No. 20-14100-JJ

# IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

DEANDRE KING,
*Defendant-Appellant.*

On appeal from the United States District Court
for the Northern District of Georgia
No. 1:13-CR-00073-TWT-JKL-1

# BRIEF OF APPELLEE THE UNITED STATES OF AMERICA

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## CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The United States agrees that the Certificate of Interested Persons and Corporate Disclosure Statement included with Appellant's brief is a complete list of all people and entities known to have an interest in the outcome of this appeal.

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

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## Federal Cases



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**Federal Statutes**



*Citations primarily relied upon. 11th Cir. R. 28-1(e).

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*Citations primarily relied upon. 11th Cir. R. 28-1(e).

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

DEANDRE KING,
*Defendant-Appellant.*

## STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction over the underlying criminal case based on 18 U.S.C. § 3231.

(B) The court of appeals has jurisdiction over this direct appeal from the judgment of the district court, under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

(C) While not jurisdictional, the notice of appeal was timely filed on October 30, 2020, within 60 days of the entry of the district court's order, on September 18, 2020. Fed. R. App. P. 4(b)(1)(A).

(D) This appeal is from a final order that disposes of all the parties' claims in this criminal case.

## STATEMENT OF THE ISSUES

1. Whether, contrary to precedent from the Supreme Court and this Court, King is excused from the procedural default of his *Davis* claim where he cannot show cause, prejudice, or actual innocence of both his § 924(c) conviction and the more serious charges that were dismissed in exchange for his plea.

2. Whether King's collateral attack waiver is enforceable and bars him from bringing this § 2255 motion.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition Below

After plea negotiations, King pleaded guilty on March 13, 2013, to a two-count information, Case No. 1:13-CR-073, which charged him with conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count One); and using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (Count Two). (Doc. 1). The district court sentenced King to 51 months' imprisonment on the conspiracy charge, to be followed by 84 months' imprisonment on the § 924(c) charge, for a total sentence of 135 months' imprisonment. (Doc. 11). King did not appeal.

On October 31, 2019, after obtaining leave from this Court to file a second or successive motion under 28 U.S.C. § 2255, King filed a motion attacking his § 924(c) conviction based on the Supreme Court decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). (Docs. 19, 20). The district court denied King's motion on September 18, 2020. (Doc. 28). King filed a timely notice of appeal. (Doc. 29). He remains incarcerated.

**B. Statement of the Facts**

**1. King's Crimes and Convictions**

On August 20, 2012, King and two others entered a PNC Bank in Dunwoody, Georgia, brandished firearms, forced bank employees – at gunpoint – to open the safes in the bank vault, and robbed the bank of $71,668. (PSR ¶ 9). King was originally indicted by a grand jury in the Northern District of Georgia in three counts of a seven-count indictment, Case No. 1:12-CR-338, with: conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Count One); armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and 2 (Count Four); and using a firearm during the armed bank robbery charged in Count Four in violation of 18 U.S.C. § 924(c) (Count Five). (Case No. 1:12-CR-338, Doc. 34).

After plea negotiations, King pleaded guilty on March 13, 2013, to a two-count information, Case No. 1:13-CR-073, which charged him instead with conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count One); and using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (Count Two). (Doc. 1). Under the negotiated plea agreement, the government dismissed the indictment in Case No. 1:12-CR-338 and King waived his right to collaterally attack his sentence through a § 2255 motion. (Doc. 3-1 at 4, 8). Importantly, the indictment dismissed by the

government — in exchange for his plea — charged King with armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and 2, and a violation of § 924(c) predicated on that offense. (Case No. 1:12-CR-338, at Docs. 34, 199). And unlike the Hobbs Act conspiracy and armed robbery charges in the original indictment, which carried maximum penalties of 20 and 25 years in prison, respectively, the § 371 conspiracy charge had a statutory maximum of just five years in prison. (PSR at 24).

King's plea agreement included the following paragraph in which he waived his right to appeal and collaterally attack his sentence:

> LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or a variance from the sentencing guideline range as calculated by the district court or an appeal or collateral attack of any sentence over 84 months with respect to Count Two. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

(Doc. 3-1-8). King certified in writing that he read the plea agreement, that he discussed it with his attorney, that he voluntarily agreed to its

terms, that he understood its terms, and that he understood that the appeal waiver provision would prevent him from challenging his conviction and sentence in any post-conviction proceeding. (*Id.* at 9-10). At his plea hearing, King was asked whether he understood that he was waiving these rights, and he confirmed that he did. (Doc. 7 at 20-21).

