

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2020

5
6 (Argued: June 1, 2021 Decided: October 26, 2021)

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8 Docket No. 19-4316-cr
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11 _____
12 UNITED STATES OF AMERICA,

13
14 *Appellee,*

15
16 v.

17
18 DERRICK BORDEN,

19
20 *Defendant-Appellant.*
21 _____

22 Before:

23
24 POOLER, LOHIER, *Circuit Judges*, and KAPLAN, *District Judge*.*

25
26 Derrick Borden pleaded guilty pursuant to a plea agreement to conspiring
27 to commit a Hobbs Act robbery and brandishing a firearm in furtherance of a
28 crime of violence, in violation of 18 U.S.C. § 924(c). Although an appeal waiver
29 provision in the agreement barred Borden from challenging his conviction or
30 sentence, the Government consented to his request to vacate the § 924(c)
31 conviction as unconstitutional in light of United States v. Davis, 139 S. Ct. 2319
32 (2019). The United States District Court for the Eastern District of New York
33 (Matsumoto, J.) vacated Borden's § 924(c) conviction and resentenced him on the
34 remaining Hobbs Act robbery conspiracy count. On appeal, Borden challenges

* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

1 his new sentence and argues that the Government cannot selectively enforce the
2 appeal waiver provision. We hold that the Government can invoke the appeal
3 waiver despite having earlier consented to Borden’s habeas petition. We
4 therefore **DISMISS** the appeal.

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6 BRUCE R. BRYAN, Manlius, NY, *for Defendant-Appellant*.

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8 OREN GLEICH, Assistant United States Attorney (Amy
9 Busa, Assistant United States Attorney, *on the brief*), *for*
10 Breon S. Peace, United States Attorney for the Eastern
11 District of New York, Brooklyn, NY, *for Appellee*.

12
13 LOHIER, *Circuit Judge*:

14 In this appeal we consider whether the Government broadly surrenders its
15 right to enforce an appellate waiver provision in a plea agreement when it
16 consents to a federal habeas proceeding that is otherwise barred by the
17 provision. Derrick Borden, the appellant here, waived his right to appeal or
18 otherwise challenge his convictions or sentence. Despite Borden’s waiver, the
19 Government agreed to let the District Court vacate Borden’s conviction under 18
20 U.S.C. § 924(c) based on the Supreme Court’s intervening decision in United
21 States v. Davis, 139 S. Ct. 2319 (2019), and to be resentenced on his remaining
22 count of conviction. Borden asks us to review his new sentence, while the
23 Government maintains that the appellate waiver provision still prevents us from

1 reviewing Borden's challenge. We hold that under the circumstances of this case
2 the appellate waiver provision remains enforceable. The appeal is DISMISSED.

3 **BACKGROUND**

4 The following facts are largely undisputed on appeal. In 2009 Derrick
5 Borden and his codefendants took part in a conspiracy to rob a marijuana dealer
6 at home. During the robbery, one of the conspirators brandished a shotgun at a
7 witness. Borden pleaded guilty before Judge Wexler of the United States District
8 Court for the Eastern District of New York to a two-count Information charging
9 conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and
10 the use and carrying of a firearm, in violation of 18 U.S.C. § 924(c). Borden's
11 guilty plea was entered pursuant to a plea agreement that contained the
12 following language:

13 The defendant agrees not to file an appeal or otherwise challenge, by
14 petition pursuant to 28 U.S.C. § 2255 or any other provision, the conviction
15 or sentence in the event that the Court imposes a term of imprisonment of
16 240 months or below. This waiver is binding without regard to the
17 sentencing analysis used by the Court.

18
19 Gov't App'x 5–6. At the plea hearing, the District Court confirmed that Borden
20 understood and agreed to the terms of the appellate waiver.

1 In December 2015 the District Court sentenced Borden to consecutive
2 terms of 60 months of imprisonment on the Hobbs Act count and 24 months of
3 imprisonment on the firearm count, for a total sentence of 84 months'
4 imprisonment, to be followed by a 5-year term of supervised release. Borden did
5 not appeal that sentence, but he later sought to vacate the firearm count pursuant
6 to § 2255.

7 In June 2019 the Supreme Court issued its decision in Davis, which held
8 that the residual clause of 18 U.S.C. § 924(c)—one of Borden’s counts of
9 conviction—is unconstitutionally vague. 139 S. Ct. at 2336. A month later the
10 Government consented to the vacatur of Borden’s § 924(c) conviction and
11 requested that the District Court resentence him. Specifically, the Government
12 made the following statement that is at the heart of this appeal:

13 The Government respectfully submits this letter in response to the
14 defendant’s motion to vacate his conviction under 18 U.S.C. § 924(c) in
15 light of the United States Supreme Court’s decision in Johnson v. United
16 States, 135 S. Ct. 2251 (2015) As set forth more fully below, in light of
17 the Supreme Court’s decision in United States v. Davis, No. 18-431, 2019
18 WL 2570623 (2019), the government consents to vacatur of the defendant's
19 § 924(c) conviction and requests that the case be remanded for a full
20 resentencing.

