the interests of justice and judicial economy." [Doc. No. 40 at 1]. While the case was stayed, the Eleventh Circuit issued a ruling in *Granda v. United States*, 990 F.3d 1272, 1288 (2021), that although *Davis* announced a new constitutional rule that was made retroactive via *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019), the petitioner could not show cause for the procedural

default of his *Davis* claim because, at the time of his appeal in 2009, "the tools existed to challenge myriad other portions of § 924(c) as vague; they existed to support a similar challenge to its residual clause" (internal quotation omitted). Approximately one month later, the Eleventh Circuit concluded likewise in *Martinez v. United States*, 853 F. App'x 416, 418 (2021), that "a defendant had the building blocks of a due process vagueness challenge to the § 924(c) residual clause even before the Supreme Court's decision in *Davis*" and thus could not show cause to excuse the default of his *Davis* claim. Whereas Granda was sentenced after Rudolph in 2009, Martinez was sentenced before Rudolph, on September 1, 2000.[9]

The Eleventh Circuit decision in *Granda* contravenes rulings of the district courts referenced above, including the undersigned, that a movant with a *Davis* claim could automatically show cause to excuse procedural default. "In *United States v. Granda*, we held that although *Davis* announced a new constitutional rule of retroactive application, it was not a 'sufficiently clear break with the past' such that an attorney would not reasonably have

[9] Rudolph was sentenced in 2005.

had the tools necessary to present the claim before that decision." *Martinez* at 418 (quoting *Granda* at 1286).

When binding precedent is issued during the pendency of a case on an issue that may affect that case, it is not unusual for a court to seek supplemental briefing because "federal district courts are bound by precedent of their circuit." *Brownlee v. United States*, No. 17-cv-23072-KMM, 2018 WL 10096595, at *1 (S.D. Fla. Apr. 24, 2018). The Supreme Court has "long recognized that a district court possesses inherent powers that are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Dietz v. Bouldin*, 570 U.S. 40 (2016) (citation and internal quotation marks omitted). *See also Smith v. Psychiatric Solutions, Inc.*, 750 F.3d 1253, 1262 (11th Cir. 2014) ("District courts have unquestionable authority to control their own dockets [and] [t]his authority includes broad discretion in deciding how best to manage the cases before them.") To that end, after becoming aware of the binding *Granda* decision and other district court decisions in this circuit citing *Granda* and finding that the movants had procedurally defaulted their *Davis* claims, the court notified the parties of such and directed them "to brief the issue of procedural

default." [Doc. No. 43 at 5]. The parties have since filed supplemental briefs on this issue. [Doc. Nos. 44, 45, and 46].

B. Is the court barred from addressing the issue of procedural default at this stage of the litigation?

To be clear, the government did not raise the issue of procedural default in its initial response to Rudolph's § 2255 motion. Rudolph suggests that it is thus improper for the court to consider whether he procedurally defaulted his *Davis* claims. He poses the question: "May a court invoke the procedural-default defense on its own, as the Court tried to do here?" and answers it by "say[ing] that the Court is forbidden to raise the defense at this late hour." [Doc. No. 45 at 11]. The government responds that Rudolph is improperly "conflat[ing] this Court's *sua sponte* request for additional briefing with the Court making a *sua sponte* ruling." [Doc. No. 46 at 5] (emphasis in original).

The court agrees with the government that this is an important distinction. As Rudolph points out, the Eleventh Circuit has recently stated that "there is some uncertainty in the law as to exactly when it is appropriate for a court to raise the issue [of procedural default] sua sponte." *Walker v. United States*, 2021 WL 3754596, at *4 (11th Cir. Aug. 25, 2021) (unpublished). The Supreme Court has clearly ruled that "[a] court of appeal

is not 'required' to raise the issue of procedural default *sua sponte*." *Trest v. Cain*, 522 U.S. 87, 89 (1997) (emphasis added). The Court declined to go further and address whether the appeals courts are permitted, rather than required, to raise procedural default *sua sponte*. In *Trest*, the Fifth Circuit had applied the bar *sua sponte* without requesting briefing from the parties, and the Court remarked on that. "We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home." *Id*. at 92. That precept is the same one followed by the Eleventh Circuit in *Paez* and expressed in *Esslinger v. Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995), where the circuit stated that "we think it fundamentally unfair for a court *sua sponte* to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." Thus, this court felt it was important to give Rudolph an opportunity to show cause. "*Trest* makes clear that, for a court to respond to the Government's initial failure to raise procedural default by 'giving the parties an opportunity for argument,' or 'ask[ing] for further briefing,' so that the court may ultimately decide the petition on the basis of procedural default, is different than the court simply 'rais[ing] the procedural default sua sponte.'" *Trudeau*

v. United States, No. 3:16-CV-273 (JCH), 2017 WL 1754765, at *7 (D. Conn. May 4, 2017).

The Eleventh Circuit has recognized that district courts may raise the issue of procedural default. In *Howard v. United States*, 374 F.3d 1068, 1073 (11th Cir. 2004), the Circuit remarked that "[t]he government failed to raise the defense of procedural default in the district court, and the court did not bring it up either. In these circumstances *Gray v. Netherland,* 518 U.S. 152, 165–66, 116 S.Ct. 2074, 2082, 135 L.Ed.2d 457 (1996), prevents the government from benefitting now from a defense it did not raise then." (emphasis added). The Eleventh Circuit reiterated this position in *Hartge v. McDonough,* 210 F. App'x 940, 944 n.3 (11th Cir. 2006), when it determined that the state had waived the defense of procedural default because "[t]his theory of procedural default was neither raised by the state nor considered by the district court." (emphasis added).

The Supreme Court has likewise allowed that a court may consider a defense not raised by the government. As described above, the Court in *Trest* emphasized that an appeals court was not required to raise the issue of procedural default *sua sponte*, thereby allowing for the possibility that it may raise the issue *sua sponte*. The Court has also stated that it can address defenses not raised by the government in habeas cases. In *Shiro v. Farley*,

510 U.S. 222, 228-29 (1994), the Court remarked that the state had failed in that habeas case to raise the argument that providing the petitioner with the relief he sought would require an improper retroactive application of a new rule, in violation of the principle asserted in *Teague v. Lane,* 489 U.S. 288 (1989) (plurality opinion). The court then indicated that even though the "State can waive the *Teague* bar by not raising it . . . we undoubtedly have the discretion to reach the State's *Teague* argument." *Id*. at 788-89. The Court ultimately declined to do so, however, because the State had omitted the *Teague* defense from its certiorari submission, not because it did not raise the argument in a lower court.

Various courts have considered Rudolph's question. In *Yeatts v. Angelone*, 166 F.3d 255, 261-62 (1999), the Fourth Circuit analyzed case law and answered the question in the affirmative:

> Nevertheless, in the presence of overriding interests of comity and judicial efficiency that transcend the interests of the parties, a federal habeas court may, in its discretion, deny federal habeas relief on the basis of issues that were not preserved or presented properly by a state. *See Granberry v. Greer,* 481 U.S. 129, 131–36, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (holding that based on concerns of comity and judicial economy, a federal habeas court, within its discretion, may raise an exhaustion defense that was not raised in the district court). Those concerns support the conclusion that a federal habeas court possesses the authority to address, in its discretion, whether there exists an unexcused adequate and independent state-law ground for a denial of relief from a challenged conviction or sentence.

Comity is a two-way street, requiring a delicate balancing of sometimes-competing state and federal concerns. *See Hardiman v. Reynolds,* 971 F.2d 500, 503 (10th Cir. 1992). On occasion, interests of comity may counsel a federal habeas court to ignore the failure of a state to assert a defense founded upon procedural default. *See id.* Furthermore, often—though by no means always—judicial efficiency is advanced when a federal habeas court addresses an issue of procedural default despite the failure of the state to preserve the issue properly. For example, a federal court may find that a petitioner obviously has procedurally defaulted an issue and may avoid a decision on a complex federal question presented by that issue by denying relief on the basis of the adequate and independent state-law ground despite the failure of a state to assert a procedural bar. In such a situation, a federal court would be justified in considering the issue of procedural default and denying the petition on that basis. Conversely, on occasion the determination of whether a petitioner has defaulted his claims will present difficult issues of state law that are not readily susceptible to decision by a federal court, while the claim advanced by the petitioner patently is without merit. In such a situation, a federal habeas court would not be justified in considering the procedural default issue. *See id.*

Our conclusion that a federal habeas court possesses the authority, in its discretion, to decide a petitioner's claim on the basis of procedural default despite the failure of the state to properly preserve procedural default as a defense comports with the unanimous decisions of the other courts of appeals that have considered this question. The First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all agree that a federal court, in the exercise of its judicial discretion, may address procedural default despite the failure of the state to preserve or present the issue properly. *See Windham v. Merkle,* 163 F.3d 1092, 1099–1101 (9th Cir. 1998); *Magouirk v. Phillips,* 144 F.3d 348, 357–58 (5th Cir. 1998); *Brewer v. Marshall,* 119 F.3d 993, 999 (1st Cir. 1997), *cert. denied,* 522 U.S. 1151, 118 S.Ct. 1172, 140 L.Ed.2d 182 (1998); *Esslinger v. Davis,* 44 F.3d 1515, 1524–25 (11th Cir. 1995); *Washington v. James,* 996 F.2d 1442, 1448 (2d Cir. 1993); *Hardiman v. Reynolds,* 971 F.2d 500,

> 501–05 (10th Cir. 1992); *Hull v. Freeman,* 932 F.2d 159, 164 n. 4 (3d Cir. 1991), *overruled on other grounds by Caswell v. Ryan,* 953 F.2d 853 (3d Cir. 1992); *Burgin v. Broglin,* 900 F.2d 990, 997–98 (7th Cir. 1990); *see also Bannister v. Delo,* 100 F.3d 610, 619 (8th Cir. 1996) (noting that district court rejected petitioner's argument that the circuit court improperly raised procedural default sua sponte in a prior appeal).
>
> A federal habeas court, in determining whether it should exercise its discretion to notice a petitioner's procedural default, should be guided by the interests of comity and judicial efficiency that support the consideration of this issue despite the failure of the state to preserve or present the issue properly. The "exercise of. . . discretion should not be automatic, but must in every case be informed by those factors relevant to balancing the federal interests in comity and judicial economy against the petitioner's substantial interest in justice." *Magouirk,* 144 F.3d at 360. Additionally, "the court should consider whether justice requires that the habeas petitioner be afforded with notice and a reasonable opportunity to present briefing and argument opposing dismissal." *Id.* Further, the court should take into consideration whether the failure of the state to raise the matter of procedural default in a timely manner was intentional or inadvertent, and when a state intentionally has declined to pursue the defense for strategic reasons, the court should be circumspect in addressing the issue. *See id.* at 359–60.

Other courts around the nation have also determined that a court may raise the issue of procedural default *sua sponte*. *See Green v. United States*, Nos. CV408–193, CR407–042, 2009 WL 6496558, at *5 n.7 (S.D. Ga., Sept. 23, 2009), *Nasirun v. United States*, No. 8:05-CV-411-T-27MSS, 2008 WL 717823 *4 (M.D. Fla. 2008), *Bradford v. United States*, No. 7: 20-CV-138 (WLS), 2021 WL 3503770, at *3 n.1 (M.D. Ga. April 7, 2021), *Oakes v. United States,* 400

F.3d 92, 97 (1st Cir. 2005) ("[W]e hold that a district court has the discretion, in a section 2255 case, to raise questions of procedural default sua sponte, even when the government has filed a reply and eschewed any reference to that defense."). *See also United States v. Willis,* 273 F.3d 592, 596 (5th Cir. 2001) ("[A] court may, *sua sponte*, invoke the procedural default rule as a bar to § 2255."); *Hines v. United States,* 971 F.2d 506, 509 (10th Cir. 1992) (same), *Chacon-Vela v. United States*, No. 1:07–cr–0148–JEC–2, 2012 WL 1657193, at *2 (N.D. Ga. May 9, 2012) ("It is true that a court may *sua sponte* raise the issue [of procedural default], if it provides the defendant with an opportunity to show cause for his default."); *Macias-Ortiz v. United States*, Nos. 8:09–cv–1494–T–24 TGW, 8:07–cr–0086–T–30 TGW, 2009 WL 5214985, at *3 n.9 (M.D. Fl. Dec. 29, 2009) (citing cases in support of raising the issue of procedural default where the government has failed to raise the defense); *Evans v. United Sates*, Nos. CV613–005, CR610–029, 2013 WL 587535, at *2 (S.D. Ga. Feb. 14, 2013) adopted by 2013 WL 839239 (S.D. Ga. Mar 06, 2013) (applying the procedural default bar and recommending dismissal of the § 2255 petition during the Rule 4(b) preliminary review because "[f]ederal habeas courts are authorized to apply the procedural default defense *sua sponte*").

In *Day v. McDonough*, 547 U.S. 198, 205 (2006), the Supreme Court stated that "the [statute of] limitations defense resembles other threshold barriers — exhaustion of state remedies, procedural default, nonretroactivity — courts have typed 'nonjurisdictional,' although recognizing that those defenses 'implicat[e] values beyond the concerns of the parties.'" (quoting *Acosta v. Artuz,* 221 F.3d 117, 123 (2nd Cir. 2000)). The Court then found:

> that district courts are permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition. We so hold, noting that it would make scant sense to distinguish in this regard AEDPA's time bar from other threshold constraints on federal habeas petitioners. *See supra,* at 1682; Habeas Rule 5(b) (placing "a statute of limitations" defense on a par with "failure to exhaust state remedies, a procedural bar, [and] non-retroactivity"); *Long,* 393 F.3d, at 404 ("AEDPA's statute of limitations advances the same concerns as those advanced by the doctrines of exhaustion and procedural default, and must be treated the same.").

Id. at 209. The Eleventh Circuit then determined in *Burgess v. United States*, 874 F.3d 1292, 1298 (2017), that under *Day*, "a district court had the authority to raise [a threshold defense] itself once the government failed to do so in its response to [the petitioner's] § 2255 motion."[10] The Circuit went on

[10] In *Burgess*, the Eleventh Circuit held that a district court may not *sua sponte* invoke a collateral-action waiver where the government has not included that defense in its response to the § 2255 motion. The circuit remarked that the court may, however, ask the government if it intends to rely on the waiver. If the government indicates that it does so intend, the

to outline the constraints imposed by *Day* on the district court before it could exercise this authority:

> the court first had to give the parties fair notice and a chance to present their positions on the [threshold] defense, and it had to consider the parties' respective positions. It also had to determine whether any delay in the application of the [threshold defense] significantly prejudiced [the petitioner] and "whether the interests of justice would be better served by addressing the merits."