King agreed that he robbed the PNC Bank on August 20, 2012, and that he possessed and brandished a firearm during the course of that robbery. (Doc. 7 at 12-14). Indeed, after the government proferred those facts and King agreed, the district court engaged in a further colloquy with King and his co-defendant:

> Q. Now, let me ask a couple more questions. Mr. Blackwell, is it correct that you did take part in the robbery of the PNC bank on 2390 Mount Vernon Road, I think it was on August 20th, 2012?
>
> A. Yes, ma'am.
>
> Q. And I have the same question for you, Mr. King. Did you take part in that robbery?
>
> A. Yes, ma'am.

(Doc. 7 at 14). The colloquy continued:

> Q. Is it correct that both of you displayed or brandished the guns while you were in the bank, Mr. Blackwell?

A. Yes, ma'am.

Q. Mr. King?

A. Yes, ma'am.

(Doc. 7 at 16).

On August 29, 2013, the district court sentenced King to 51 months' imprisonment on the conspiracy charge, to be followed by 84 months' imprisonment on the § 924(c) charge, for a total sentence of 135 months' imprisonment. (Doc. 11). King did not file a direct appeal. (See Docket generally).

**2. King's § 2255 Motions**

On April 28, 2016, King filed a § 2255 motion (Doc. 12) based upon *Johnson v. United States*, 135 S. Ct. 2551 (2015), but the motion was denied on the basis that King's "appeal waiver is valid and expressly bars him from challenging his sentence — on any ground — under § 2255." (Doc. 16-3). King did not appeal. (See Docket generally).

On October 31, 2019, after obtaining leave from this Court to file a second or successive motion under 28 U.S.C. § 2255, King filed a motion attacking his § 924(c) conviction based on the Supreme Court decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). (Docs. 19, 20).

The government opposed King's motion on the bases that King had procedurally defaulted any *Davis* claim, and his motion was barred by the waiver in his plea agreement. (Doc. 24). Though noting that in some cases arising under *Davis*, the government opts not to raise these affirmative defenses, the government argued that enforcement of these defenses was proper here because the government forwent additional – and more serious – charges in return for King's plea on the § 924(c) count. (Doc. 24 at 3, n. 1).

The district court agreed and denied King's motion on September 18, 2020. (Doc. 28). The court held that King's plea agreement waived his right to bring the collateral attack. (*Id.* at 3-4). Moreover, the court held that King had procedurally defaulted any *Davis* claim. (*Id.* at 4). Anticipating this Court's recent holding in *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021), the district court held that King failed to show cause for his procedural default. (*Id.* at 4-5). And in addressing King's argument that his "actual innocence" excused his procedural default, the court recognized that – under Supreme Court precedent – King "must prove that he was actually innocent of both the § 924(c) charge in Count Two and the forgone armed bank robbery and related § 924(c) charges in the dismissed indictment." (Doc. 28 at 6). Because "King's plea colloquy establishes without doubt that he participated in the armed bank robbery with others,

and that he brandished his gun," the court held that King could not meet his burden of establishing actual innocence. (*Id.*).

**C. Standard of Review**

This Court reviews de novo whether procedural default precludes a § 2255 petitioner's claim, which is a mixed question of law and fact. *See Fordham v. United States*, 706 F.3d 1345, 1347 (11th Cir. 2013). This Court also reviews de novo the validity and interpretation of an appeal waiver. *See United States v. Bushert*, 997 F.2d 1343, 1352 (11th Cir. 1993).

## SUMMARY OF THE ARGUMENT

King procedurally defaulted his *Davis* claim by failing to attack the validity of his § 924(c) conviction before the district court or on direct appeal. Binding precedent precludes his effort to show cause to excuse this default, as a *Davis* claim is insufficiently novel. King also cannot show actual prejudice since the most reasonable alternative is that King would have pled to a § 924(c) charge predicated on the substantive armed robbery he admitted to in his plea colloquy.

