

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 21-10458  
Non-Argument Calendar

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D.C. Docket Nos. 0:16-cv-62630-KAM; 0:08-cr-60309-KAM-3

RODOLFO MARTINEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Southern District of Florida

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(August 2, 2021)

Before JORDAN, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Rodolfo Martinez, a federal prisoner, appeals the district court’s denial of his authorized, second 28 U.S.C. § 2255 motion to vacate. He argues that his conviction for using or carrying a firearm during a crime of violence or a drug-trafficking crime is invalid because one of the two predicate crimes on which the conviction was based no longer qualifies as a crime of violence under *United States v. Davis*, 139 S. Ct. 2319 (2019). The government responds by moving for summary affirmance of the district court’s order and for a stay of the briefing schedule, arguing that Martinez’s *Davis* claim is procedurally defaulted.

Summary disposition is appropriate either where time is of the essence, such as “situations where important public policy issues are involved or those where rights delayed are rights denied,” or where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).<sup>1</sup>

When reviewing a district court’s denial of a 28 U.S.C. § 2255 motion, we review questions of law de novo and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). Similarly, we review de novo whether procedural default precludes a § 2255 movant’s claim, which is a

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<sup>1</sup> We are bound by cases decided by the former Fifth Circuit before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

mixed question of law and fact. *Granda v. United States*, 990 F.3d 1272, 1286 (11th Cir. 2021).

Section 2255 allows federal prisoners to obtain post-conviction relief and set aside prior convictions when a sentence “was imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. § 2255(a). But a § 2255 claim, including a claim raised under *Davis*, may be procedurally defaulted if the petitioner failed to raise the claim at trial or on direct appeal. *See Granda*, 990 F.3d at 1285–86. A defendant can overcome this procedural bar by establishing either (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted. *Id.* at 1286.

Section 924(c) of Title 18 of the United States Code provides for a mandatory consecutive sentence for any defendant who uses or carries a firearm during a crime of violence or a drug-trafficking crime. After the Supreme Court in *Davis* held that a portion of the statute defining a “crime of violence” was invalid, this Court held that conspiracy to commit Hobbs Act robbery did not qualify as a crime of violence within the meaning of § 924(c). *Brown v. United States*, 942 F.3d 1069, 1075–76 (11th Cir. 2019).

Martinez argues that his § 924(c) conviction is invalid because it was predicated in part on his Hobbs Act conspiracy offense as a crime of violence,

contrary to *Davis*. The government is correct as a matter of law that Martinez’s *Davis* challenge is procedurally defaulted—as Martinez concedes—because he never argued that § 924(c) was unconstitutionally vague prior to these § 2255 proceedings.<sup>2</sup> See *Parker*, 993 F.3d at 1265; *Granda*, 990 F.3d at 1286–92. He cannot show cause for failing to do so because the building blocks for raising that argument existed at the time of his 2011 direct appeal; “a vagueness-based challenge to the § 924(c)(3)(B) residual clause was not sufficiently novel to establish cause.” *Parker*, 993 F.3d at 1265; see *Granda*, 990 F.3d at 1287. Nor can he show prejudice, because his *Davis* claim is foreclosed on the merits by our decisions in *Granda* and *Parker*.<sup>3</sup> As in those cases, the record here makes clear that the valid and invalid predicates for Martinez’s firearm conviction—conspiracy to commit Hobbs Act robbery by robbing a drug dealer of cocaine, and conspiracy to possess the cocaine with intent to distribute it—were “inextricably intertwined.” *Granda*, 990 F.3d at 1280. In other words, “the jury could not have concluded that [Martinez] conspired to possess a firearm in furtherance of his robbery conspiracy

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<sup>2</sup> While the scope of review in a § 2255 appeal is limited to issues specified in the certificate of appealability (COA), we may read the COA to encompass procedural issues that must be resolved before we can reach the merits of the underlying claim, and we do so here. *McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001).

<sup>3</sup> Notably, in *Granda* and *Parker*, we rejected the same arguments in reliance on *Stromberg v. California*, 283 U.S. 359 (1931), *Alleyne v. United States*, 570 U.S. 99 (2013), and *In re Gomez*, 830 F.3d 1225 (11th Cir. 2016), that Martinez raises here. See *Parker*, 993 F.3d at 1264–65; *Granda*, 990 F.3d at 1293–96.

without also finding at the same time that he conspired to possess the firearm in furtherance of his conspiracy and attempt to obtain and distribute the cocaine.” *Id.* at 1289; *see Parker*, 993 F.3d at 1265 (“if the jury relied on the invalid Hobbs Act conspiracy predicate, it also relied on the valid drug trafficking predicates”).

Last, Martinez has not made any attempt to overcome the procedural bar by showing that he is actually innocent of the § 924(c) charge, nor could he meet that standard on this record. “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.” *Granda*, 990 F.3d at 1292 (alteration in original) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). For purposes of this motion, Martinez has not challenged the description of his offense conduct contained in his presentence investigation report or the evidence presented at his trial, all of which amply supports the jury’s verdict finding him guilty of using or carrying a firearm in furtherance of a conspiracy to possess with intent to distribute cocaine, in violation of 18 U.S.C. § 924(c).

Because the government’s position is correct as a matter of law, we **GRANT** the government’s motion for summary affirmance. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. We **DENY** the accompanying motion to stay the briefing schedule as moot.