Id. at 1298-99. Here, the court has given the parties fair notice and an opportunity to present their positions concerning procedural default. The court does not find any prejudice to Rudolph in the delayed focus on this issue. There have been no other proceedings or actions in this case in the interim, and Rudolph himself now seeks another stay of the litigation.[11] Even if the § 2255 motion is successful and three of his life sentences are

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district court should provide the movant with an opportunity to be heard on the issue. The Eleventh Circuit distinguished procedural default from collateral-action waiver and applied the Federal Rules of Civil Procedure rather than *Day* to collateral-action waiver because "[u]nlike a collateral-action waiver, which only certain criminal defendants opt to enter into, all prisoners are bound by the statute of limitations and the doctrines of exhaustion, procedural bar, and nonretroactivity." 874 F.3d at 1299.

[11] Rudolph requests that the court stay any ruling on his § 2255 motion until the Supreme Court resolves certiorari petitions in *Blackwell v. United States*, No. 20-8016, and *Granda*. [Doc. No. 45 at 24]. The petition in *Blackwell* was denied on October 4, 2021. A petition in *Granda* was filed on November 1, 2021. No. 21-6171. The court declines to further stay this litigation.

vacated, Rudolph is still currently subject to another life sentence and consecutive 120 years of imprisonment. Furthermore, there is nothing in the record to indicate that the government strategically withheld the procedural default defense. Instead, it affirmatively asserts the defense in its supplemental brief. Applying *Granda*, it is clear that Rudolph cannot show cause for his procedural default. The procedural default defense "substantially implicate[s] the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice." *Hines v. United States*, 971 F.2d 506, 509 (10th Cir. 1992). Procedural default is manifest from the record in this case. The interests of justice and judicial economy would be better served by dismissing Rudolph's motion on the basis of procedural default. The court therefore finds that it has the discretion to consider procedural default in this case.

C. Has the government deliberately waived the procedural default defense?

Rudolph next argues that the government has deliberately waived the procedural default defense. [Doc. No. 45 at 9]. He bases this argument on two grounds: (1) that the government did not raise procedural default prior to the court's order for supplemental briefing, and (2) his review of other *Davis* § 2255 motions in this district and his resulting determination that "the

government well knows how to raise the procedural-default defense when it wants to." [Doc. No. 45 at 2]. The government maintains that it did not deliberately waive this defense and stresses that "the omission of a discussion regarding procedural default in the government's initial response was an oversight, not deliberate." [Doc. No. 46 at 5]. The government points to its history of arguing procedural default in cases such as Rudolph's where it has foregone serious changes for the sake of the plea agreement. [*Id.*].[12]

Both sides point to the government's actions in other cases; however, this court is concerned only with the government's actions in this case. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). To penalize the government in this case simply because it chose to waive procedural bars in cases where it concluded the interests of justice warranted such waivers would have a chilling effect on the government's decision to waive procedural bars in any cases, to the detriment of criminal defendants generally. The

[12] Here, the government agreed to forego the death penalty and other charges in exchange for Rudolph's guilty plea.

court thus does not imply waiver by the fact that the government acted differently in other cases. "In keeping with the need to avoid judicial second-guessing of prosecutorial decisions, we have never held that similarly situated defendants must be treated identically. We allow the government discretion to decide which individuals to prosecute, which offenses to charge, and what measure of punishment to seek." *United States v. Lawrence*, 179 F.3d 343, 348 (5th Cir. 1999) (finding that "[n]otwithstanding [the petitioner's] protestations, the government had a rational and proper basis for its decision to oppose a [§ 2255] motion identical to one that it had earlier conceded."). Rudolph "cannot estop the government from changing its position as the evolving nature of the law encourages the government (as well as defendants) to seek new pronouncements from the courts." *Id*. at 350.

Furthermore, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano,* 507 U.S. 725, 733 (1993) (internal quotation omitted). In *Day v. McDonough*, 547 U.S. 198, 199 (2006), the Supreme Court determined that "[t]he District Court in this case confronted no intelligent waiver on the State's part" where the state asserted in its answer that the habeas petition was timely yet the magistrate judge determined under controlling Eleventh Circuit precedent

that the petition was actually untimely.[13] Nine months after the state answered the petition, the magistrate judge issued notice to the defendant and afforded him an opportunity to show why his petition was not untimely.[14] At that time, the government still did not contest the timeliness of the petition. The Court stated that the record did not indicate the State "strategically" withheld the defense or deliberately waived it. The Court characterized the government's actions as "inadvertent error, a miscalculation that was plain under Circuit precedent." *Id*. at 211. In contrast, the Court found deliberate waiver by the government in *Wood v. Milyard*, 566 U.S. 463, 474 where "the State, after expressing its clear and accurate understanding of the timeliness issue . . . deliberately steered the District Court away from the question and towards the merits of Wood's petition." The Court noted that "the State informed the District Court it would 'not challenge' Wood's petition on timeliness grounds." *Id*. at 470. The government's conduct in this case aligns more with the state's conduct in *Day* than in *Wood*. Here, the government has not stated that it will not challenge

[13] The district court adopted the magistrate judge's recommendation.
[14] In this case, the court requested supplemental briefing on the issue of procedural default ten months after the government filed its initial response to the § 2255 motion. During approximately six of these months the case was stayed pending the Supreme Court's rulings in *Borden* and *Burris*.

Rudolph's petition on procedural grounds. Instead, it has affirmatively asserted the defense in its supplemental briefing. This conduct does not constitute a deliberate waiver but rather a forfeiture at most. As explained in *Day*, a court can raise a forfeited defense. *See also Wood* at 471 (clarifying that "[i]n *Day,* we affirmed a federal district court's authority to consider a forfeited habeas defense when extraordinary circumstances so warrant."); *Burgess* at 1298 (explaining the limits on the court's ability to address a forfeited defense). The court does not find there to be a deliberate waiver on the part of the government thus it may apply the procedural default doctrine in this case.

D. Has Rudolph procedurally defaulted his *Davis* claim?

Rudolph argues that the Eleventh Circuit decision in *Granda* "is wrong to say that a *Davis* claimant cannot establish cause and prejudice" necessary to excuse procedural default. [Doc. No. 45 at 17]. He maintains that his "claim was not reasonably available until the Supreme Court expressly overruled its own precedents and issued novel opinions red-lining three nearly-identical residual clauses." [*Id*. at 18]. However, in *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1261 (11th Cir. 2013) (overruled on other grounds by *McCarthan v. Director of Goodwill Industries-Suncoast, Inc*., 851 F. 3d 1076 (11th Cir. 2017)), the Eleventh Circuit stressed that:

> This Court has made clear that futility of a claim due to adverse Circuit precedent at the time of direct appeal does not constitute cause to excuse a procedural default in a first § 2255 motion. *McCoy,* 266 F.3d at 1258–59 (applying the procedural default rule in a first § 2255 motion because petitioner did not raise his *Apprendi* claim on direct appeal, even though the claim was rejected by "every circuit which had addressed the issue" at the time). (footnote omitted)

Granda makes clear that Rudolph "had the building blocks of a due process vagueness challenge to the § 924(c) residual clause even before the Supreme Court's decision in *Davis*." *Martinez v. United States*, 853 F. App'x 416, 418 (11th Cir. 2021). As the government puts it, "Rudolph's response argues that *Granda* is wrongly decided, but it is beyond the power of this Court to ignore Eleventh Circuit precedent." [Doc. No. 46 at 8].[15] Because Rudolph cannot establish cause to excuse his procedural default, the court need not address the prejudice prong of the procedural default analysis.

[15] Counsel for Rudolph filed a petition for certiorari in another case in this district, *Blackwell v. United States*, No. 20-8016, concerning procedural default and the *Granda* decision. Prior to the ruling in *Granda*, the court in *Blackwell* determined that the movant had procedurally defaulted his *Davis* claims. Counsel's petition stated that the Eleventh Circuit in *Granda* adopted the view of the district court in *Blackwell*. The petition included the question of "[w]hether a defendant can ever show cause and prejudice to avoid the procedural default bar on a meritorious *Davis* challenge to a § 924(c) conviction?" The Supreme Court denied certiorari on October 4, 2021. [Doc. No. 48].

Rudolph maintains, however, that should the court find he cannot show either cause or prejudice, his default should still be excused because he is actually innocent of the § 924(c) convictions. "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citations omitted). Rudolph asserts that he "is actually innocent of his § 924(c) offenses because each is based solely on invalid, residual-clause predicates." [Doc. No. 45 at 21]. The government responds that Rudolph must show that he is actually innocent not just of the § 924(c) charges, but also Count 19 of the indictment and Counts 1 of the indictments in both this district and the Northern District of Alabama.[16] [Doc. No. 44 at 10]. This is because the government dismissed Count 19 (which was punishable by death) and did not pursue the death penalty on Counts 1 of the Georgia and Alabama indictments in exchange for

[16] Count 19 of the Northern District of Georgia indictment charged Rudolph with transporting the explosive used to bomb the New Woman All Women Health Care Clinic in Birmingham, Alabama. [Doc. No. 4 at 8-9]. Count 1 of the Northern District of Georgia indictment concerned the bombing at Centennial Olympic Park. [*Id.* at 1]. Count 1 of the Northern District of Alabama indictment concerned the bombing at the New Woman All Women Health Care Clinic.

Rudolph's guilty plea. The government maintains that Rudolph's admissions both in the plea agreement and the plea colloquy prevent him from being able to make a showing of actual innocence on these charges.

The government cites to *Bousley* in support of this argument. There, the Supreme Court held that "[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." 523 U.S. at 624. Rudolph disagrees with the government's characterization and avers that "[n]one of the government's examples qualify as 'more serious charges.'" [Doc. No. 45 at 22]. He contends that he pled guilty to Count 1 of each indictment and that "the agreement not to seek death on that count is not a 'charge' at all, but merely a discretionary sentencing enhancement." [*Id.*]. As for Count 19, he maintains that it is "equally serious" to the charges in Counts 1 of the two indictments. [*Id.*]. He thus asserts that he does not need to show actual innocence on those charges.

In return for Rudolph's guilty plea, the government agreed not to file notice of intent to seek the death penalty for Counts 1 and 2. [Doc. No. 19-1 at 14]. Counts 1 and 2 of the indictment concern the bombing at Centennial Olympic Park, in which Alice Hawthorne was killed. The statutes in Counts 1 and 2, 18 U.S.C. §§ 844(i) and 924(c), both provide for punishment by death

when death results. The government also agreed to dismiss thirteen other charges in the indictment in return for Rudolph's guilty plea. [Doc. No. 18-1 at 3]. Two of those charges, Counts 3 and 19, concern transportation of the explosive used in some of the bombings. The statute in Counts 3 and 19, 18 U.S.C. § 844(d), also provides for punishment by death when death results.[17]

Because all three statutes allow for punishment by death in this situation, Rudolph maintains that the § 844(d) charge "is merely equivalent to the crimes to which Mr. Rudolph pled guilty." [Doc. No. 45 at 22]. The Supreme Court did not define the term "more serious charges" in *Bousley*. It did stress, however, that the reason why actual innocence can excuse procedural default is to prevent excessive punishment of someone who is factually innocent. 523 U.S. at 923. Understanding the dynamics behind plea negotiations, the Court emphasized that the showing of actual innocence would have to extend to any more serious charges forgone by the government during the plea negotiations. As the court in *Booth v. Thomas*, No. 7:12-cv-

[17] In its brief, the government refers the court only to Count 19, which like Count 3 is a charge under 18 U.S.C. § 844(d). Count 19 concerns transportation of the explosive used in the bombing at the New Woman All Women Health Care Clinic in Birmingham, Alabama, in which Robert Sanderson was killed. However, the government also dismissed Count 3 pursuant to the plea agreement. Count 3 concerned transportation of the explosive used in the bombing at Centennial Olympic Park, in which Alice Hawthorne was killed.

0747, 2015 WL 400662, at * 10 (N.D. Ala. Jan. 28, 2015) explained, "[t]he likely rationale for *Bousely's* rule regarding a showing of actual innocence of foregone charges is that the defendant should not receive an unjustified windfall as a result of his guilty plea." "Under *Bousley*, a defendant must demonstrate actual innocence for a more serious charge or 'a petitioner could escape criminal liability [simply] because of a prosecutor's lenience in agreeing to conviction on less serious, but now invalid, counts in obtaining the plea.'" *United States v. Hernandez*, No. 14-cr-00120-EMC-6, 2020 WL 4349850, at *5 (N.D. Cal. July 29, 2020) (quoting *Vosgien v. Persson*, 742 F.3d 1131 (9th Cir. 2014)).

Here, Rudolph is technically correct that the death penalty for Counts 1 and 2 is not a separate charge listed in the indictment. But it also not just "a discretionary sentencing enhancement" as Rudolph tries to characterize it. [Doc. No. 45 at 22]. Under 18 U.S.C. § 3593(a)(2), the government must file and serve on the defendant a notice "setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death." After the defendant is either found guilty by a jury or pleads guilty, a separate hearing must be conducted to determine if the death penalty should be imposed. This hearing may be held before the jury that convicted the defendant, a separate jury empaneled for sentencing

purposes if the defendant pled guilty, or the judge if the defendant so moves and the government agrees. 18 U.S.C. § 3593(b). At this hearing, "the government must prove the existence of any aggravating factor beyond a reasonable doubt." *United States v. Lighty*, 616 F.3d 321, 343 (4th Cir. 2010). While it may be within the government's discretion to seek the death penalty, the death penalty itself is not a discretionary enhancement to a defendant's sentence. "[T]he Eighth Amendment requires that a sentence of death not be imposed arbitrarily." *Jones v. United States*, 527 U.S. 373, 381 (1999).

It is clear from the record of this case that the government decided to forego the death penalty on Counts 1 and 2 in exchange for Rudolph's guilty plea. The government also agreed to withdraw its previously filed notice of intent to seek the death penalty in the Northern District of Alabama case. [Doc. No. 19-1 at 15]. Additionally, the government "agree[d] not to bring further criminal charges against the defendant related to the charges to which he's pleading guilty, or to the information that the defendant provide[d] to the government" concerning the location of hidden explosives and firearms,[18] as described in paragraph 11 of the plea agreement. [*Id.*].