Similarly, binding Supreme Court precedent precludes King's claims of actual innocence. In a case like this — where a defendant pleaded guilty in exchange for the government's forgoing more serious charges – King's showing of actual innocence must also extend to the foregone charges as well. King's plea colloquy established without doubt that he was guilty of armed bank robbery, and thus he cannot meet his burden of showing actual innocence.

Finally, the waiver in King's plea agreement is valid, enforceable, and bars him from bringing this collateral attack. The district court so ruled in denying King's previous § 2255 motion in 2016, an order King failed to appeal and remains bound by. And there is no manifest injustice in holding King to the bargain from which he has benefited by avoiding punishment for more serious charges to which he has already admitted his guilt.

## ARGUMENT AND CITATIONS OF AUTHORITY

### 1. King's procedural default bars his claims.

When a prisoner fails to raise a claim on direct appeal, the claim is procedurally defaulted for purposes of collateral review. A court generally may not consider a defaulted claim raised in a § 2255 motion unless the prisoner establishes both "cause" for the default and "prejudice" from the asserted error. *United States v. Frady*, 456 U.S. 152, 167-168 (1982). The Supreme Court has also recognized a narrow alternative, under which a procedural default may be excused if the prisoner can show that he is "actually innocent" of the underlying offense. *Bousley v. United States*, 523 U.S. 614, 622 (1998) (citation omitted). Because King cannot meet his burden under either alternative, his claim is barred.

#### A. King failed to challenge his § 924(c) conviction in the district court or on appeal.

King procedurally defaulted his *Davis* claim by failing to raise it in the district court or on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003); *see also Granda v. United States*, 990 F.3d 1272, 1285–86 (11th Cir. 2021) ("This problem arises because Granda did not argue in the trial court, or on direct appeal, that his § 924(o) conviction was invalid since the § 924(c)(3)(B) residual clause was unconstitutionally vague."). A defendant may not raise claims that are

procedurally barred in a § 2255 motion unless he can show cause for not raising the claims on appeal, including that the claim was unavailable, and that actual prejudice resulted from the alleged error. *United States v. Frady*, 456 U.S. 152, 167 (1982); *Jones v. United States*, 153 F.3d 1305, 1307 (11th Cir. 1998). "Available" means that the merits of the challenge "can be reviewed without further factual development." *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). Unless a defendant can show that the alleged error was unavailable, a court may not consider § 2255 relief on that ground unless (1) cause is established for not raising the challenge on direct appeal, and (2) actual prejudice resulted from the alleged error. *Jones*, 153 F.3d at 1307.

**B. Binding Circuit precedent forecloses King's effort to show cause to excuse his default.**

King cannot show cause for not raising a timely vagueness challenge to his § 924(c) conviction. It is true that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Howard v. United States*, 374 F.3d 1068, 1072 (11th Cir. 2004). To establish novelty "sufficient to provide cause" based on a new constitutional principle, King must show that the new rule was "a sufficiently clear break with the past, so that an attorney representing

[him] would not reasonably have had the tools for presenting the claim." *Id.*

However, "[t]hat an argument might have less than a high likelihood of success has little to do with whether the argument is available or not. An argument is available if there is a reasonable basis in law and fact for it." *Pitts v. Cook*, 923 F.2d 1568, 1572 n.6 (11th Cir. 1991). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was available at all." *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (internal quotation marks and citation omitted).

*Davis* applied well-established constitutional vagueness principles, 139 S. Ct. at 2325, that have been on the books for nearly a century. *See, e.g., Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Given this landscape, a vagueness challenge to § 924(c)(3)(B) was not "novel." *See, e.g., Dugger v. Adams*, 489 U.S. 401, 409-410 (1989) (finding that a claim was not novel where "the legal basis for a challenge was plainly available"); *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996) ("If the tools were available for a petitioner to construct the legal argument at the time of the state appeals process, then the claim cannot be said to be so novel as to constitute cause for failing to raise it earlier.") (citation and internal quotation marks

omitted); *see also McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001) (holding that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was not novel because the "building blocks" existed before the decision itself was announced). Even if it was unlikely that King's challenge would have succeeded, the Supreme Court has long held that "futility cannot constitute cause." *Bousley*, 523 U.S. at 623.

In a recent published opinion, this Court agreed, finding that a *Davis* challenge "is not sufficiently novel to establish cause." *Granda*, 990 F.3d at 1286. Under this Court's prior panel precedent rule, the *Granda* decision forecloses King's effort to show cause to excuse his procedural default. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) ("Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court.").

