No. 20-14100-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DEANDRE KING,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On appeal from the United States District Court
for the Northern District of Georgia

REPLY BRIEF OF APPELLANT DEANDRE KING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under 11th Circuit Rule 26.1-2(b), counsel certifies that the certificates filed by the parties in the initial briefs listed a complete accounting of the persons and companies with an interest in this appeal.

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* Pursuant to 11th Cir. R. 28-1(e), Mr. King notes that he primarily relies upon these citations.

ARGUMENT AND CITATION OF AUTHORITY

Mr. King sits in a federal prison convicted for an act that *is not a crime*. What should a court do about that jarring fact? Nothing, says the government. It insists that Mr. King must stay in prison anyway because, first, he is not "actually innocent" and, second, he bargained away the right to challenge this phantom conviction. The government is doubly wrong.

I. Mr. King's *Davis* claim, although it is procedurally defaulted, survives because he is actually innocent of the § 924(c) crime.

The government's actual-innocence argument depends upon a critical mistake of fact.[1] In *Bousley v. United States*, the Supreme Court declared 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."[2] The government places the weight of its argument upon the operative phrase "more serious charges." It tells us no fewer than twelve times that it dismissed "more serious" crimes in exchange for Mr. King's guilty plea to the 18 U.S.C. § 371 conspiracy.[3] Yet that simply is not true.

During plea negotiations, the government swapped out two crimes—conspiracy to commit Hobbs Act robbery and armed bank robbery—for

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1 *Brief of Appellee the United States of America* at 10-20.

2 523 U.S. 614, 624 (1998) (emphasis added).

3 *Brief of Appellee the United States of America* at 1, 7, 9, 14 n.2, 16 n.3, 17, 18 & n.5.

one, the generic § 371 conspiracy. (The government also traded out one § 924(c) count for another.) The government strains to convince us that the dismissed crimes are "more serious" than the convicted crimes. How so? It says that the two dismissed counts are "more serious" simply because they carry higher statutory maximum sentences of twenty and twenty-five years, in contrast to the five-year maximum on the § 371 conspiracy.

Yet why must we measure "more serious" solely through the statutory maximum? The government does not say. And certainly *Bousley* does not apply that narrow definition. The government elevates form over substance. Yes, the dismissed crimes carry higher potential sentences than the § 371 conspiracy, but those maximums are artificial and played no role at all here in Mr. King's case. In practical terms, the dismissed counts are merely *equally* serious. The crimes of Hobbs Act conspiracy and bank robbery carry the same mandatory minimum sentence (no prison time at all) as the § 371 conspiracy.[4] The crimes of Hobbs Act conspiracy and bank robbery carry the same sentencing guideline range as the § 371 conspiracy.[5] Indeed, the guidelines required the court below to apply the range from those substantive offenses to the § 371 conspiracy count.[6] In the end, Mr. King's advisory range on that count was merely 51-63 months in prison

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4 18 U.S.C. § 1951(a); 18 U.S.C. § 2113(a), (d).

5 U.S.S.G. §§ 2B3.1, 2X1.1; (PSR ¶ 20).

6 (PSR ¶ 20).

(and again, that range was based entirely on the dismissed counts).[7] The guideline range was extraordinarily influential here—as it is in any federal sentencing hearing, the range was the "lodestar" of the ultimate sentence—because the court imposed a term of 51 months, the low end.[8] It mattered not, then, whether Mr. King was convicted of the substantive offenses dismissed by the government, or the § 371 conspiracy. There was no practical difference in the severity—or seriousness—of the crimes. The outcome would have been the same either way.[9]

In the end, it is a fiction to say that Mr. King avoided "more serious" charges in exchange for his guilty plea to the § 371 conspiracy.[10] Because

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7 (PSR ¶¶ 20-30, p. 24).

8 *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016) ("[T]he Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar").