[18] Rudolph had informed the government that there were five locations containing "a significant amount of hidden dynamite." [Doc. No. at 18-1 at 3]. One of these locations "contain[ed] a hidden bomb buried approximately 50

The government also dismissed thirteen other charges in the federal indictment that were pending against Rudolph.

These decisions by the government to forego the death penalty and additional significant charges limited Rudolph's exposure at sentencing. Also, there is no indication in the record that the government would not have elected to seek the death penalty on Counts 3 and 19 had Rudolph not pled guilty. Thus, Counts 3 and 19 could be characterized in that respect as more serious charges than the charges to which Rudolph pled guilty. At the very least, they contain equally serious charges to those in Counts 1 and 2. Again, the concerns implicated in the actual innocence analysis include ensuring that a movant is not being punished more severely than he should be. Thus, it is sensical that a movant who pled guilty and asserts actual innocence should have to make a showing of factual innocence as to any equally serious charges that were foregone by the government in exchange for his guilty plea. Courts in both this circuit and across the nation have found that "the *Bousley* actual-innocence showing extends to more-serious and as-serious charges." *United States v. Ross*, No.: 2:10-CR-178, 2017 WL 3769758, at *14 (N.D. Ind. Aug. 31, 2017). *See also Lewis v. Peterson*, 329 F.3d 934, 937 (7th Cir. 2003)

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yards from a major roadway and approximately 200 yards from homes and businesses." [*Id.* at 4].

("The logic of the *Bousley* opinion does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. It is enough that it is as serious. For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound."); *Tavera v. United States*, No. 16-22346-CIV-KING/White, 2018 WL 3014073, at *5 (S.D. Fla. June 15, 2018) ("In the guilty plea context, in addition to showing that he was actually innocent of the offense to which he pled guilty, the defendant also must demonstrate that he was actually innocent of any charges of greater or equal seriousness that the government dismissed or withheld from charging in return for the guilty plea."); *United States v. Caso*, 723 F.3d 215, 221-22 (D.C. Cir. 2013) (finding that the analysis undertaken by the Supreme Court in *Bousley* would have been superfluous if it was not necessary for a movant to make a showing of actual innocence on equally serious charges); *Kimbrough v. United States*, No. 3:19-cv-1006, 2021 WL 809678, at *6 (M.D. Tenn. Mar. 3, 2021) (stating that the § 2255 movant failed to make the requisite showing of actual innocence on equally serious charges that also carried potential life sentences); *Ford v. United States*, No. CV 115-034, 2016 WL 6211722, at *2 (S.D. Ga. Oct. 24, 2016) (ruling that the movant was procedurally barred because he could not

show he was actually innocent of equally serious charges that were dropped during the process of plea bargaining); *Booth v. Thomas*, No. 7:12-CV-0747-AKK-JEO, 2015 WL 400662, at *10 (N.D. Ala. Jan. 28, 2015) (same).

The actual innocence exception is a narrow one that has been described as a "'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring). The primary purpose of the actual innocence analysis is to prevent a fundamental miscarriage of justice. To that end, the court can see no cogent basis for distinguishing between whether a foregone charge was "more serious" or "equally serious." Rudolph has not made a threshold showing of actual innocence. Indeed, he has not even attempted to show that he is factually innocent of the § 844(d) charges or even any of the other charges that the government forewent in the plea agreement. His admissions in both the plea agreement and the plea colloquy establish his guilt. The court finds that he has failed to establish actual innocence to overcome his procedural default.

Because Rudolph cannot establish cause to excuse his procedural default or show actual innocence to overcome the default, the court finds that he has procedurally defaulted his *Davis* claims.

III. Even if Rudolph could overcome procedural default, he cannot proceed on his § 2255 motion because he waived the ability to collaterally attack his sentence.

In its response to Rudolph's § 2255 motion, the government argues that Rudolph has waived the ability to collaterally attack his sentence. [Doc. No. 37 at 5]. The government refers the court to Paragraph 14 of the plea agreement:

> 14. WAIVER OF APPEAL: In consideration of the Government's recommended disposition, the defendant voluntarily and expressly waives, to the maximum extent permitted by federal law, the right to appeal his conviction and sentence in this case, and the right to collaterally attack his sentence in any post-conviction proceeding, including motions brought under 28 U.S.C. § 2255 or 18 U.S.C. § 3771, on any ground.

[Doc. No. 18-1 at 4]. The government argues that Rudolph knowingly and voluntarily agreed to this waiver, and that this waiver prevents him from seeking relief via the § 2255 motion. Rudolph presents two arguments in response: (1) that the plea agreement only bars him from challenging his sentence and not his § 924(c) convictions and (2) the waiver cannot be enforced because the sentence he has received is now beyond the statutory maximum following the Supreme Court's decision in *Davis*. The court will address each of these arguments in turn.

A. Does the waiver bar Rudolph from collaterally attacking the § 924(c) convictions?

Rudolph contends that the plea agreement waives only his ability to collaterally attack his sentence, not the underlying convictions as he maintains he is doing in his § 2255 motion. He emphasizes the language in the plea agreement in support of his argument. He also cites the portion of the plea transcript in which the court queries him as follows: "You are also waiving your right to ever *collaterally attack your sentence* in any post-conviction proceeding, such as a habeas corpus or other type proceeding. Do you understand that? Yes." [Doc. No. 19 at 49, emphasis added by defendant]. He cites the following cases in support of his argument that the language of the plea agreement allows him to collaterally attack his § 924(c) convictions:

> *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006) ("A defendant's waiver of his right to appeal a sentence is just that: it does not also constitute a waiver of his right to challenge a conviction."); *Cowart v. United States*, 139 Fed. Appx. 206, 208 (11th Cir. 2005) (unpublished) ("the language of Cowart's sentence appeal waiver provided that she waived her right 'to collaterally attack her sentence,' and did not mention a waiver of the right to attack her plea or the plea agreement itself [and therefore] Cowart's valid sentence-appeal waiver does not preclude these issues"); *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004) (holding that waiver of "right to appeal any sentence imposed" does not bar defendant from appealing on grounds that government breached plea agreement); *Allen v. Thomas*, 161 F.3d 667, 673 (11th Cir. 1998) (holding that

> agreement not to seek "parole, commutation of sentence, reprieve, or any other form of relief from life imprisonment" did not bar defendant from seeking federal habeas review of underlying convictions because it referred "to a reduction of the sentence, not to relief from the underlying conviction itself").

[Doc. No. 38 at 4]. Rudolph argues that "[b]ecause the plea colloquy in this case only conveyed to Mr. Rudolph that he was waiving the right to collaterally attack his sentences, not his convictions, it does not meet the *Bushert* test." [*Id*. at 5]. In *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993), the Eleventh Circuit held that in order to enforce a sentence appeal waiver, "[t]he government must show that either (1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver."

The cases cited by Rudolph are inapposite. In *Cowart*,[19] the § 2255 movant attacked the validity of her guilty plea due to the ineffectiveness of her counsel. The Eleventh Circuit determined that her challenge to her plea was not barred by the appeal waiver because the waiver only concerned the sentence, and not the plea itself. Here, Rudolph has not challenged the

[19] The court also notes that this is an unpublished decision and thus is not binding precedent. *See Crocker v. Beatty,* 995 F.3d 1232, 1241 n.6 (11th Cir. 2021) ("unpublished cases . . . do not serve as binding precedent and cannot be relied upon to define clearly established law") (internal quotation omitted).

validity of his plea. In *Copeland*, the Eleventh Circuit rejected the government's argument that Copeland had "waived his right to appeal anything connected with [the drug] case except for the three exceptions listed in paragraph 22 of the waiver of appeal, none of which apply." 381 F.3d at 1104-5 (emphasis added, internal quotation omitted). In *Thomas*, the Eleventh Circuit focused on the phrase "or any other form of relief from life imprisonment" in the waiver provision and determined "that language of that level of generality is not sufficient to constitute a valid waiver of specific rights." 161 F.3d at 672. Here, there is no ambiguity in the waiver provision of Rudolph's plea agreement. *Palmer* concerned the waiver of the right to appeal a conviction, not collaterally attack it. There, the Fifth Circuit held that "[a] defendant's waiver of his right to appeal a sentence is just that: it does not also constitute a waiver of his right to challenge a conviction." 456 F.3d at 487. Here, the language of the waiver provision is clear that Rudolph waived the ability to appeal both his conviction and his sentence, thus *Palmer* has no bearing on this case.

Indeed, the holdings in all of these cases cited by Rudolph are narrowly tailored to the facts of those individual cases, thus they are not helpful to Rudolph's cause. This is because "[a] plea agreement is, in essence, a contract between the Government and a criminal defendant." *United States*

v. Howle, 166 F.3d 1166, 1168 (11th Cir. 1999). There is no requirement that each contract, or plea agreement, be crafted the same in every case. If there were, the whole system of plea negotiations would be a useless exercise. In the cases cited by Rudolph, the courts looked closely at the language of the individual plea agreements to determine if the defendants had agreed to the asserted waiver. Here, the court will do likewise.

Rudolph's argument hinges on the lack of the words "or conviction" in the collateral attack waiver portion of the plea agreement and in a statement signed by Rudolph and attached to the plea agreement. For the purposes of clarity, the court reproduces this portion of Rudolph's argument below with the emphasis as supplied by Rudolph:

> The government quotes the plea agreement, but it fails to understand it. The agreement states:
>
> > WAIVER OF APPEAL: In consideration of the Government's recommended disposition, the defendant voluntarily and expressly waives, to the maximum extent permitted by federal law, the right to appeal his conviction and sentence in this case, *and the right to collaterally attack his sentence in any post-conviction proceeding*, including a motion brought under 23 U.S.C. § 2255 or 18 U.S.C. § 3771, on any ground.
>
> The text states that Mr. Rudolph only waived (1) "the right to appeal his conviction and sentence" and (2) "the right to collaterally attack his sentence." The language near the end of

> the agreement, directly above Mr. Rudolph's signature, draws this same line:
>
> > I also have discussed with my attorney the rights I may have to appeal or challenge my sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, to the maximum extent permitted by federal law, from appealing my conviction or sentence *or challenging my sentence in any post-conviction proceeding*.

[Doc. No. 38 at 2-3, footnotes omitted]. Rudolph goes on then to declare that "[t]he text speaks for itself." [*Id*. at 3].

But the court's inquiry where a waiver provision is concerned is not limited to just the text itself. As the Eleventh Circuit explained in *United States v. Jeffries*, 908 F.2d 1520, 1523 (1990):

> Plea agreements are interpreted and applied in a manner that is sometimes likened to contractual interpretation. This analogy, however, should not be taken too far. In *In re Arnett,* 804 F.2d 1200, 1203 (11th Cir. 1986), this court summarized the standards applied to interpretation of plea agreements. First, the court noted that a "hyper-technical reading of the written agreement" and "a rigidly literal approach in the construction of language" should not be accepted. *Id.* Second, the written agreement should be viewed "against the background of the negotiations" and should not be interpreted to "directly contradic[t] [an] oral understanding." *Id.* Finally, a plea agreement that is ambiguous "must be read against the government." *Id.* (citing *United States v. Harvey,* 791 F.2d 294, 303 (4th Cir. 1986)). The rational for this method of interpretation is that a plea agreement must be construed in light of the fact that it constitutes a waiver of "substantial constitutional rights" requiring that the defendant be adequately warned of the consequences of the plea. *Arnett,* 804 F.2d at 1203.

Because a waiver of either the right to appeal or collaterally attack is a serious relinquishment of rights, courts look to what a defendant "reasonably understood at the time he signed his plea agreement." *United States v. Copeland*, 381 F.3d 1101, 1109 (11th Cir. 2004). "To constitute a valid waiver of substantial constitutional rights, a guilty plea . . . must be offered with sufficient awareness of the likely consequences." *In Re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986) (per curiam) (citing *Brady v. United States*, 397 U.S. 742 (1970)). *See also United States v. Hunter*, 835 F.3d 1320, 1329 (11th Cir. 2016) (finding that the defendant "is entitled to specific performance of the terms of the agreement as he reasonably understood them at the time of his plea.").

The inquiry then is what Rudolph understood the term "sentence" in the waiver provision and the court's plea colloquy to mean. Where "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver," the waiver will be enforced. *Bushert*, 997 F.2d at 1351. "[A] defendant's informed and voluntary waiver of the right to collaterally attack a conviction and sentence is enforceable." *In re Acosta,* 480 F.3d 421, 422 (6th Cir. 2007). Rudolph does not allege that he did not understand the waiver provision.

The waiver language in his plea agreement does not treat the issue of his guilt as separate from the sentence to be imposed. Paragraph 2 of the plea agreement specifically outlines the rights he waived concerning adjudication of his guilt (*e.g.*, "the right to plead not guilty and the right to be tried by a jury . . . the right to confront and cross-examine the witnesses against him . . . [the right] to testify on his own behalf and present evidence in his defense.") [Doc. No. 18-1 a 1]. That paragraph goes on to state:

> The defendant understands that by pleading guilty, he is giving up all of these rights and there will not be a trial of any kind. The defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the sentence in post-conviction proceedings. By entering the Plea Agreement, the defendant is waiving those rights to appeal or collaterally attack his sentence, as specified in paragraph 14 below.

[*Id.*]

This was a binding plea under Federal Rule of Criminal Procedure 11(c)(1)(C). Thus, the conviction and the sentence are intertwined. During the plea hearing, the court specifically queried Rudolph on his understanding that his plea of guilty was tied to a specific sentence:

> THE COURT: I note that in your plea agreement on page 3, if you want to turn to that, paragraph 7, that all parties, including Mr. Rudolph, have agreed that he shall be sentenced to life imprisonment on Counts 1, 2, 6 and 11. That each of the remaining counts, that is Counts 5, 7, 10 and 12, as to those counts, he shall receive the maximum allowed on each count.

> Further, it provides that there shall be no fine. Is that your agreement and understanding?
>
> THE DEFENDANT: It is.