The *Granda* holding is also correct. Citing *Reed v. Ross*, 468 U.S. 1 (1984), the court noted that the Supreme Court has identified several "circumstances in which novelty might constitute cause for defaulting a claim." *Granda*, 990 F.3d at 1286.[1] But the court found that a *Davis*

[1] The *Granda* court noted that, unlike the Supreme Court's decision voiding the Armed Career Criminal Act's ("ACCA") residual

claim fails to fit any of the categories under the *Reed* framework and thus Granda – like King – failed to show cause sufficient to avoid procedural default. *Id.* at 1286-88.

As is equally true of King, "the case law extant at the time of Granda's appeal confirms that he did not then lack the 'building blocks of' a due process vagueness challenge to the § 924(c) residual clause." *Granda*, 990 F.3d at 1287. And "[t]he tools existed to challenge myriad other portions of § 924(c) as vague; they existed to support a similar challenge to its residual clause." *Id.* at 1288. For those reasons, King, like Granda, "cannot show cause to excuse his procedural default." *Id.*

**C. King cannot show actual prejudice to excuse his default.**

Though his failure to show cause is sufficient to foreclose King's effort to avoid procedural default, he also fails to show actual prejudice.[2] Actual prejudice requires a defendant to show "not merely

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clause, "*Davis* did not overrule any prior Supreme Court precedents holding that the § 924(c) residual clause was not unconstitutionally vague." *Granda*, 990 F.3d at 1287. Thus a *Davis* error, unlike a *Johnson* error, does not fit into the first *Reed* category: "when a decision of the Supreme Court explicitly overrules one of its precedents, cause exists to excuse default of a claim based on the new decision." *Reed*, 468 U.S. at 17.

[2] On this issue, *Granda* is not helpful, as it involved a trial rather than a guilty plea in lieu of more serious charges, and a § 924(c)

that the alleged errors created a possibility of prejudice, but that they worked to his actual and substantial disadvantage . . . ." *Frady*, 456 U.S. at 170; *Parks v. United States*, 832 F.2d 1244, 1245 (11th Cir. 1987) (the cause and actual prejudice standard is more stringent than the plain error standard). King cannot show that any alleged error affected his substantial rights or the fairness, integrity, or public reputation of judicial proceedings.

As the district court recognized, King's plea agreement and plea colloquy "establish[] without doubt that he participated in the armed bank robbery with others, and that he brandished his gun." (Doc. 7 at 7). And in plea negotiations, the government expressly forewent charging petitioner with a substantive federal armed bank robbery count and an associated § 924(c) count.

King therefore cannot show prejudice, because armed bank robbery is undoubtedly a crime of violence to serve as the predicate for King's § 924(c) charge. *See In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016) (denying an application for leave to file a second or successive section 2255 motion); *In re Hunt*, 835 F.3d 1277, 1277 (same); *see also In re Sams*, 830 F.3d 1234, 1239 (11th Cir. 2016) (concluding that a conviction for bank robbery alone – pursuant to 18

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charge based on multiple predicates – some still valid. *Granda*, 990 F.3d at 1288-91.

U.S.C. § 2113(a) – qualifies as a crime of violence under section 924(c)(3)(A)).

King also has not shown, "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Davila*, 569 U.S. 597, 608 (2013) (citation omitted). By his plea, King avoided three indisputably valid charges to which he has admitted his guilt, and for which he would have been exposed to substantially longer imprisonment.[3]

To the extent King claims that he shows prejudice because he would not have pled to a constitutionally invalid charge, this ignores the most obvious and likely alternative scenario in the face of *Davis*. Instead of predicating King's § 924(c) charge on the conspiracy charge, the government would have based it on the substantive armed bank robbery itself, as it did in the original indictment. (Case No. 1:12-CR-338, Doc. 34).[4] It could have done so even without King

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[3] The original indictment charged King with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 and armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) and 2, which carry maximum penalties of 20 and 25 years in prison, respectively. By contrast, the § 371 conspiracy charge to which King pled in exchange for dismissing the more serious charges has a statutory maximum of just five years in prison.