21

22 Davis appears to have abrogated the Second Circuit's holding in
23 Barrett that the conduct-specific approach applies to Section 924(c)'s
24 Residual Clause and implicitly appears to have abrogated its alternative

1 holding that, under a categorical approach, a conspiracy to commit a crime
2 of violence is itself a crime of violence under the Residual Clause. In light
3 of this ruling, the government consents to defendant's request that his
4 conviction on Count Two be vacated. The government notes that the
5 defendant's motion may be procedurally barred by, among other things,
6 the appellate waiver in the defendant's cooperation agreement. However,
7 in light of the particular circumstances of this case, . . . the government is
8 not seeking to enforce that waiver and consents to the defendant's motion.

9

10 The government consents to the defendant's motion to vacate his
11 conviction on Count Two and respectfully requests that the case be
12 remanded for a full resentencing on Count One. See *United States v.*
13 *Powers*, 842 F.3d 177, 179 (2d Cir. 2016) (explaining that remedy for
14 conviction error is remanding for de novo resentencing).

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16 Appellant's App'x 37–39 (emphasis added). Judge Matsumoto, to whom the
17 matter was reassigned, thereafter vacated Borden's § 924(c) conviction and, in
18 December 2019, resentenced him on the only remaining count of conspiracy to
19 commit Hobbs Act robbery.

20 At the resentencing, the District Court calculated the revised applicable
21 Guidelines range to be 151 to 188 months' imprisonment, which was much
22 higher than Borden's original 84-month sentence. As relevant to this appeal, the
23 revised Guidelines range reflected the District Court's conclusion, over Borden's
24 objection, that conspiracy to commit Hobbs Act robbery counts as a crime of

1 violence under § 4B1.2(a) of the Guidelines, thus triggering the career offender
2 enhancement contained in Guidelines § 4B1.1(b).

3 But the District Court asserted that the career offender designation would
4 not “make[] a material difference in the sentence” it would impose. Instead, the
5 District Court considered Borden’s good behavior in prison, including the fact
6 that he had completed several classes and programs, the significant family
7 support he enjoyed, as well as an offer of steady employment that, the District
8 Court said, would “go a long way toward relieving the stress of insufficient
9 funds and [would] convince Mr. Borden that he has good prospects for a law-
10 abiding life.” Appellant’s App’x 84–86.

11 The District Court then sentenced Borden to 60 months’ imprisonment on
12 the Hobbs Act count (the same term that the original sentencing judge had
13 previously imposed on that count) to be followed by three years of supervised
14 release. Finally, the District Court informed Borden that he had the right to

1 appeal his sentence. Borden, who by that time had served more than 63 months
2 in prison, was released from prison that day.

3 DISCUSSION

4 Borden challenges his designation as a career offender and seeks a remand
5 to reduce his term of supervised release. See United States v. Chestnut, 989 F.3d
6 222, 224–25 (2d Cir. 2021) (explaining that in many cases, “an appeal challenging
7 a criminal sentence will not be rendered moot when the defendant is released
8 from prison so long as the defendant is still subject to a term of supervision”).
9 The valid appeal waiver in this case requires that we dismiss his appeal rather
10 than address his challenge.

11 “Waivers of the right to appeal a sentence are presumptively enforceable,”
12 United States v. Arevalo, 628 F.3d 93, 98 (2d Cir. 2010), and the exceptions to this
13 rule “occupy a very circumscribed area of our jurisprudence,” United States v.
14 Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000). We have not decided, however,
15 whether the Government “is entitled to partial enforcement of an appeal
16 waiver.” United States v. Ojeda, 946 F.3d 622, 629 (2d Cir. 2020). Here, for
17 example, the Government previously consented to Borden’s request to vacate the
18 § 924(c) conviction notwithstanding the existence of a valid appeal waiver that

1 purported to foreclose his request. We now hold that “partial enforcement” or
2 “partial invocation” of a plea agreement’s waiver provision is permitted under
3 limited circumstances, including those present in this case, as set forth below.

4 To start, consenting to permit Borden to move to vacate his § 924(c)
5 conviction was in Borden’s interest, in the interest of judicial economy,¹ and in
6 the interests of justice; there was no dispute that the conviction was
7 constitutionally infirm. Under those circumstances, we see no reason to
8 discourage the Government from consenting to the correction of a constitutional
9 error by offering limited relief from an appeal waiver (or waiver of other post-
10 conviction relief) that benefits the defendant.