[Doc. No. 19-1 at 19]. The court then questioned Rudolph specifically regarding the sentence that would be imposed if he pled guilty:

> THE COURT: According to my calculations, you will receive four life sentences, one each for Counts 1, 2, 6 and 7. On Count 5 under your plea agreement, you will receive 20 years. On Count 7, you will receive 40 years. On Count 10, you will receive 40 years. And on Count 12, you will receive 20 years. Now these sentences may be run consecutively, which means that you will receive four life sentences, consecutively, and 120 years to follow. In fact, the statutes in this case require that each of the life sentences in this particular Indictment be run consecutively. Do you understand that?
>
> THE DEFENDANT: Yes.

[*Id*. at 46-47]. The court again inquired if Rudolph understood that he would receive a predetermined sentence under the binding plea if he pled guilty:

> THE COURT: Okay. Are you aware that the United States Sentencing Commission has issued guidelines for judges to follow in determining the sentence in a criminal case?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you and your attorneys talked about the Sentencing Commission guidelines and how they might apply to your case?
>
> THE DEFENDANT: Yes.

> THE COURT: While the Court will have a presentence report prepared for use later by the Bureau of Prisons, it will primarily be for the computation of the restitution. In this case, there is a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), and if I accept your plea agreement, the agreed disposition or sentence will be included in the judgment, and you will not be able to withdraw your plea.
>
> However, you may challenge the facts reported in the presentence report, and the Court will resolve those objections at the time of sentencing. Do you understand that?
>
> THE DEFENDANT: Yes.

[*Id*. at 48]. In advising Rudolph that he was waiving his right to appeal, the court did not distinguish between conviction and sentence, because the two are so intertwined. The court likewise did not make such a distinction when advising Rudolph that he was waiving his right to collaterally attack his sentence. [*Id*. at 49]. At the end of the hearing, the court informed Rudolph:

> Mr. Rudolph, pursuant to the Federal Rules of Criminal Procedure 11(c)(1)(C), I hereby accept your plea and approve your plea agreement. I now advise you that the agreed upon disposition will be included in the judgment of the Court.

[*Id*. at 53]. It is clear from the plea colloquy, the two paragraphs in the plea agreement describing waiver (Paragraphs 2 and 14), as well as the additional statement signed by Rudolph and attached to the plea agreement, that he understood the full significance of the waiver.

Furthermore, the court expressly advised Rudolph that the Sentencing Guidelines would not be considered when imposing his sentence. While it is possible to collaterally attack a sentence without challenging a conviction via a § 2255 motion, that is not the scenario in this case. For instance, a movant may challenge an increased sentence that was applied under the residual clause of the Armed Career Criminal Act, which was subsequently struck down as unconstitutionally vague in *Johnson*. In such a case, the defendant is not challenging his conviction but rather the enhancement to his sentence. Here, the sentence was not based on anything other than Rudolph's plea and the counts of conviction. "[I]t is the binding plea agreement that is the foundation for the term of imprisonment to which the defendant is sentenced." *Freeman v. United States*, 564 U.S. 522, 535 (2011) (Sotomayor, J., concurring). Any relief that Rudolph seeks as to his conviction can only be achieved through a collateral attack on his sentence. As the court in the Northern District of Alabama explained in its order analyzing the waiver in that case, "in order for Rudolph to collaterally attack his *conviction*, he first must attack his *sentence*, which he has waived the right to do." *Rudolph v. United States*, --F.Supp.3d--, 2021 WL 3212804, at *16 (N.D. Ala. July 29, 2021) (emphasis in original). The waiver in the Northern District of Alabama case contains the same language as the waiver in this case. The court finds

Rudolph's argument that the waiver does not bar his challenge to the § 924(c) convictions to be unpersuasive.

B. Can the waiver be enforced following the Supreme Court's decision in *Davis* if the predicate crime of arson is no longer a crime of violence for purposes of § 924(c)?

Rudolph argues that the waiver cannot be enforced because the sentence he has received is now beyond the statutory maximum following the Supreme Court's decision in *Davis*. On its face, this argument presumes that the court agrees with Rudolph his "§ 924(c) convictions are no longer viable after *Davis*." [Doc. No. 38 at 7]. The court makes no determination on that issue, however, as it need not proceed to a merits analysis of Rudolph's § 2255 motion because he has procedurally defaulted his *Davis* claims and the waiver bars him from receiving relief via this collateral attack. Nevertheless, the court may still dispense with Rudolph's argument. As explained above, the plea agreement is essentially a contract between Rudolph and the government. "In a contract (and equally in a plea agreement) one binds oneself to do something that someone else wants, in exchange for some benefit to oneself. By binding oneself one assumes the risk of future changes in circumstances in light of which one's bargain may prove to have been a bad one. That is the risk inherent in all contracts; they limit the parties' ability to take advantage of what may happen over the period in

which the contract is in effect." *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005).

In *Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020), the Seventh Circuit held that a defendant can waive the right to challenge the constitutionality of his statute of conviction, even in a situation such as Rudolph's where a § 924(c) conviction may be based on a crime that no longer serves as a valid precedent.[20] In *Grzegorczyk v. United States*, 997 F.3d 743, 748 (7th Cir. 2021), the Seventh Circuit also rejected the argument that the movant's § 2255 was constitutional in nature because it "merely asserts that murder-for-hire is not a 'crime of violence' under the elements clause [of § 924(c)]. This is an issue of statutory construction, not a claim of constitutional immunity from prosecution. As we have explained before, an unconditional guilty plea implicitly waives such challenges." (internal citations omitted).[21] The Ninth Circuit ruled similarly in *United States v.*

[20] The court emphasizes that it has not made a determination on the merits of Rudolph's argument that arson, the offense defined in 18 U.S.C. § 844(i), is no longer a crime of violence in light of the Supreme Court's ruling in *Davis*.
[21] A petition for certiorari was filed in this case on October 8, 2021, on the question of whether "an unconditional guilty plea, by itself, waive[s] a defendant's right to challenge his conviction under § 924(c) on the grounds that *Davis* rendered it unconstitutional."

Goodall, --F.4th--, 2021 WL 4768103 (Oct. 13, 2021). There, the Ninth Circuit stated:

> The contours of a conviction are fully known when the defendant pleads guilty and waives his appellate rights. The defendant admits his guilt, the facts alleged in the plea agreement, and the sufficiency of the facts to establish his guilt on each element of the crime charged. He also knows precisely what he is giving up in exchange for the benefits of the guilty plea at the very moment the plea is entered—a trial and the constitutional rights that accompany it. Although there always remains a chance the law could change in the defendant's favor, the defendant knowingly and voluntarily assumes that risk because he receives a presumably favorable deal under existing law.

(internal quotation and citation omitted). The court in Rudolph's case in the Northern District of Alabama found similarly. So too has a district court in the Fifth Circuit. In *Love v. United States*, No. 3:17-cv-1431-B (BT), 2021 WL 225214, at *2 (N.D. Tex. June 2, 2021), the court rejected the petitioner's argument that:

> "[a]side from being a miscarriage of justice, it would be an absurd result of this Court to understand and adopt the ruling in *Davis* by the Supreme Court, but then not give <u>any defendant</u> a chance to benefit from it because of a waiver made at the time the case had not yet been decided" (emphasis added) . . . because not every defendant pleads guilty, as his argument appears to presume. Moreover, even if all defendants pleaded guilty, they do not always do so pursuant to a written plea agreement with the Government containing a waiver provision.

(internal citation omitted). As the Eleventh Circuit stated in *United States v. Melton*, 861 F.3d 1320, 1321-22 (11th Cir. 2017):

> In negotiating a plea bargain, both sides aim for the best terms they can get, placing bets on what the future will hold. The problem is that the future and certainty are strangers, and not everyone wins a wager. Sometimes, a deal, like a tattoo, does not age well and what appeared to be attractive in the past seems unattractive in the future. But plea agreements, like most tattoos, are written in permanent ink and cannot be redrawn just because one party suffers from the plea bargain form of buyer's remorse.

Although it may seem unfair to Rudolph that the change in the law following *Davis* will not affect his sentence, it is not a miscarriage of justice to enforce the waiver that Rudolph negotiated and agreed to when he decided to enter his guilty plea.[22] Because Rudolph has procedurally defaulted his *Davis* claims and the waiver bars him from pursuing this collateral attack, the court denies his § 2255 motion.

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[22] Putting the waiver issue aside, the court notes that changes in law, even when they may be on point for a certain case, do not necessarily result in relief for seemingly affected defendants. For instance, not all changes in law are made retroactive. For years, many defendants could not receive relief under the Fair Sentencing Act of 2010. The Fair Sentencing Act became law on August 3, 2010, but was not made retroactive. It was not until the First Step Act was enacted on December 21, 2018, that the relief provided under the Fair Sentencing Act became available to defendants who were sentenced prior to August 3, 2010. On November 1, 2014, Amendment 782 to the United States Sentencing Guidelines was enacted, lowering the base offense level for most drug offenses under U.S.S.G. § 2D1.1. It was not made retroactive, however, until 2015. The Supreme Court's determination in *United States v. Booker*, 543 U.S. 220 (2005) that the Sentencing Guidelines are not mandatory is not retroactively applicable to cases on collateral review. The list could go on.

IV. Certificate of appealability

Rule 11 of the Rules Governing § 2255 Proceedings states that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A § 2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1). Section 2253(c)(2) in turn states that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." A substantial showing of the denial of a constitutional right "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

The court understands that Rudolph has appealed the denial of the § 2255 motion that he filed in the Northern District of Alabama. No. 21-12828-DD (11th Cir. Aug. 18, 2021). That motion raised the same *Davis* claims that were before this court. On October 18, 2021, the Eleventh Circuit granted Rudolph's motion to stay that appeal pending this court's ruling.

The court in Alabama has granted Rudolph a certificate of appealability on the following issue:

> Whether Mr. Rudolph's plea agreement — in which he waived "the right to appeal his conviction and sentence" and "the right to collaterally attack his sentence in any post-conviction proceeding, including a motion brought under 28 U.S.C. § 2255 or 18 U.S.C. § 3771, on any ground" — now bars him from attacking his conviction under *United States v. Davis*, 139 S. Ct. 2319 (2019), by way of a motion brought under 28 U.S.C. § 2255?

No. 2:20-cv-8024-CLS (N.D. Ala. Aug. 17, 2021). As noted above, the waiver in Rudolph's plea agreement in the Northern District of Alabama is identical to the waiver in his plea agreement in this court. This court will therefore issue Rudolph a certificate of appealability on the same issue.

Unlike the court in Alabama, however, this court has also found that Rudolph has procedurally defaulted his *Davis* claims. In the interests of conserving judicial resources, the court will also grant Rudolph a certificate of appealability on the issue of whether this court erred in determining that he has procedurally defaulted his *Davis* claims.

V. Conclusion

For the reasons explained above, the court DENIES Rudolph's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [Doc. Nos. 30, 36]. The court issues a certificate of appealability on the waiver and procedural default issues outlined above.

SO ORDERED this 8th day of November, 2021.

/s/CHARLES A. PANNELL, JR.
CHARLES A. PANNELL, JR.
United States District Judge

FILED
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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ERIC ROBERT RUDOLPH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Civil Action No. 2:20-cv-08024-CLS**
	)	**(Criminal Case No. CR-00-S-0422-S)**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Eric Robert Rudolph pled guilty in this court on April 13, 2005, to both counts of an indictment charging him, in Count One, with maliciously damaging by means of an explosive a building and property used in an activity affecting interstate commerce, thereby causing the death of one person and inflicting severe personal injuries on another, in violation of 18 U.S.C. § 844(i); and, in Count Two, with knowingly using a destructive device during the crime of violence charged in Count One, in violation of 18 U.S.C. § 924(c)(1). He was sentenced to consecutive life sentences on July 18, 2005.[1] He now is back before the court after filing, on June 22, 2020, a motion under 28 U.S.C. § 2255 to vacate, correct, or set aside his sentence for the offense alleged in Count Two. His motion is based upon the Supreme Court's

[1] *See* Criminal Case No. CR 00-S-0422-S, doc. no. 556 (Transcript of July 18, 2005 Sentencing Proceeding) and doc. no. 559 (July 20, 2005 Written Judgment).

decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), holding that the definition of the term "crime of violence" contained in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague and, therefore, void. *See* doc. no. 1 (Motion to Vacate Sentence).[2]

This court stayed these proceedings, pending the Supreme Court's ruling in *Borden v. United States*, 141 S. Ct. 1817 (2021): a case that raised the question of whether a defendant's prior conviction for an offense that required a "mens rea" (subjective mental state)[3] of "recklessness" qualified as a "violent felony" under the "elements clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i).[4] The answer to that question is important, in view of Rudolph's argument that the offense of arson charged in Count One cannot serve as the predicate (or basis) for the § 924(c)(1) offense alleged in Count Two, because conviction for arson requires proof that a defendant "maliciously" damaged property with a destructive device, and a mens rea of "maliciousness" does not require proof of "intentional conduct," but

[2] Subsection 924(c)(3)(B) of this statute is generally referred to as the "residual clause."

[3] "Mens rea" is a Latin phrase meaning "guilty mind," and it serves as a concise reference to the subjective state of mind that the prosecution, in order to convict, must prove that a defendant possessed when committing a particular crime. *See Mens Rea*, Black's Law Dictionary 1075 (9th ed. 2009) (Bryan A. Garner, Ed.).

[4] The elements clause of the Armed Career Criminal Act defines the term "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(e)(2)(B)(i).

can be satisfied by some degree of "recklessness." *See* doc. no. 14 (Petitioner Rudolph's Reply), at 19–22. The Supreme Court issued its ruling in *Borden* on June 10, 2021, and held that a criminal offense requiring a mens rea of "recklessness" does not qualify as a "violent felony" under the elements clause of the Armed Career Criminal Act. *Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021).[5] The remainder of this opinion evaluates Rudolph's motion in light of the Supreme Court's holdings in *Davis* and *Borden*.

I. RUDOLPH'S INDICTMENT

A. Count One of the Superseding Indictment: *malicious damage of property with an explosive*

> On or about the 29th day of January, 1998, in Jefferson County, within the Northern District of Alabama, the defendant, ERIC ROBERT RUDOLPH, did maliciously damage, by means of an explosive, a building and property used in an activity affecting interstate and foreign commerce, namely the New Woman All Women Health Care Clinic located at 1001 17th Street South in Birmingham, Alabama, which prohibited conduct resulted in the death of Robert D. Sanderson and personal injury to Emily Lyons, in violation of Title 18, United States Code, Section 844(i).