[4] Such a charge remains valid after *Davis*. *See In re Pollard*, 931 F.3d 1318, 1321 (11th Cir. 2019) ("This Court has already held that armed robbery of a bank qualifies as a crime of violence under

pleading guilty to the substantive robbery itself, since a "conviction under section 924(c) does not require either that the defendant be convicted of or charged with the predicate offense." *United States v. Frye*, 402 F.3d 1123, 1127 (11th Cir. 2005). King admitted during his plea colloquy he is guilty of this crime, brandishing a firearm during the course of an armed bank robbery. (Doc. 7 at 12-16). King cannot prove a reasonable probability of any outcome other than the one that occurred – to his great benefit: a plea to a § 371 count and a § 924(c) count in exchange for the dismissal of more serious charges to which he has already admitted his guilt. King thus cannot meet his burden of showing actual prejudice.

**D. Supreme Court precedent forecloses King's effort to show actual innocence, since he has already admitted his guilt to the more serious charges dismissed in exchange for his plea.**

Since King cannot show cause and actual prejudice to excuse his procedural default, "his only way around procedural default would be to establish that he is actually innocent." *Granda*, 990 F.3d at 1291–92.[5] The actual innocence exception to the procedural default bar is

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§ 924(c)(3)(A)'s use-of-force clause.... As a result, Pollard cannot show that the Supreme Court's invalidation of § 924(c)(3)(B) in *Davis* benefits him in any way.")

[5] Though *Granda* cites the correct legal framework for the actual innocence exception in the context of a trial, King's further reliance on *Granda* is misplaced because – unlike Granda who went to trial –

"exceedingly narrow in scope as it concerns a petitioner's actual innocence rather than his legal innocence. Actual innocence means factual innocence, not mere legal innocence." *Lynn v. United States*, 365 F.3d 1225, 1235 n.18 (11th Cir. 2004) (alterations accepted) (internal quotation marks and citations omitted). "To establish actual innocence, [the] petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623.

But even if King could show that he is factually innocent of his § 924(c) conviction, it is not enough to avoid procedural default. In *Bousley*, the Supreme Court considered the situation — like in this case — where a defendant pleaded guilty in exchange for the government's forgoing more serious charges. 523 U.S. at 624. The 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." *Bousley*, 523 U.S. at 624; *see also United States v. Caso*, 723 F.3d 215, 220-221 (D.C. Cir. 2013); *Lewis v. Peterson*, 329 F.3d 934, 937 (7th Cir. 2003).[6]

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King pled guilty to the § 924(c) charge in exchange for the dismissal of more serious charges. As discussed in detail in this section, this distinction makes all the difference.

[6] Like his reliance on *Granda*, King's reliance on the Fifth Circuit decision in *United States v. Reece*, 938 F.3d 630 (5th Cir. 2019) is

In other words, King has the burden to prove that he was actually innocent not just of the § 924(c) charge in Count Two of the information, but the Hobbs Act conspiracy, armed bank robbery, and § 924(c) charges in the original indictment. Those crimes exposed King to imprisonment for up to 20 years, 25 years, and life imprisonment, respectively, but were dismissed in exchange for King's plea to lesser charges: a § 371 conspiracy with a maximum punishment of just five years, and the § 924(c) charge at issue here. (Case No. 1:12-CR-338, at Docs. 34, 199). Such an effort is doomed by King's plea colloquy, which – as the district court ably found – "establishes without doubt that he participated in the armed bank robbery with others, and that he brandished his gun." (Doc. 7 at 7).

Since King "can show neither cause, nor prejudice, nor actual innocence, he cannot overcome procedural default." *Granda*, 990 F.3d at 1292.

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misplaced. The defendant in *Reece* did not plead guilty, let alone plead guilty in exchange for the dismissal of more serious charges. He was thus not required to show his actual innocence of anything but the § 924(c) charge. Unlike the defendant in *Reece*, for King to avail himself of the actual innocence exception, *Bousley* requires that he show not only that he is actually innocent of the conspiracy-based § 924(c) charge, but also the charges that were dismissed in exchange for his guilty plea. As discussed below, King cannot do so in light of the admissions in his plea colloquy.