9 The outcome always was going to be the same, no matter which crime Mr. King pled guilty to. At the sentencing hearing, Mr. King and the government both recommended a sentence of 51 months in prison, the low end of the guideline range. (Doc. 21 at 3-4). The court followed suit and imposed the 51-month sentence on the § 371 crime, a full nine months below that crime's statutory maximum. (Doc. 21 at 5). There was never any chance Mr. King would receive a higher sentence on the substantive count, whether it was the § 371 crime, the Hobbs Act conspiracy, or the armed bank robbery.

10 The district court, too, misconstrued the seriousness of the dismissed counts. It relied upon this clearly erroneous fact: "[Mr. King's] plea avoided lengthy additional mandatory minimum sentences on the charges the government dismissed in exchange for the plea." (Doc. 28

the Hobbs Act conspiracy and bank robbery charges are merely equivalent to, but not more serious than, the crime to which Mr. King pled guilty, we need *not* show that he is actually innocent of those collateral crimes after all. Even under *Bousley*, Mr. King is actually innocent of the § 924(c) crime and merits relief.[11]

II. Mr. King's *Davis* claim must prevail in spite of the generic collateral-attack waiver, and the law-of-the-case doctrine has no place here.

On the collateral-attack waiver issue, the government seeks shelter behind the law-of-the-case doctrine.[12] The problem with this tactic is two-fold. First, the district court heard the same argument below and chose not to adopt it. Second, the doctrine has no place here anyway.[13]

The government argues here that Mr. King's *Davis* claim is barred by the law-of-the-case doctrine. The district court certainly did not think so.

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at 5). That is simply not so. The dismissed crimes had no mandatory minimums at all. Yet the district court allowed this mistaken understanding of the record to seep into its conclusion that Mr. King failed to meet *Bousley's* actual-innocence standard.

11 We narrated our actual-innocence claim in the initial brief, and we will not repeat ourselves here. *Brief of Appellant Deandre King* at 11-15.

12 *Brief of Appellee the United States of America* at 23.

13 A defendant cannot knowingly waive a future right to challenge a conviction and sentence that is beyond the statutory maximum. Such a sentence is illegal, plain and simple. We will not plow here the same ground we plowed in our initial brief. *Brief of Appellant Deandre King* at 18-23.

Although the government made this very argument below,[14] the court ignored the gambit and instead simply ruled against Mr. King on the merits of the waiver issue.[15] It later granted us a certificate of appealability on the waiver question, again paying no mind to the law-of-the-case question.[16] It would be improvident for this Court to adopt the government's law-of-the-case defense here on appeal, in the absence of a holding from the district court. What's more, it is little wonder that the district court turned a cold shoulder to the law-of-the-case doctrine. It does not apply here.

The government insists that "the district court had already ruled on this precise issue with respect to [Mr.] King's *Johnson*-based § 2255 motion in 2016."[17] Yet do the *Davis*-based claim in the new § 2255 motion and the district court's holding in the *Johnson*-based § 2255 motion match "precisely"? Not at all.[18]

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14 (Doc. 24 at 5-7).

15 (Doc. 28 at 3-4).

16 (Doc. 39 at 1).

17 *Brief of Appellee the United States of America* at 23.

18 The government makes this argument—the *Johnson* claim is equal to the *Davis* claim—without a hint of irony. Yet elsewhere in its brief, in the procedural-default discussion, the government tells us that a *Johnson* claim is different from a *Davis* claim. *Brief of Appellee the United States of America* at 13 n.1 ("Thus a *Davis* error, unlike a *Johnson*