Criminal Case No. CR 00-S-0422-S, doc. no. 17 (Superseding Indictment), at 1. The

[5] As Justice Kagan stated at the beginning of her plurality opinion in *Borden*, the Armed Career Criminal Act mandated "a 15-year minimum sentence for persons found guilty of illegally possessing a gun who have three or more prior convictions for a 'violent felony.' The question here is whether a criminal offense can count as a 'violent felony' if it requires only a mens rea of recklessness — a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify." *Borden v. United States*, 141 S. Ct. 1817, 1821–22 (2021) (plurality opinion).

statute upon which Count One is based defines the federal offense of arson as "maliciously" damaging or destroying "by means of *fire* or an *explosive*, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (emphasis supplied).[6]

The Grand Jury elaborated Count One by adding the following "special findings" to the Superseding Indictment:[7]

> **NOTICE OF SPECIAL FINDINGS**
>
> The allegations of Count One of this Indictment are hereby realleged as if fully set forth herein and incorporated by reference. With regard to Count One of this Indictment, the Grand Jury makes the following special findings:
>
> 1. The defendant, ERIC ROBERT RUDOLPH, was 18 years of age or older at the time of the offense. (18 U.S.C. § 3591(a)[8]).

[6] Specifically, the full text of the federal arson statute reads as follows:

> (i) Whoever *maliciously* damages or destroys, or attempts to damage or destroy, by means of fire *or an explosive*, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and *if death results to any person*, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, *or to the death penalty or to life imprisonment*.

18 U.S.C. § 844(i) (emphasis supplied).

[7] The original indictment (doc. no. 1 in Criminal Case No. CR-00-S-0422-S) also contained two Counts based upon the same statutes, but did not include the "Special Findings" quoted in text.

[8] 18 U.S.C. § 3591(a) specifies the criteria that must be considered before a death sentence may be imposed, and dictates that no person may be sentenced to death unless it is determined,

2. The defendant, ERIC ROBERT RUDOLPH,:

   a. intentionally killed the victim. (18 U.S.C. § 3591(a)(2)(A));

   b. intentionally inflicted serious bodily injury that resulted in the death of the victim. (18 U.S.C. § 3591(a)(2)(B)).

   c. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, who died as a direct result of the act. (18 U.S.C. § 3591(a)(2)(C)).

   d. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person and constituted a reckless disregard for human life and the victim died as a direct result of the act. (18 U.S.C. § 3591(a)(2)(D)).

3. The defendant, ERIC ROBERT RUDOLPH,:

   a. during the commission of an offense under section 844(i), as alleged herein, caused the death of and injuries resulting in the death of a person. [18 U.S.C. § 3592(c)(1)[9]].

   b. in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to

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beyond a reasonable doubt, at a hearing conducted in accordance with 18 U.S.C. § 3593 that the offender was at least 18 years of age on the date of the offense, and that the criteria specified in textual paragraphs 2.a through 2.d following this footnote are satisfied.

[9] 18 U.S.C. § 3592(c) states that, when "determining whether a sentence of death is justified for an offense described in [18 U.S.C. §] 3591(a)(2), the jury . . . shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist." Subsection 3592(c)(1) addresses the aggravating circumstance of a death that occurs during the commission of another crime, and provides (in the portion here pertinent) that: "The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under . . . [18 U.S.C. §] 844(i) (destruction of property affecting interstate commerce by explosives)[.]"

the victim of the offense. [18 U.S.C. § 3592(c)(5)[10]].

c. committed the offense in an especially heinous, cruel and depraved manner in that it involved torture or serious physical abuse to the victims. [18 U.S.C. § 3592(c)(6)[11]].

d. committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism. [18 U.S.C. § 3592(c)(9)[12]].

e. intentionally attempted to kill more than one person in a single criminal episode. [18 U.S.C. § 3592(c)(16)[13]].

Criminal Case No. CR 00-S-0422-S, doc. no. 17 (Superseding Indictment), at 2–3 (Notice of Special Findings) (footnotes supplied).

B. Count Two of the Superseding Indictment: *use of a destructive device during and in relation to the crime of violence charged in Count One*

On or about the 29th day of January, 1998, in Jefferson County, within the Northern District of Alabama, the defendant, ERIC ROBERT RUDOLPH, *knowingly* used *a firearm*, *that is a destructive device*,

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[10] Subsection 3592(c)(5) addresses the aggravating factor of a criminal act that gives rise to a "Grave risk of death to additional persons," and provides that: "The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense."

[11] Subsection 3592(c)(6) addresses the aggravating factor of a criminal offense that is committed in a "Heinous, cruel, or depraved manner," and provides that: "The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim."

[12] Subsection 3592(c)(9) addresses the aggravating factor that arises when it is shown that "The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism."

[13] Subsection 3592(c)(16) addresses the aggravating factor of "Multiple killings or attempted killings"; that is, when it is shown that "The defendant intentionally killed or attempted to kill more than one person in a single criminal episode."

> during and in relation to *a crime of violence* for which he may be prosecuted in a Court of the United States, *that is the damage to a building and property used in an activity affecting interstate and foreign commerce, as described above in Count One*, and in the course of such conduct *caused the death of Robert D. Sanderson* through the use of said firearm, in violation of Title 18, United States Code, Section 924(c)(1).

Id. at 1–2 (emphasis supplied).[14]

II. RUDOLPH'S PLEA AGREEMENT

Rudolph executed a binding Plea Agreement on April 4, 2005,[15] and subsequently entered pleas of "guilty" to both Counts of the Superseding Indictment. He explicitly admitted his actual guilt of the offenses charged, surrendered his right to a trial by jury, and waived his rights to appeal or collaterally attack his convictions

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[14] The relevant portions of the statute upon which Count Two is based read as follows:

> (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any *crime of violence* or drug trafficking crime (including a *crime of violence* or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a *firearm*, or who, in furtherance of any such crime, possesses a *firearm*, shall, in addition to the punishment provided for such *crime of violence* or drug trafficking crime—
>
> * * * *
>
> (B) If the *firearm* possessed by a person convicted of a violation of this subsection— . . . (ii) is a . . . *destructive device*, . . . the person shall be sentenced to a term of imprisonment of not less than 30 years.

18 U.S.C. § 924(c)(1)(A) & § 924(c)(1)(B)(ii) (emphasis supplied).

[15] *See* Criminal Case No. CR 00-S-0422-S, doc. no. 537 (Plea Agreement).

and sentences. In return, the Government withdrew its notice of intent to seek the death penalty,[16] and agreed that Rudolph should be sentenced to consecutive terms of life imprisonment.[17]

Rudolph stipulated that the Government's evidence at trial would prove the facts set forth in the following Statement of Facts, and admitted that those facts would "establish his guilt beyond a reasonable doubt."[18]

> Eric Robert Rudolph served in the United States Army between 1987 and 1989. According to several Army witnesses, he received training in improvised or field explosive devices. Both during and after his Army service, Rudolph possessed military manuals concerning conventional military explosives.
>
> At various times Eric Rudolph used alias names. One such alias was "Z. Randolp." On February 9, 1996, using this alias, Rudolph bought a postal money order which he used in an attempt to purchase a manual entitled "Kitchen Improvised Fertilizer Explosives." This manual was never sent to Rudolph. About one month later, Rudolph, using the same alias, ordered a different manual entitled "Ragnar's Homemade Detonators." Rudolph did receive this manual, which detailed how to construct a detonator for initiating high explosives, including dynamite.
>
> **The Birmingham Bombing**
>
> On Thursday, January 29, 1998, at 7:32 a.m. Central Standard

[16] *Compare id.*, doc. no. 79 (Notice of Intent to Seek the Death Penalty) *with id.*, doc. no. 537 (Plea Agreement), ¶ 6, at 3 ("Although the statutes of conviction, 18 U.S.C. § 844(i) and 924(c), provide for a maximum penalty of death upon the Government's notice of intent to seek the death penalty, the Government agrees to withdraw such notice filed on December 11, 2003.").

[17] *Id.*, doc. no. 537 (Plea Agreement), ¶ 6, at 3.

[18] *Id.* ¶ 3, at 2.

Time (CST), a bomb exploded in front of the New Woman All Women Health Care Clinic, a health clinic that performs abortions, in Birmingham, Alabama. The bomb had been buried under shrubbery next to the walkway leading up to the clinic, and further concealed under an artificial plant.

The bomb exploded as Robert Sanderson, a Birmingham Police officer working security at the clinic, leaned over it, killing him. The autopsy on the body of Officer Sanderson indicated that his death was a result of the thermal and concussion effect of the blast from the device. The clinic's head nurse, Emily Lyons, who was standing nearby, was seriously and permanently injured. The explosion also caused extensive damage to the building and property used in interstate commerce or used in activities affecting interstate commerce.

Eric Robert Rudolph had constructed and placed this bomb outside the New Woman All Women Health Care Clinic and it was detonated by radio remote control as Officer Sanderson stood over it.

The bomb contained dynamite as the explosive, and Eveready batteries as the power source. The bomb contained a Radio Shack plastic battery holder, and a Rubbermaid Servin'Saver clear plastic container with an almond-colored lid. Gray duct tape and black plastic electrical tape also were in this bomb. Over five and one-half pounds of nails were in this bomb as shrapnel. The Birmingham bomb was inside a locked tool box, covered with green plastic foliage.

Just after the blast, a witness saw a white male walking calmly away from the vicinity of the explosion, as everyone else in the area rushed towards it. The witness thought that was suspicious, and he followed the man. After a while, the man ducked behind an apartment building and emerged having changed his appearance by taking off his baseball cap and jacket. The witness continued to follow the man for some distance, but eventually lost him. The witness then stopped at a McDonald's Restaurant to call 911.

As the witness was on the telephone with the 911 operator, he

observed through the window of the McDonald's the same man he had been following earlier walking along the opposite side of the street. As the witness was telling the 911 operator what he was seeing, a customer in the McDonald's observed what was occurring and called out a physical description of the white male to the witness, who relayed it to the 911 operator. He described the individual as a white male, 5'11" to 6' tall, approximately 180 pounds, collar-length dark hair, approximately 35 years old — a description consistent with Rudolph — wearing a black baseball cap, a green and black plaid short-sleeve shirt layered over a long-sleeve black shirt and wearing a black backpack, which appeared full.

After providing the description, the first and second witnesses left the restaurant to follow the man. The second witness eventually saw the man placing something in the back of a gray Nissan pickup truck with a camper shell, and recorded the truck's license tag — North Carolina plate number KND1117. When the witness stopped to give the information to the police, he lost sight of the truck. After Rudolph's photo was publicized by the media in February 1998, this witness contacted ATF agents and told them that he had seen the photograph in the media of the person who was being sought as a material witness. He stated that he was certain the person in the picture was the person he had seen driving the pickup truck on the day of the bombing. The photograph was of Eric Rudolph.

Shortly after the second witness observed the truck, the first witness saw the gray Nissan pickup with camper shell being driven by the same white male he had been following earlier. The witness made a U-turn and followed the truck. Independently of the second witness, the first witness recorded the license plate number as North Carolina license number KND1117. He subsequently lost the truck in traffic.

Alabama State Troopers traced North Carolina license plate number KND1117 to a vehicle registered to Eric Rudolph with an Asheville, North Carolina address. The address, however, was his mother's old address. While agents tried to locate Rudolph's current residence, Rudolph returned to Murphy, North Carolina, where his truck

was seen turning into his driveway at about 4:30 p.m. Eastern Standard Time (EST). Murphy is about a 5-hour drive from Birmingham.

That evening Rudolph was seen in a video store in town, and on Friday morning, January 30, 1998, he returned the video and rented another. That afternoon, he stopped by a grocery store and returned to his trailer.

At about 5:00 p.m. EST on January 30, 1998, the Birmingham U.S. Attorney's Office obtained an arrest warrant for Rudolph, and a news conference was held to announce that Rudolph was wanted as a material witness to the clinic bombing. Given the national media coverage of the news conference, Rudolph quickly learned that he had been identified as a suspect in the bombing. Rudolph bought dinner at a Burger King and went to a grocery store where he purchased a large quantity of oatmeal, canned goods, batteries, and other camping supplies. Agents arrived at Rudolph's trailer between 8:00 and 9:00 p.m. that evening. They found the heat on, the lights on and the front door standing open, but Rudolph was gone. Rudolph had fled into the mountains of western North Carolina to hide.

Within hours of the Birmingham clinic bombing, two letters were mailed from the Birmingham area to two Atlanta print media outlets. The letters were essentially identical, handwritten separately in disguised block printing, with a black felt-tip pen on lined paper. The letters claimed responsibility for the Birmingham clinic bombing on behalf of the "Army of God," and threatened more violence in the future against abortion supporters and anyone associated with the drug RU-486. The Army of God letters concluded with the phrase "DEATH TO THE NEW WORLD ORDER" and the code "4-1-9-9-3."

Beginning on February 2, 1998, agents executed a series of search warrants for Rudolph's trailer and storage unit. Eight days after Rudolph disappeared, on February 7, 1998, his Nissan truck was found abandoned in a heavily wooded area outside Murphy, North Carolina. Agents executed a search warrant for the truck.

During searches of Rudolph's trailer, agents found residue of nitroglycerin dynamite in numerous locations, including: the carpet; two baseball caps; cushioning from a rocking chair; a rented VCR tape and cover; a bed sheet from Rudolph's bed; and a pair of gray socks. Dynamite residue also was found on the steering wheel cover and a paper grocery bag in Rudolph's abandoned Nissan truck.

An examination of latent fingerprints found inside the truck revealed that all identifiable latent fingerprints belonged to Rudolph. Agents also recovered latent fingerprints belonging to Rudolph from the driver's side seat belt buckle. There were no latent fingerprints belonging to anyone else in the truck. One latent print not belonging to Rudolph was found on the inside tailgate of the truck.

During the autopsy on Officer Sanderson's body, doctors removed two pieces of metal that were identified as pieces of a hose clamp. Agents traced numbers on one of the pieces to identify it as part of a hose clamp marketed under the brand name "Popular Mechanics." Popular Mechanics hose clamps were sold exclusively at WalMart. During the search of Rudolph's trailer, agents discovered a receipt that shows the purchase of a set of two hose clamps at the Murphy Wal-Mart on December 24, 1997. The hose clamps are the same type as those found in Officer Sanderson's body. No hose clamps of that type were found in the search of Rudolph's trailer, truck or storage unit.