**2. King waived his right to bring a collateral attack on his conviction.**

The Supreme Court has recognized that a defendant may knowingly and voluntarily waive statutory or constitutional rights as part of a plea agreement. *See, e.g.*, *Ricketts v. Adamson*, 483 U.S. 1, 8-10 (1987) (upholding plea agreement's waiver of right to raise a double-jeopardy defense); *Town of Newton v. Rumery*, 480 U.S. 386, 389 (1987) (affirming enforcement of plea agreement's waiver of right to file an action under 42 U.S.C. § 1983). As a general matter, statutory rights are subject to waiver in the absence of some "affirmative indication" to the contrary from Congress. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). Likewise, even the "most fundamental protections afforded by the Constitution" may be waived. *Id.*

King's plea agreement included the following paragraph in which he waived his right to appeal and collaterally attack his sentence:

> LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the Defendant voluntarily and expressly waives the right to appeal his conviction and sentence and the right to collaterally attack his conviction and sentence in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. § 2255) on any ground, except that the Defendant may file a direct appeal of an upward departure or a variance from the sentencing guideline range as calculated by the district court or an appeal or collateral attack of any sentence over 84 months with respect to Count Two. The Defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government initiates a direct appeal of the sentence imposed, the Defendant may file a cross-appeal of that same sentence.

(Doc. 3-1-8). King certified in writing that he read the plea agreement, that he discussed it with his attorney, that he voluntarily agreed to its terms, that he understood its terms, and that he understood that the appeal waiver provision would prevent him from challenging his conviction and sentence in any post-conviction proceeding. (*Id.* at 9-10). At his plea, King was asked whether he understood that he was waiving these rights, and he confirmed that he did. (Doc. 7 at 20-21).

In general, a knowing and voluntary waiver of the right to appeal or to file a collateral attack is enforceable. *United States v. Bascomb*, 451 F.3d 1292, 1294-97 (11th Cir. 2006); *Williams v. United States*, 396 F.3d 1340, 1341-42 (11th Cir. 2005); *United States v. Buchanan*, 131

F.3d 1005, 1008 (11th Cir. 1997); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). In order for a court to uphold a waiver of appeal or collateral attack, the government need only demonstrate that "(1) the district court specifically questioned the defendant concerning the sentence appeal waiver . . . or (2) it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver." *Bushert*, 997 F.2d at 1351; *Williams*, 396 F.3d at 1341-42. Here, the record establishes that the district court specifically questioned King about the waiver of appeal and collateral attack during his plea hearing, and King knowingly and voluntarily waived his right to collaterally attack his conviction and sentence. And because the district court did not impose a sentence higher than 84 months on Count Two, and the Government did not appeal, neither of the two enumerated exceptions to the waiver apply here, and it should be enforced.

In a published opinion last year, the Seventh Circuit upheld the denial of a *Davis*-based § 2255 motion on grounds that it was barred by the defendant's collateral attack waiver. *Oliver v. United States*, 951 F.3d 841, 844 (7th Cir. 2020). King claims that the Ninth Circuit has held otherwise, but he quotes a decision that pre-dates *Davis* and considered the direct appeal waiver of a claim under *Johnson*. *See United States v. Torres*, 828 F.3d 1113, 1124-1125 (9th Cir. 2016). King

also cites an unpublished Fifth Circuit decision in which the court considered the merits of a *Davis* claim. *See United States v. Picazo-Lucas*, 821 F. App'x 335, 338 (5th Cir. 2020). The Fifth Circuit's explanation for declining to enforce the collateral-attack waiver was unreasoned, however, and appeared to turn on the specific language of the waiver at issue. *Id.* at 338 (basing decision on "[t]he language of [the defendant's] plea agreement"). King's waiver is significantly more specific.

Moreover, the district court had already ruled on this precise issue with respect to King's *Johnson*-based § 2255 motion in 2016, a ruling that King failed to appeal, and the law-of-the-case doctrine dictates that this previous ruling governed the present motion. (Doc. 16). The magistrate judge raised King's collateral attack waiver in response to King's previous § 2255 motion, making the same points the government makes now. (Doc. 13-6-9). The magistrate judge reviewed the plea agreement and plea hearing transcript, and determined that "[n]one of the exceptions to [King's] waiver of his right to file a § 2255 motion apply" and that King "knowingly and voluntarily agreed to the appeal waiver." (Doc. 13-7-8). Though King objected (Doc. 15), the district court agreed with the magistrate judge, finding that King's "appeal waiver is valid and expressly bars him from challenging his sentence — on any ground — under § 2255. (Doc. 16-3). King did not

file an appeal, and the district court's ruling constitutes a final order on this issue.