11 Second, as is the case here, the issue the Government permits the
12 defendant to pursue and the issue as to which it seeks to invoke the appeal
13 waiver provision must not be closely linked. This is the limitation imposed by
14 Ojeda, in which we refused to permit the Government to partially invoke an
15 appeal waiver where there was a “close relationship between the issues raised on
16 appeal, both of which implicate[d] the district court’s responsibility to consider

¹ The Government could have sought to enforce the waiver provision and block the resentencing. This would likely have fueled more litigation about the appeal waiver. Although Borden himself has appealed his new sentence, in many cases a defendant who obtains relief at resentencing may be satisfied with the result.

1 the full impact of [the] related state sentences on his effective term of
2 imprisonment, and neither of which requires de novo resentencing.” 946 F.3d at
3 630. We held that where the Government had consented to a limited remand on
4 one sentencing issue that was closely linked to another for which it sought to
5 invoke the appeal waiver, it was appropriate to remand both issues rather than
6 permit partial invocation of the waiver.² See id. at 629–30.

7 Borden contends that our holding in Ojeda broadly prevents the
8 Government from “selectively enforc[ing]” his appeal waiver. But this case is
9 clearly distinguishable from Ojeda. Here the two issues are not “undoubtedly
10 interrelated.” Id. at 629. To the contrary, Borden’s § 2255 motion relating to
11 whether his § 924(c) conviction should be vacated after Davis, and this appeal
12 relating to whether Hobbs Act robbery is a crime of violence triggering the career
13 offender sentencing enhancement, raise significantly different issues. See Beckles
14 v. United States, 137 S. Ct. 886, 890–92 (2017) (holding that advisory Guidelines
15 are not subject to vagueness challenges under the Due Process Clause and
16 distinguishing guidelines from statutes fixing permissible sentences). Moreover,

²In addition to the close relationship of the issues, we noted “the government’s consent to a limited remand” and our “traditional discretion to control the scope of our mandate in sentencing cases.” Ojeda, 946 F.3d at 630.

1 the issues were raised at entirely separate stages in Borden’s criminal
2 proceedings; indeed, Borden’s § 924(c) conviction was vacated by the District
3 Court well before the career offender issue could even have arisen at
4 resentencing.

5 Third, here the Government seeks to dismiss all of Borden’s challenges on
6 appeal, while the Government in Ojeda sought to parse related challenges,
7 inviting us to dismiss some but not other challenges. Although we do not
8 require that the Government seek to dismiss the entire appeal under these
9 circumstances, see, e.g., United States v. Ortega-Hernandez, 804 F.3d 447, 451–52
10 (D.C. Cir. 2015) (remanding to correct a mistakenly imposed sex-offender
11 registration condition while applying appeal waiver to dismiss the remainder of
12 appeal), the fact that the Government has done so here further distinguishes this
13 case from Ojeda.

14 Setting aside Ojeda, Borden maintains that the Government’s letter to the
15 District Court asserting that it would not seek to enforce certain of its rights
16 under the appellate waiver “broadly relinquished” its right to enforce any part of
17 the waiver provision. Appellant’s App’x 38. We do not share Borden’s reading
18 of the letter, which was submitted in response to Borden’s motion for vacatur of

1 his § 924(c) conviction and for resentencing. The letter explains that the
2 Government “consents to vacatur of the defendant’s § 924(c) conviction and
3 requests that the case be remanded for a full resentencing.” Appellant’s App’x
4 37. The letter then asserts that “[i]n light of [Davis], the government consents to
5 defendant’s request that his conviction on [the firearm count] be vacated . . .
6 [and] is not seeking to enforce [the appellate] waiver and consents to the
7 defendant’s motion.” Appellant’s App’x 38. And it concludes as follows: “The
8 government consents to the defendant’s motion to vacate his conviction on [the
9 firearm count] and respectfully requests that the case be remanded for a full
10 resentencing on [the conviction for conspiracy to commit Hobbs Act robbery].”
11 Appellant’s App’x 39. In our view, neither the text nor the context of the
12 Government’s letter indicates an intent to “broadly relinquish” any of its rights
13 under the plea agreement. In addition, Borden does not appear to have relied on
14 the Government’s letter to his detriment. To the contrary, the letter permitted
15 Borden to obtain precisely the relief he sought. And although we “construe plea
16 agreements strictly against the Government,” United States v. Lutchman, 910
17 F.3d 33, 37 (2d Cir. 2018) (quotation marks omitted), that standard does not