A piece of crystal was removed from Emily Lyon's body. This type of crystal has been identified as one used in a radio remote controlled device, like the ones used to fly radio remote controlled airplanes. A piece of a circuit board belonging to a JR 6000 remote control unit was found on the roof of a building adjacent to the New Woman All Women Health Care clinic. Other pieces found at the bomb site are consistent with the JR 6000 remote control unit, including a servo and a plastic battery pack. Explosives experts will testify that based upon this evidence, the bomb could have been detonated by remote control.

After the material witness warrant was issued in Birmingham on

> January 30, 1998, Eric Robert Rudolph remained a fugitive for approximately five years. He was arrested in Murphy, North Carolina in the early morning hours of May 30, 2003 by local law enforcement.

Criminal Case No. CR 00-S-0422-S, doc. no. 537 (Plea Agreement), at 10–13.

III. THE RELIEF SOUGHT BY RUDOLPH

As noted, Count Two of Rudolph's indictment was based upon 18 U.S.C. § 924(c)(1), which allowed additional and more severe penalties for his use of "a firearm, that is a destructive device," when committing the "crime of violence" charged in Count One. "Crime of violence" is defined two ways in subsection 924(c)(3):

> (3) For purposes of this subsection the term "*crime of violence*" means *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 [*generally referred to as the* "**elements clause**"], *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 [*generally referred to as the* "**residual clause**"].

18 U.S.C. § 924(c)(3) (all emphasis and bracketed alterations supplied).

The Supreme Court construed subsection 924(c)(3)(B), the so-called "residual clause," in *United States v. Davis*, 139 S. Ct. 2319 (2019), and held that its definition of a "crime of violence" was unconstitutionally vague and, therefore, void. *See id.*

at 2336.

Rudolph contends that the term "crime of violence," as used in reference to the predicate offense of arson charged in Count One, was defined by the "residual clause" of subsection 924(c)(3)(B), and that his conviction and sentence for the offense charged in Count Two must, in accordance with *Davis*, be vacated as unconstitutional.

He also contends that the sentences for *both Counts* of his indictment were negotiated and imposed as "a package," and that this court accordingly must

> *set the case for resentencing as to* ***count 1****. At that hearing, the parties should have an opportunity to agree on a sentence as to* ***count 1***, consistent with [the parties' binding plea agreement entered pursuant to Federal Rule of Criminal Procedure] 11(c)(1)(C). If the parties cannot agree upon a sentence or if the Court does not accept the agreement, Mr. Rudolph should have the opportunity to withdraw his plea, consistent with Rule 11(c)(5)(B).

Doc. no. 14 (Petitioner Rudolph's Reply), at 29 (all emphasis and bracketed alterations supplied).

IV. DISCUSSION

Rudolph's motion potentially presents as many as four issues. *First*, was it timely? If so, then: *Secondly*, which party bears the burden of proof? *Thirdly*, did Rudolph's conviction under Count Two rest upon the "elements" or "residual" clause of 18 U.S.C. § 924(c)(3)? *Finally*, if the latter, do the appeal and collateral attack

waiver provisions contained in Rudolph's binding plea agreement bar him from seeking under § 2255 the relief described in the previous section?

A. The Timeliness of Rudolph's Motion

Following the Supreme Court's decision in *Davis*, the Eleventh Circuit held that the new, substantive rule announced in that case should be applied retroactively. *In re Hammoud*, 931 F.3d 1032, 1038–39 (11th Cir. 2019).

Motions made under 28 U.S.C. § 2255 have a one-year limitation period that runs from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255(f)(3).

The decision in *Davis* was issued on June 24, 2019. Rudolph filed his motion to vacate on June 22, 2020.[19] Therefore, his motion was timely.

B. The Burden of Proof

Numerous Eleventh Circuit cases, as well as binding authorities from the former Fifth Circuit,[20] hold that a § 2255 movant "bears the burden to prove the claims in his § 2255 motion." *Beeman v. United States*, 871 F.3d 1215, 1222 (11th Cir. 2017) (citing *Rivers v. United States*, 777 F.3d 1306, 1316 (11th Cir. 2015)); *see*

[19] *See* doc. no. 1 (Pro Se Motion to Vacate).

[20] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

also, *e.g.*, *LeCroy v. United States*, 739 F.3d 1297, 1321 (11th Cir. 2014); *Barnes v. United States*, 579 F.2d 364, 366 (5th Cir. 1978) ("Under Section 2255, [the movant] had the burden of showing that he was entitled to relief.") (alteration supplied); *Coon v. United States*, 441 F.2d 279, 280 (5th Cir. 1971) ("A movant in a collateral attack upon a judgment has the burden to allege and prove facts which would entitle him to relief.").

More recently, the Eleventh Circuit held in *Weeks v. United States*, 930 F.3d 1263 (11th Cir. 2019), that a § 2255 movant raising a claim under the Supreme Court's opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the residual clause of the Armed Career Criminal Act, "bears the burden of showing, more likely than not, that 'it was use of the residual clause that led to the sentencing court's enhancement of his sentence.'" *Weeks*, 930 F.3d at 1271 (quoting *Beeman*, 871 F.3d at 1221–22). The motion "fails '[i]f it is just as likely that the sentencing court relied on the elements or enumerated offenses clause, solely or as an alternative basis for the enhancement.'" *United States v. Pickett*, 916 F.3d 960, 963 (11th Cir. 2019) (quoting *Beeman*, 871 F.3d at 1222) (alteration in original). Because *Johnson* and *Davis* invalidated materially identical residual clauses, the same burden applied in challenges based upon the *Johnson* opinion will be applied here, and Rudolph bears the burden of proof on his § 2255 motion.

C. The Predicate Offense: *Was "crime of violence" defined by the elements clause, or by the residual clause, of 18 U.S.C. § 924(c)(3)?*

If the term "crime of violence" as used in reference to the federal arson offense charged in Count One was defined by the "elements clause" of 18 U.S.C. § 924(c)(3)(A), the Supreme Court's decision in *United States v. Davis* would not apply, and Rudolph's § 2255 motion would be due to be dismissed as a matter of law.

When determining whether the § 844(i) arson offense constitutes a "crime of violence" under the elements clause, the court must employ the so-called "categorical approach." *See Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) ("We apply the categorical approach when determining whether an offense constitutes a 'crime of violence' under the elements clause.").

1. The "categorical approach"

A defendant's actual conduct when committing the offense in question is not relevant when applying the categorical approach, because the court is required to determine only whether the predicate crime "has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis supplied); *see also Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (holding that a "sentencing judge may look only to 'the elements of the [offense], not to the facts of [the] defendant's conduct'") (quoting

Taylor v. United States, 495 U.S. 575, 601 (1990)) (alterations in original).

Accordingly, this court cannot look at the evidence of Rudolph's actual conduct summarized in Part II, *supra*, but must instead presume that his conviction for the federal offense of arson "rested upon the 'least of the acts criminalized' by the statute." *United States v. Oliver*, 962 F.3d 1311, 1316 (11th Cir. 2020) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)).

Rudolph argues that, under the categorical approach, the § 844(i) arson offense cannot be deemed a "crime of violence" under subsection 924(c)(3)(A)'s elements clause. His argument is based upon two contentions. First, he argues that the arson statute, which has a mens rea of *maliciousness*, is broader than subsection 924(c)(3)(A)'s elements clause, which refers solely to *intentional* conduct, because "maliciousness" encompasses both "intentional" and "reckless" acts.

Second, he argues that subsection 924(c)(3)(A)'s elements clause requires proof that physical force was used "against the person or property *of another*," but the "least of the acts criminalized" by the arson statute includes a crime committed by a defendant against *his own property*. *See, e.g.*, *Russell v. United States*, 471 U.S. 858, 859 (1985) (involving the prosecution under 18 U.S.C. § 844(i) of a defendant who attempted to set fire to his own apartment building).

a. *The elements of proof for the predicate offense of arson* ("crime

of violence") *charged in Count One*

The pattern jury instructions in effect within the Eleventh Circuit on April 13, 2005, the date on which Rudolph entered his pleas of guilty, state that a defendant could be convicted of arson under 18 U.S.C. § 844(i) only if the Government proved at least the following three facts beyond a reasonable doubt:[21]

> First: That the Defendant [damaged] [destroyed] [attempted to damage or destroy] a [building] [vehicle] [other real or personal property] as described in the indictment by means of a [fire] [explosive], as charged.
>
> Second: That *the Defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from* [his] [her] *acts*.
>
> Third: That the [building] [vehicle] [other real or personal property] that was [damaged] [destroyed] [attempted to be damaged or destroyed] by the Defendant, was used [in interstate or foreign commerce] [in any activity affecting foreign or interstate commerce].

Eleventh Circuit Pattern Jury Instructions – Criminal Cases, *Offense Instruction* 28, at 189 (2003) (bracketed text in original, italicized emphasis supplied).[22]

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[21] In Rudolph's case, the Government also was required to prove a fourth element: "that Robert D. Sanderson died, and Emily Lyons sustained personal injuries, as a direct and proximate result of [Rudolph's] actions." Criminal Case No. CR 00-S-0422-S, doc. no. 543 (Transcript of Plea Colloquy), at 25–26 (describing Government's burden of proof) (alteration supplied).

[22] The 2010 Revisions to the Eleventh Circuit Patterns, as well as the 2020 Revisions currently in effect, are identical to the instructions quoted in text, except in one respect: *that is*, "deliberate" is substituted for "willful" in the second element, which now requires the Government to prove that "the Defendant acted intentionally or with ***deliberate*** disregard of the likelihood that damage or injury would result from [his] [her] acts." *See* Eleventh Circuit Pattern Jury Instructions — Criminal Cases, *Offense Instruction* O28, at 209 (2020); Eleventh Circuit Pattern Jury Instructions

b. *The definition of "maliciously" as used in § 844(i)*

The members of the 2003 Pattern Jury Instruction Committee formulated the second element of proof quoted in the preceding section to reflect their understanding of what Congress intended when using the term "maliciously" in 18 U.S.C. § 844(i).[23] The Comments to the 2003 Patterns state that the Committee's formulation was based upon the Fourth Circuit's opinion in *United States v. Gullett*, 75 F.3d 941 (4th Cir. 1996), holding that the term "maliciously" was "comparable to the common law definition of malice,[24] and 'is satisfied if the defendant acted intentionally or with willful disregard of the likelihood that damage or injury would result from his or her acts.'" Eleventh Circuit Pattern Jury Instructions – Criminal Cases, *Committee Annotations and Comments to Offense Instruction 28*, at 190 (2003 Revision)

— Criminal Cases, *Offense Instruction* 28, at 198 (2010).

The Comments to the 2010 Revisions state that the Pattern Jury Committee "avoided the use of 'willful' because of possible confusion with Basic Instruction 9.1A," which defines the word "willfully" as meaning that the defendant's act "was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted 'willfully,' the person need not be aware of the specific law or rule that [his] [her] conduct may be violating." Eleventh Circuit Pattern Jury Instructions – Criminal Cases, *Basic Instruction* 9.1A, at 35 (2010 Revisions).

[23] *See* note 6, *supra*, for the text of 18 U.S.C. § 844(i).

[24] "Common law malice" is defined by the Eleventh Circuit as "ill will," and is usually discussed in contrast to actual or constitutional malice in defamation cases. *See, e.g.*, *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362 (11th Cir. 1987) ("'[M]alice' means ill will."); *see also, e.g.*, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252 (1974) ("[C]ommon-law malice [is] frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights.") (alterations supplied); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974) (White, J., dissenting) (discussing "malice in the traditional sense of ill will").

(quoting *Gullett*, 75 F.3d at 948) (footnote supplied). *See also United States v. Morrison*, 218 F. App'x 933, 940–41 (11th Cir. 2007) ("Although § 844(i) does not define the term 'maliciously,' several circuits have specifically held that, based on common law and the legislative history of the statute, the term includes acts done 'intentionally or with willful disregard of the likelihood that damage or injury would result.'") (quoting *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998) (*per curiam*)).

The Fourth and Eleventh Circuit definitions of "maliciously" as acting "intentionally, or with willful [or deliberate[25]] disregard [for] the likelihood that damage or injury would result from" the defendant's use of fire or an explosive to damage any building or real or personal property used in interstate commerce is consistent with that of at least five other circuits. *See, e.g.*, *McFadden v. United States*, 814 F.2d 144, 146 (3d Cir. 1987) (adopting the common law definition of "maliciously" as acting "intentionally or with willful disregard of the likelihood that damage or injury would result"); *United States v. Monroe*, 178 F.3d 304, 307 (5th Cir. 1999) ("'[M]aliciously' for purposes of § 844(i) means 'acting intentionally or with willful disregard of the likelihood that damage or injury would result.'") (alteration

[25] See note 22, *supra*, explaining the basis for the substitution of "deliberate" for "willful" in the second element of the 2010 and 2020 Revisions of the pattern jury instructions for the federal offense of arson.

supplied); *United States v. Grady*, 746 F.3d 846, 848–50 (7th Cir. 2014) (upholding a jury instruction defining "maliciously" as acting "intentionally or with deliberate disregard of the likelihood that damage or injury will result"); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) (defining "maliciously" as acting "with willful disregard of the likelihood that damage or injury would result"); *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998) (upholding a jury instruction based on the definition of "maliciously" as acting "intentionally or with willful disregard of the likelihood that damage or injury would result"). *See also Carlon-Bonilla v. Barr*, 825 F. App'x 488, 489 (9th Cir. 2020) (citing many of the cases listed above, and explicitly joining those courts in their definition of "maliciously" as including acts "done in willful disregard of the likelihood that property damage would result").

c. *"Maliciously" and the elements clause of subsection 924(c)(3)(A)*

"Maliciously," as defined by the Circuit Court decisions referenced in the preceding subsection, includes a mens rea of "recklessness." *See United States v. Tsarnaev*, 968 F.3d 24, 101 (1st Cir. 2020) ("[T]he parties agree (or at least do not dispute) that 'maliciously' there includes both intentional and reckless acts.") (alteration supplied) (citing *Grady*, 746 F.3d at 848–49 (adopting the foregoing definition, and collecting cases from the Third, Fourth, Fifth, and Tenth Circuits holding that "maliciously" includes recklessness)).