On the basis of the district court's prior ruling, it is the law of this case that King's collateral attack waiver bars his § 2255 claim. Under the law-of-the-case doctrine, "an issue decided at one stage of a case is binding at later stages of the same case." *United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997). "A federal court enunciating a rule of law to be applied in a particular case establishes the 'law of the case,' which other courts owing obedience to it must, and which itself will, normally apply to the same issues in subsequent proceedings in that case." *Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984) (emphasis removed) (internal quotation marks omitted). The law-of-the-case doctrine thus requires "a court to follow what has been decided explicitly, as well as by necessary implication, in an earlier proceeding." *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 n.3 (11th Cir. 1990) (emphasis removed). By failing to appeal the district court's final order in 2016, King should be barred from attempting to relitigate the issue now.

There are three exceptions to the law-of-the-case doctrine, namely, where the defendant can show either (1) new evidence; (2) an intervening change in the law that dictates a different result; or (3) that the prior decision was clearly erroneous and would result in

manifest injustice. *Escobar-Urrego*, 110 F.3d at 1561. None of these exceptions apply here. There has been no new evidence that would affect these purely legal questions. There has been no intervening change in the law with respect to the validity of collateral attack waivers. And the prior decision was neither clearly erroneous nor results in manifest injustice.

"It is not a miscarriage of justice to refuse to put [petitioner] in a better position than [he] would have been in if all relevant actors had foreseen *Davis*." *Oliver*, 951 F.3d at 847. Indeed, far from King being able to show that enforcement of his collateral attack waiver would be a miscarriage of justice, the opposite is true. King's guilty plea and collateral attack waiver were made in exchange for the government's agreement to forgo charges that exposed King to substantially higher statutory maximums. In particular, the charges dismissed by the government—in exchange for his plea — charged King with Hobbs Act conspiracy, punishable by 20 years in prison, armed bank robbery, punishable by 25 years in prison, and a violation of § 924(c) predicated on that offense, (Docket, Case No. 1:12-CR-338, at 34) — which would still qualify as a predicate offense after *Davis*. *See In re Pollard*, 931 F.3d 1318, 1321 (11th Cir. 2019) ("This Court has already held that armed robbery of a bank qualifies as a crime of violence under § 924(c)(3)(A)'s use-of-force clause.... As a result,

Pollard cannot show that the Supreme Court's invalidation of § 924(c)(3)(B) in *Davis* benefits him in any way.")

Moreover, King's plea colloquy with the Court made clear he was guilty of those dismissed crimes. The government explained during King's plea colloquy that King and his co-conspirators robbed a PNC Bank while possessing and brandishing handguns, pointing the guns at bank employees while taking more than $71,000 from the bank. (Doc. 7 at 23-24). The government further proffered that a cooperating witness identified King as one of the robbers and a video on King's cellphone showed him with the proceeds of the robbery. (Doc. 7 at 24). And the district court's colloquy with King further established his guilt to these crimes. (Doc. 7 at 14-16). In other words, the facts proffered by the government and admitted by King proved not just the offenses to which King pled guilty, but those charges that were dismissed as well.

King has received the benefit of the bargain into which he knowingly and voluntarily entered. (Doc. 3-1 at 4, 8). That is sufficient to uphold a collateral attack waiver. *Bushert*, 997 F.2d at 1351; *Williams*, 396 F.3d at 1341-42. Importantly, King cannot avoid his waiver by relying on case law involving sentences that exceed the statutory maximum. Unlike cases that involved an exception for a sentence in excess of the statutory maximum, like *United States v.*

*Rosales-Acosta*, 679 F. App'x 860, 861 (11th Cir. 2017), King's waiver only provided an exception for an upward variance/departure or a sentence in excess of 84 months on Count Two (Docs. 3 at 8; 7 at 27), and neither exception applies. There is no exception in King's waiver that entitles him to relief from his obligation.

The only injustice would occur if King were able to retain the benefits of his plea — the dismissal of the Hobbs Act conspiracy, armed bank robbery, and related § 924(c) charge and the higher statutory maximums they entailed — while escaping the collateral attack waiver to which he knowingly and voluntarily agreed.

## CONCLUSION

The United States respectfully requests that this Court affirm the denial of King's § 2255 motion.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

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