Let's compare the two motions. In the present § 2255 motion, which he filed in October 2019, Mr. King argued that his § 924(c) conviction in Count Two is unlawful under *Davis*—a brand-new Supreme Court opinion, one must add—because the § 924(c) residual clause is unconstitutional and the § 924(c) conviction was based upon that now-defunct residual clause.[19] What was Mr. King's claim in the earlier § 2255 motion, a motion he filed in April 2016? That is hard to say. Mr. King's motion—a motion he filed himself and which runs less than one, handwritten page—is not the model of clarity.[20] He directed his *Johnson* claim only at his "enhanced sentence" and "the predicates used to enhance or designate him as a lawful [sic] offender."[21] In his objections to the magistrate judge's report and recommendation he cited case law related to *Johnson* and to the United States Sentencing Guidelines, including the career offender provision.[22] He ended with this: "Virtually every circuit except the Eleventh recognize[s] that the identical residual clause in the guidelines are also

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error, does not fit into the first *Reed* category"). According to the government, the two clauses are apples and oranges when it comes to the procedural-default inquiry, but apples to apples on the collateral-attack waiver inquiry. The government cannot have it both ways.

19 (Doc. 19).

20 (Doc. 12 at 1).

21 *Id.*

22 (Doc. 15 at 1).

unconstitutionally vague and violate due process."[23] It is little surprise, then, that the magistrate judge wrote only about *Johnson* and the guidelines, and cited binding Eleventh Circuit case law on that topic alone.[24] The district court adopted the magistrate's report, again on the *Johnson*/guidelines topic only, and denied Mr. King's motion.[25]

But Mr. King's claim was not directed at his § 924(c) conviction and sentence. In fact, he made no mention at all of § 924(c) in his motion or in his objections to the magistrate's report and recommendation.[26] The magistrate offered no opinion on the § 924(c) residual clause issue. Nor did the district court cite, much less discuss, the § 924(c) count in the order denying Mr. King's motion.[27] The § 924(c) residual clause, then, played no role at all in Mr. King's earlier § 2255 motion.

The current motion, which targets the § 924(c) residual clause in light of a Supreme Court opinion that arrived years after the earlier motion ended, simply does not present the "precise" issue found in the former

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23 (Doc. 15 at 1).

24 (Doc. 13 at 5).

25 (Doc. 16 at 2).

26 (Doc. 12, 15).

27 (Doc. 16).

motion. Because the district made no law on this topic, there is no "law of the case" to apply here.[28]

CONCLUSION

The government offers this final grievance: "[T]he only injustice would occur if [Mr.] King were able to retain benefits of his plea . . . while escaping the collateral attack waiver."[29] Yet what of the injustice in forcing upon Mr. King an 84-month prison term for an act that is no crime at all? On which side do the equities lie? We ask the Court to vacate the district court's order denying Mr. King's § 2255 motion, vacate the § 924(c) conviction and sentence, and remand the case with instructions to impose a fresh sentence on the surviving § 371 conspiracy count.

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[28] There is one problem with the district court's uninvited invocation of the waiver to block Mr. King's earlier motion. The court violated this Court's rule in *Burgess v. United States*: A district court may not, of its own volition, enforce a collateral attack waiver and deny a § 2255 motion. 874 F.3d 1292, 1301 (11th Cir. 2017). Both the magistrate and the district court did exactly that, all without any response or invitation by the government. The validity of the district court's denial of Mr. King's earlier *Johnson* motion is suspect. Even if this Court concludes that the district court "decided the precise issue" presented here now, that decision was "clearly erroneous," and the law-of-the-case doctrine must fall away. *United States v. Escobar-Urrego*, 110 F.3d 1556, 1561 (11th Cir. 1997).

[29] *Brief of Appellee the United States of America* at 27.

CERTIFICATE OF COMPLIANCE AND SERVICE

This is to certify that the foregoing brief is in compliance with Federal Rule of Appellate Procedure 32(a)(5), (6) because it has been prepared in Book Antiqua 14 point, a proportionally-spaced typeface, using the Microsoft Word 2016 word processing software. Moreover, this brief also complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it includes approximately 2,004 words, according to the same software. Finally, on the date set forth below, counsel uploaded this brief to the Court's web site, which promptly served opposing counsel:

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