Accordingly, the mens rea element of the federal arson statute can be satisfied by either intentional or reckless conduct.

Thus, the issue before this court becomes: *can an offense with a mens rea requirement of* "maliciously," *which includes* "recklessness," *satisfy the elements clause found at 18 U.S.C. § 924(c)(3)(A)?* The Supreme Court answered that question in *Borden v. United States*, 141 S. Ct. 1817 (2021), holding that the elements clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i) — a clause that is materially identical to the one at issue in this case[26] — does not encompass crimes with a mens rea of recklessness. *See Borden*, 141 S. Ct. at 1821. Justice Kagan, who authored the plurality opinion in *Borden*,[27] reasoned that subsection 924(e)(2)(B)(i)'s use of the "phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825.

The *Borden* decision likely applies to the materially identical elements clause at issue in this case. Because Rudolph's conviction for the predicate § 844(i) arson offense alleged in Count One required proof that he acted "maliciously" — a mens

[26] See note 4, *supra*, recording that the elements clause of the Armed Career Criminal Act defines "violent felony" as meaning "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another[.]" 18 U.S.C. § 924(e)(2)(B)(i).

[27] Justice Thomas concurred solely in the judgment. *See Borden*, 141 S. Ct. at 1834–37 (Thomas, J., concurring).

rea that "includes both intentional and reckless acts"[28] — it cannot be considered a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A),[29] which unquestionably requires a mens rea of intent or knowledge: that is, "of purposeful or knowing conduct"[30] in the use of physical force against the person or property of *another individual*. "Reckless conduct is not aimed in that prescribed manner." *Borden,* 141 S. Ct. at 1825.

d. "*Against the person or property of another*"

Even if the Supreme Court had decided *Borden* differently, arson still would not qualify as a crime of violence under subsection 924(c)(3)(A)'s elements clause. As Deputy Solicitor General Eric J. Feigin noted during oral argument in *Borden*, the requirement for proof that the predicate "crime of violence" was one in which physical force was used "against the person or property of another" means that "arson does not qualify as a crime of violence under . . . [subsection 924(c)(3)(A)'s elements clause], because you can commit it by burning down your own house for the insurance money." Transcript of Oral Argument at 42, *Borden v. United States*, No. 19-5410 (Nov. 3, 2020) (alteration and ellipsis supplied).

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[28] *United States v. Tsarnaev*, 968 F.3d 24, 101 (1st Cir. 2020).

[29] As stated before, § 924(c)(3)(A)'s elements clause defines "crime of violence" as "an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

[30] *Borden*, 141 S. Ct. at 1828.

Many courts have applied the categorical approach to reach the same conclusion: that is, 18 U.S.C. § 844(i) is not a crime of violence as defined by the elements clause in 18 U.S.C. § 924(c)(3)(A), because that clause requires the "use, attempted use, or threatened use of physical force against the person or property *of another*"; *and*, as long as the property that was destroyed by fire or an explosion was used in interstate commerce, arson can be committed by a defendant against his own property. *See, e.g.*, *In re Franklin*, 950 F.3d 909, 911 (6th Cir. 2020) (granting § 2255 motion based on *Davis* because § 844(i) arson can be committed against the defendant's own property and, therefore, does not fall under the elements clause of subsection 924(c)(3)(A)); *United States v. Salas*, 889 F.3d 681, 684 (10th Cir. 2018) (vacating § 924(c) conviction and remanding for resentencing on § 844(i) because arson is not a "crime of violence" under the elements clause); *United States v. Moore*, 802 F. App'x 338, 342 (10th Cir. 2020) (same); *Hammond v. United States*, No. 3:19-cv-00544-KDB, 2019 WL 5295703, at *2–3 (W.D. N.C. Oct. 18, 2019) (same); *United States v. Lecron*, No. 3:19CR4, 2019 WL 2774297, at *4–5 (N.D. Ohio July 2, 2019) (same); *United States v. Garcia*, No. 2:11-cr-00290-TLN, CKD, 2019 WL 95509, at *1–2 (E.D. Cal. Jan. 3, 2019) (same); *Evey v. United States*, No. 2:16-cv-08900-SVW, 2018 WL 6133407, at *6 (C.D. Cal. May 10, 2018) (same).

The Government responded to this portion of Rudolph's argument in only a

cursory manner, because it is clear that the § 844(i) arson statute can apply to defendants who burn or bomb their own property. *See, e.g.*, *Russell*, 471 U.S. at 859 (involving prosecution, under 18 U.S.C. § 844(i), of a defendant who attempted to set fire to an apartment building that he owned); *United States v. Flaherty*, 76 F.3d 967, 974 (8th Cir. 1996) (upholding application of § 844(i) where owner of burger and malt shop committed arson at his own place of business in order to perpetrate insurance fraud); *United States v. Parsons*, 993 F.2d 38, 41 (4th Cir. 1993) (upholding conviction under § 844(i) against defendant who burned down her own home, which was being used as rental property, for insurance proceeds). As demonstrated by the foregoing decisions, that interpretation of the arson statute was true at the time Rudolph was convicted.

e. *Summary of the analysis of § 844(i) arson under the categorical approach*

In summary, even though Rudolph intentionally committed his crime against the property of another, the court is required by the categorical approach to look to the broadest conception of the crime, which, in the case of arson, includes an act recklessly committed against the defendant's own property. Therefore, Rudolph's arson conviction could not have qualified as a "crime of violence" under the elements clause of 18 U.S.C. § 924(c)(3)(A).

In another case, perhaps, this would be the end of the inquiry, and the sentence for the offense alleged in Count Two would be vacated as having been based upon the residual clause of subsection 924(c)(3)(B) that was declared unconstitutionally vague in *Davis*, *supra*. Here, however, the court also must ask whether, under the terms of his binding plea agreement, Rudolph gave up his right to file this § 2255 motion in the first place.

D. Direct Appeal and Collateral Attack Waivers

A defendant's waiver of his right to appeal or collaterally attack a sentence is valid if the waiver is made knowingly and voluntarily. *Williams v. United States*, 396 F.3d 1340, 1341 (11th Cir. 2005). To establish that a waiver was made knowingly and voluntarily, the Government must show either (1) that the district court specifically questioned the defendant about the waiver during the plea colloquy, or (2) that the record makes it manifestly clear that the defendant otherwise understood the full significance of the waiver. *Id.*; *see also United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). When a waiver is entered into knowingly and voluntarily, and contains express language relinquishing the right of collateral review, it is enforceable and precludes the defendant from collaterally attacking his sentence. *Williams*, 396 F.3d at 1342.

Rudolph's plea agreement included three provisions that explicitly

acknowledged his understanding that, by entering pleas of guilty to both counts of the Superseding Indictment, he waived his rights to directly appeal and collaterally attack his convictions and sentences. The first such acknowledgment was contained in paragraph 2, reading as follows:

> 2. The defendant understands that by pleading guilty, he is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the defendant would have the right to an attorney. If the defendant could not afford an attorney, the Court would appoint one to represent the defendant. During the trial, the defendant would be presumed innocent and the Government would have the burden of proving him guilty beyond a reasonable doubt. The defendant would have the right to confront and cross-examine the witnesses against him. If the defendant wished, he could testify on his own behalf and present evidence in his defense, and he could subpoena witnesses to testify on his behalf. If, however, the defendant did not wish to testify, that fact could not be used against him. *If the defendant were found guilty after a trial, he would have the right to appeal the conviction. The defendant understands that by pleading guilty*, *he is giving up all of these rights* and there will not be a trial of any kind. *The defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the sentence in post-conviction proceedings. By entering this Plea Agreement, the defendant is waiving those rights to appeal or collaterally attack his sentence, as specified in paragraph 13 below*. Finally, the defendant understands that, to plead guilty, he may have to answer questions posed to him by the Court concerning the rights that he is giving up and the facts of this case, and the defendant's answers, if untruthful, may later be used against him in a prosecution for perjury or false statements.

Criminal Case No. CR-00-S-0422-S, doc. no. 537 (Plea Agreement), ¶ 2, at 1–2 (emphasis supplied).

The second, more explicit acknowledgment was found in paragraph 13, reading as follows:

> 13. **WAIVER OF APPEAL**: In consideration of the Government's recommended disposition, the defendant voluntarily and expressly waives, *to the maximum extent permitted by federal law*, the right to appeal his conviction and sentence in this case, and the right to collaterally attack his sentence in any post-conviction proceeding, including a motion brought under 28 U.S.C. § 2255 or 18 U.S.C. § 3771, *on any ground*.

Id. ¶ 13, at 5 (boldface emphasis in original, italicized emphasis supplied).

The third acknowledgment was found in the following, unnumbered paragraph on page 7 of the Plea Agreement, below which Rudolph inscribed his signature and the date on which he executed the agreement:

> I have read the Indictment against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. **I also have discussed with my attorney the rights I may have to appeal or challenge my sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, to the maximum extent permitted by federal law, from appealing my conviction or sentence or challenging my sentence in any post-conviction proceeding**. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

Id. at 7 (boldface emphasis in original).

In addition, this court specifically questioned Mr. Rudolph about his understanding of the last two waivers during the plea colloquy conducted in open court on April 13, 2005.

> THE COURT: Mr. Rudolph, I want you to look at Paragraph Number 13 of your plea agreement, which appears on Page 5. That paragraph begins with all caps, bold-faced words, "Waiver of Appeal" [and reads as follows]:
>
> > "In consideration of the Government's recommended disposition, the defendant voluntarily and expressly waives, to the maximum extent permitted by federal law, the right to appeal his conviction and sentence in this case, and the right to collaterally attack his sentence in any post-conviction proceeding, including a motion brought under Title 28, United States Code, Section 2255 or Title 18, United States Code, Section 3771, on any ground."
>
> I also would like for you to look at the last unnumbered paragraph of your plea agreement that is found on page 7. That paragraph appears immediately above the first signature I asked you to identify this morning [*i.e.*, Rudolph's own signature]. And I want you to read the bold-faced text of that paragraph.
>
> > "**I also have discussed with my attorney the rights I may have to appeal or challenge my sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, to the maximum extent permitted by federal law, from appealing my conviction or sentence or challenging my sentence in any post-conviction proceeding**."
>
> Did you read both of the portions of your plea agreement that I

just quoted before you signed the document?

THE DEFENDANT: Many times, Your Honor.

THE COURT: Did you discuss those portions of your plea agreement with your attorneys before you signed the document?

THE DEFENDANT: I did, Your Honor.

THE COURT: And do you clearly understand that by executing this plea agreement and entering your two pleas of guilty, you will have waived or given up your right to appeal your conviction, your sentences, as well as your right to challenge your sentences in any post-conviction proceeding?

THE DEFENDANT: Yes, I understand.

THE COURT: Ms. Clarke, did you fully discuss those portions of the plea agreement with Mr. Rudolph before he signed the document?

MS. CLARKE: Yes.

THE COURT: Do you believe that he understands the significance of his appeal waivers?

MS. CLARKE: I do.

THE COURT: And do you concur with Mr. Rudolph's decision to execute those waivers?

MS. CLARKE: Yes, I do.

Criminal Case No. CR 00-S-0422-S, doc. no. 543 (Transcript of Plea Colloquy), at 20–22 (bracketed text supplied).

The three provisions of the plea agreement quoted above, and the foregoing

plea colloquy, demonstrate that Mr. Rudolph knowingly and voluntarily waived, "*to the maximum extent permitted by federal law*, the right to . . . collaterally attack his sentence in any post-conviction proceeding . . . *on any ground*." Criminal Case No. CR 00-S-0422-S, doc. no. 537 (Plea Agreement), ¶ 13, at 5 (emphasis supplied). *See also id.* at 7 (unnumbered paragraph) (same).

The Eleventh Circuit has long enforced appeal and collateral attack waivers that are knowingly and voluntarily made according to their specific terms. *See, e.g.*, *United States v. Brown*, 415 F.3d 1257, 1272 (11th Cir. 2005); *United States v. Frye*, 402 F.3d 1123, 1129 (11th Cir. 2005); *Williams*, 396 F.3d at 1342; *United States v. Weaver*, 275 F.3d 1320, 1333 (11th Cir. 2001); *United States v. Pease*, 240 F.3d 938, 942 (11th Cir. 2001); *United States v. Buchanan*, 131 F.3d 1005, 1008 (11th Cir. 1997). *See also United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005) ("Plea bargains . . . are like contracts and should be interpreted in accord with what the parties intended.").

Rudolph argues, nevertheless, that the collateral attack waivers contained in his Plea Agreement do not bar his *Davis* challenge because he is attacking his *conviction*, as opposed to his *sentence*,[31] and, his conduct no longer falls into the definition of the crime charged in Count Two.

[31] *See* doc. no. 14 (Petitioner Rudolph's Reply), at 3-7.

1. Collaterally attacking a *conviction*, but not a *sentence*

Rudolph first argues that the provisions in his Plea Agreement waiving "the right to *appeal* his *conviction and sentence* . . . and the right to *collaterally attack* his *sentence* in any post-conviction proceeding"[32] do not bar him from collaterally attacking his *conviction*. *See* doc. no. 14 (Petitioner Rudolph's Reply), at 4 (citing *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006) ("A defendant's waiver of his right to appeal a sentence is just that: it does not also constitute a waiver of his right to challenge a conviction."); *Cowart v. United States*, 139 F. App'x 206, 208 (11th Cir. 2005) ("[T]he language of Cowart's sentence appeal waiver provided that she waived her right 'to collaterally attack her sentence,' and did not mention a waiver of the right to attack her plea or the plea agreement itself [and therefore] Cowart's valid sentence-appeal waiver does not preclude these issues.") (alterations supplied); *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004) (holding that waiver of "right to appeal any sentence imposed" did not bar defendant from appealing on grounds that government breached plea agreement); *Allen v. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998) (holding that agreement not to seek "parole, commutation of sentence, reprieve, or any other form of relief from life imprisonment" did not bar defendant from seeking federal habeas review of

[32] Criminal Case No. CR-00-S-0422-S, doc. no. 537 (Plea Agreement), ¶ 13, at 5.

underlying convictions because it referred "to a reduction of the sentence, not to relief from the underlying conviction itself")). Rudolph also argues, based upon the same passages, that the court did not adequately inform him that he was waiving his right to *collaterally attack* his *conviction*.[33]

Rudolph is wrong. It is not possible to collaterally attack only a *conviction* under 28 U.S.C. § 2255, which provides an avenue to attack the defendant's *sentence*. Specifically, that statute provides that:

> A prisoner in custody under *sentence* of a court established by Act of Congress claiming the right to be released upon the ground that the *sentence* was imposed *in violation of the Constitution* or laws of the United States, or that the court was without jurisdiction to impose such *sentence*, or that the *sentence* was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the *sentence* to vacate, set aside or correct the *sentence*.

28 U.S.C. § 2255(a) (emphasis supplied). The focus of that provision is entirely on a defendant's sentence, and the ability to attack that sentence while still serving it.

The next subsection of that statute permits a court to also vacate a defendant's judgment of conviction, and to then either "discharge the prisoner" or "grant a new

[33] There is nothing in the record that suggests Rudolph did not understand the waiver clause at the time of his conviction and sentencing. *See* Criminal Case No. CR 00-S-0422-S, doc. no. 543 (Transcript of Plea Colloquy), at 21–22 ("And do you clearly understand that by executing this plea agreement and entering your two pleas of guilty, you will have waived or given up your right to appeal your conviction, your sentences, *as well as your right to challenge your sentences in any post-conviction proceeding*?"); *see also United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (holding that a waiver is unenforceable unless "the district court specifically questioned the defendant" about the waiver, or "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver").

trial." 28 U.S.C. § 2255(b). However, any relief as to the underlying conviction is granted only as a result of a successful challenge to the sentence imposed. In other words, in order for Rudolph to collaterally attack his *conviction*, he first must attack his *sentence*, which he waived his right to do.

Rudolph recognized that limitation when framing his initial, *pro se* motion as a "motion to vacate his § 924(c) *sentence* pursuant to 28 U.S.C. § 2255 in light of *U.S. v. Davis*." Doc. no. 1 (Pro Se Motion to Vacate), at 1 (formatting modified, emphasis supplied). Rudolph correctly explained in his initial, *pro se* pleading that this court had jurisdiction over his motion because he is "held in custody as a result of sentences imposed by this court." *Id.* at 2. He then argued that the sentence imposed for the offense of conviction alleged in Count Two could not be maintained in light of *Davis*, and that, under the "sentence package doctrine," he also should be resentenced for the arson offense in Count *One*. *See id.* at 3. The pleading subsequently filed by Rudolph's appointed counsel also invoked that same doctrine to ask that Rudolph be resentenced as to Count *One* if the court vacated his sentence on Count *Two*. *See* doc. no. 14 (Petitioner Rudolph's Reply), at 29.

None of the cases cited by Rudolph or his appointed attorneys contradict his original assertion that he was moving to vacate his *sentence*, nor do any support his new argument that he is collaterally attacking *only* his *conviction*. The Fifth Circuit

held in *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006), that a sentence-appeal waiver did not equate to a waiver of the right to directly appeal *a conviction*. A direct appeal differs from a § 2255 motion, however, because a defendant may bring an appeal of any "final decision" of the court, *see* 28 U.S.C. § 1291, but a motion under § 2255 may be brought only by someone "in custody under sentence of a court" who is collaterally attacking the sentence that keeps them there. Each of the defendants in the other cases cited by Rudolph — *i.e.*, *Cowart v. United States*, 139 F. App'x 206, 208 (11th Cir. 2005); *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004); and *Allen v. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998) — sought, unlike Rudolph, to attack a portion of their plea, conviction, or sentence which they did not explicitly waive their right to attack.

For all of the foregoing reasons, Rudolph's argument that he is attacking only his *conviction*, but not his *sentence*, is not persuasive.

2. The contention that Rudolph's conduct no longer fits the definition of the crime charged in Count Two

Rudolph also argues that his collateral attack waiver is not enforceable against his *Davis* claim because "his conduct [no longer falls] within the definition of the charged crime." *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008) (alteration supplied). Rudolph contends that, when he pled guilty in 2005, it was

"with the understanding that 18 U.S.C. § 924(c)'s residual clause was valid and enforceable and that his conduct fell within its prohibitions." Doc. no. 14 (Petitioner Rudolph's Reply), at 7. After the Supreme Court rendered its decision in *Davis*, however, his conduct no longer supports such a conviction. Therefore, he argues, the court has imposed "a penalty for a crime beyond that which is authorized by statute," and it must be vacated. *Bushert*, 997 F.2d at 1350 n.18.

Rudolph's argument does not withstand close scrutiny, because it ignores the fact that his conviction for the offense charged in Count Two and its corresponding sentence were valid *in 2005*. "[A] voluntary plea of guilty intelligently made *in light of the then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970) (alteration and emphasis supplied). *See also, e.g.*, *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) ("[T]he possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea.") (alteration supplied); *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005) ("[T]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.") (alteration supplied); *United States v. Lockett*, 406 F.3d 207, 214 (3d Cir. 2005) ("The possibility of a favorable change in the law occurring after a plea agreement is merely one of the

risks that accompanies a guilty plea."); *United States v. Archie*, 771 F.3d 217, 222 (4th Cir. 2014) ("If we declined to enforce [the defendant's] appeal waiver because of a subsequent change in the law, we would deprive the Government of the benefit of its bargain and frustrate the purpose underlying such contracts.") (alteration supplied); *United States v. Burns*, 433 F.3d 442 (5th Cir. 2005) (enforcing appeal waiver against challenge based on change in law); *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005) ("[W]here developments in the law later expand a right that a defendant has waived in a plea agreement, the change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature."); *United States v. Killgo*, 397 F.3d 628, 629 n.2 (8th Cir. 2005) ("The fact that Killgo did not anticipate the *Blakely* or *Booker* rulings does not place the issue outside the scope of his waiver."); *United States v. Porter*, 405 F.3d 1136, 1145 (10th Cir. 2005) ("To allow defendants or the government to routinely invalidate plea agreements based on subsequent changes in the law would decrease the prospects of reaching an agreement in the first place, an undesirable outcome given the importance of plea bargaining to the criminal justice system."); *United States v. Masilotti*, 565 F. App'x 837, 839 (11th Cir. 2014) ("[A] knowing and voluntary waiver is valid and enforceable against claims based on subsequent changes in the law unless a provision in the plea agreement states otherwise.").

Rudolph's argument also ignores the fact that the Eleventh Circuit has consistently enforced waivers of appeal and collateral attack rights against *constitutional challenges*. *See, e.g.*, *United States v. Bascomb*, 451 F.3d 1292, 1297 (11th Cir. 2006) (citing *Brown*, 415 F.3d at 1272).

Most importantly, the Eleventh Circuit has upheld an appeal waiver against a *Davis* challenge. *See United States v. Joseph*, 811 F. App'x 595, 598 (11th Cir. 2020) (*per curiam*);[34] *see also United States v. Buckner*, 808 F. App'x 755, 765 (11th Cir. 2020) (enforcing appeal waiver as to claim that defendant was improperly classified as career offender). It follows that the Eleventh Circuit likely would uphold a collateral-attack waiver against a *Davis* challenge.[35]

Other circuit courts also have upheld appeal and collateral attack waivers

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[34] The plea agreement in *Joseph* contained a provision waiving the defendants' right "to assert any claim that (1) the statutes to which the defendant is pleading guilty are unconstitutional; and/or (2) the admitted conduct does not fall within the scope of the statutes of conviction." *United States v. Joseph*, 811 F. App'x 595, 598 (11th Cir. 2020). The specificity of that waiver does not change the analysis in the present case because the Eleventh Circuit has consistently held that defendants are "free to bargain away [their rights] to raise constitutional issues as well as non-constitutional ones." *United States v. Bascomb*, 451 F.3d 1292, 1297 (11th Cir. 2006) (so holding where the appeal waiver did not contain a specific waiver of constitutional challenges).

[35] The instances where the Court has held differently involved appeal waivers with explicit exceptions for sentences in excess of the statutory maximum. *See United States v. Cilla*, 712 F. App'x 880, 883–84 (11th Cir. 2017) (holding *Johnson* argument not barred by appeal waiver because of the exception for sentences in excess of the statutory maximum); *United States v. Rosales-Acosta*, 679 F. App'x 860, 861 (11th Cir. 2017) (*per curiam*) (holding that the appeal waiver did not preclude a challenge to an Armed Career Criminal Act enhancement). There are no exceptions to Rudolph's waiver of appeal or collateral attack.

against *Davis* and other similar challenges.[36] Most relevantly, the Seventh Circuit ruled on the enforceability of a collateral attack waiver against a *Davis* challenge in *Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020). In that case, two defendants had entered guilty pleas for, among other charges, use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). Each of their plea agreements contained the following clause:

> I expressly waive my right to appeal or contest my conviction and my sentence or the manner in which my conviction or my sentence was determined or imposed, *to any Court on any ground*, including any claim of ineffective assistance of counsel unless the claimed ineffective assistance of counsel relates directly to this waiver or its negotiation, *including any appeal . . . or any post-conviction proceeding, including but not limited to, a proceeding under Title 28, United States Code, Section 2255 . . . .*

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[36] *See, e.g.*, *United States v. Terry*, 788 F. App'x 933, 934 (4th Cir. 2020) (enforcing appeal waiver against *Davis* challenge); *United States v. Worthen*, 842 F.3d 552, 555–56 (7th Cir. 2016) (enforcing waiver against challenge to § 924(c) "crime of violence" designation); *United States v. Posada-Cardenas*, No. 20-cv-01086-CMA, 2020 WL 6585798, at *2 (D. Colo. Nov. 10, 2020) (enforcing collateral attack waiver against *Davis* challenge); *Gallardo v. United States*, No. 18-cv-802 KWR-JFR, 2020 WL 1495740, at *3 (D. N.M. Mar. 27, 2020) (recognizing enforceability of collateral attack waiver against *Davis* challenge); *Davis v. United States*, No. 19-22263-CV-MOORE, 2019 WL 11343401, at *6 (S.D. Fla. Sept. 20, 2019) (enforcing appeal waiver against *Davis* challenge); *Kendall v. United States*, No. 1:18-cv-00108-GNS, 2019 WL 1786870, at *3 (W.D. Ky. Apr. 24, 2019) (enforcing collateral attack waiver against *Dimaya* claim); *Weeks v. United States*, No. C18-5618RBL, 2019 WL 1489169, at *2–3 (W.D. Wash. Apr. 3, 2019) (enforcing waiver against *Dimaya* challenge); *Lee v. United States*, No. CV-16-08138-PCT-JAT, 2018 WL 4899567, at *3 (D. Ariz. Oct. 9, 2018) (enforcing collateral attack waiver against *Johnson* claim); *Brown v. United States*, No. 1:16-cv-2136-WSD, 2016 WL 7367751, at *1–2 (N.D. Ga. Dec. 20, 2016) (enforcing waiver against challenge to § 924(c) sentence); *McKenzie v. United States*, No. 2:09-cv-340-MHT(WO), 2011 WL 2836758, at *3 (M.D. Ala. May 25, 2011) (enforcing waiver against actual innocence claim based on novel Supreme Court decisions); *Claudio v. United States*, No. 8:03-cr-254-T-17TGW, 2008 WL 2116928, at *3 (M.D. Fla. May 19, 2008) (enforcing waiver, even against constitutional challenge).

Id. at 843 (emphasis supplied). During the plea colloquy, the district court emphasized that "on any ground" included challenges alleging the conviction or sentence was "in violation of the Constitution." *Id.*

Despite the waivers, the defendants moved under 28 U.S.C. § 2255 to vacate their convictions under 18 U.S.C. § 924(c) on the grounds that the residual clause was unconstitutionally vague. The Seventh Circuit held that the defendants' collateral attack waivers were enforceable because they did not fall within the "few narrow and rare" grounds the Seventh Circuit had previously recognized for not enforcing a "voluntarily and effectively-counseled waiver of direct appeal *or collateral review*."[37] *Oliver*, 951 F.3d at 844 (emphasis supplied). The Seventh Circuit has "consistently rejected arguments that an [express] appeal waiver is invalid because the defendant did not anticipate subsequent legal developments." *Id.* at 845 (quoting *United States v. McGraw*, 571 F.3d 624, 631 (7th Cir. 2009)) (alteration in original). Appeal and collateral attack waivers in plea agreements are favored because they effectively "allocate the risk of the unknown for both sides." *Id.*

The *Oliver* defendants argued that their challenge was "non-waivable" because the statute upon which they were convicted now was facially unconstitutional. *See*

[37] Those "few narrow and rare grounds" are: the district court relying on a "constitutionally impermissible factor" like race or gender, the sentence exceeding the statutory maximum; or the proceedings lacking a "minimum of civilized procedure." *Oliver v. United States*, 951 F.3d 841, 844 (7th Cir. 2020).

Class v. United States, 138 S. Ct. 798, 805 (2018) (holding that a "valid guilty plea does not, *by itself*, bar direct appeal of . . . constitutional claims") (emphasis and ellipsis added). The *Class* decision did not, however, invalidate appeal and collateral attack waivers,[38] and the Seventh Circuit, like the Eleventh Circuit, has repeatedly held "that a defendant's freedom to waive his appellate rights includes the ability to waive his right to make constitutionally-based appellate arguments." *United States v. Smith*, 759 F.3d 702, 707 (7th Cir. 2014); *see also Bascomb*, 451 F.3d at 1297.

This court finds the Seventh Circuit's disposition in *Oliver*, in combination with the Eleventh Circuit precedent discussed above, to be persuasive in holding that Rudolph's collateral attack waiver is enforceable against his *Davis* challenge.

Rudolph, having knowingly and voluntarily waived his right to collaterally attack his sentence on any ground, may not now have his sentence vacated. As in any contract, the parties allocated the risks, and gave proper consideration. The Government agreed not to pursue the death penalty and, in return, Rudolph agreed not to appeal his convictions or sentences, or to collaterally attack his sentences. This court will enforce that agreement according to its terms.

V. CONCLUSION

Based upon the foregoing discussion, Rudolph's 28 U.S.C. § 2255 motion is

[38] *See, e.g.*, *United States v. Lloyd*, 901 F.3d 111, 124 n.11 (2d Cir. 2018) (holding that *Class* did not render broad appeal waivers invalid).

due to be denied. An appropriate judgment will be entered contemporaneously herewith.

DONE this 29th day of July, 2021.

Senior United States District Judge