Nos. 17-3306 and 17-3307

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEDRICK BUFKIN AND DIAMOND TONEY,

Petitioners-Appellees,

v.

UNITED STATES OF AMERICA,

Respondent-Appellant.

On Appeal from the United States District Court
for the Northern District of Indiana (Hammond)
Nos. 2:16-cv-00236-JVB and 2:16-cv-00181-JVB
Judge Joseph S. Van Bokkelen, Presiding

SUPPLEMENTAL RESPONSE BRIEF OF PETITIONERS-APPELLEES DEDRICK BUFKIN AND DIAMOND TONEY

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INTRODUCTION

The effect of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), on this case is clear: it further supports the district court's holding that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague. Petitioners in this case were convicted solely of violating § 924(c). The Seventh Circuit later held in *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016), *cert denied*, 138 S. Ct. 247 (2017), that § 924(c)(3)(B) is unconstitutionally vague in light of Supreme Court precedent. The district court therefore granted Petitioners relief under 28 U.S.C. § 2255, holding that their convictions and sentences could not stand under § 924(c)(3)(B) because it is unconstitutionally vague. The government appealed only the question of whether § 924(c)(3)(B) is unconstitutionally vague.

Section 924(c)(3)(B) is worded identically to 18 U.S.C. § 16(b), the statute at issue in *Dimaya*. *Dimaya* held that § 16(b) is unconstitutionally vague, and in doing so again applied the well-settled categorical approach. 138 S. Ct. at 1211, 1216-17. As a result, the sole impact of *Dimaya* on this case is to provide further support for this circuit's binding precedent in *Cardena* and the district court's holding in this case that § 924(c)(3)(B) is unconstitutionally vague. That should end the analysis.

The government instead has filed a 33-page supplemental brief raising all new arguments—all of which it has waived, and none of which are supported by or follow from *Dimaya*. The government failed to raise *any of the arguments in its supplemental brief* in its district court briefing on Petitioner's § 2255

petition or in its prior briefing in this appeal. It is no surprise that the government now wishes to raise new arguments it long ago abandoned, as all of the arguments it previously chose to raise have now been rejected by the district court in this case, the Seventh Circuit in *Cardena*, and the Supreme Court in *Dimaya*. It is well-settled that the government cannot do so.

Nor can the government be rescued from its waivers by purporting to "withdraw[ ] in its entirety its opening brief arguments and restat[e] the issue statements, facts, and arguments in this supplemental brief." Gov. Supp. Br. at 1. The government asked this court to "strike the briefs and start anew" with briefing this appeal in light of *Dimaya*, and only in the alternative to "file a supplemental brief explaining how *Dimaya* affects the outcome of this appeal." *See* App. Dkt. 31.[1] The Court's order explicitly limited the government to the latter. App. Dkt. 32 ("**IT IS ORDERED** that the motion is **GRANTED** to the extent that the government may file a supplemental brief addressing *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), by June 18, 2018."). The government's supplemental brief thus goes far beyond what the court authorized it to file.

Even if the court somehow could reach the merits of the government's new arguments, they all fail. Its new argument for disregarding § 924(c)(3)(B)'s categorical approach is not supported by *Dimaya*, as the Supreme Court in *Dimaya* applied the categorical approach. 138 S. Ct. at 1211. Indeed, only Justice Thomas' dissent in *Dimaya* argued that the Court should abandon the

[1] Citations to "App. Dkt." are to the Seventh Circuit docket in this case, and citations to "Dkt." are to the district court docket in this case.

categorical approach. *Id.* at 1258-59 (Thomas, J., dissenting). Accordingly, while the government makes the outrageous contention that *Dimaya* "requires 18 U.S.C. § 924(c)(3)(B) to be interpreted using an underlying conduct approach rather than a categorical approach," *see* Gov. Supp. Br. at 1, this simply is not true. Supreme Court and Seventh Circuit precedent make clear that statutes like § 924(c)(3)(B) defining an "offense" "by its nature" require application of the categorical approach. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *Cardena*, 842 F.3d at 996. Indeed, following *Dimaya*, the Seventh Circuit denied the government's request to reconsider this issue *en banc*. *See United States v. Jenkins*, No. 14-2898 (7th Cir. Aug. 3, 2018), ECF No. 96.

The government fares no better with its brand-new arguments about procedural default, resentencing on charges dismissed pursuant to the plea agreements, or reinstating charges dismissed pursuant to the plea agreements. Again, the government is raising these arguments for the first time in its supplemental brief. These arguments are all waived, do not follow from *Dimaya*, and run afoul of circuit precedent. The court therefore should affirm the district court's grant of Petitioners' habeas petitions.

SUMMARY OF THE ARGUMENT

As discussed in Section I, the sole effect of *Dimaya* on this case is to reaffirm the district court's holding in this case and this circuit's precedent that § 924(c)(3)(B) is unconstitutionally vague. This court therefore should affirm the district court's grant of habeas relief to Petitioners.

All of the government's other arguments fail for the same reasons: (1) they have been waived by the government; (2) they do not follow from and are not supported by *Dimaya*; and (3) they are wrong on the merits. Section II addresses the government's new argument that the court can and should jettison the well-settled categorical approach to § 924(c)(3)(B). Section III addresses the government's new arguments regarding procedural default and plain error. Finally, Section IV addresses the government's new arguments regarding reinstatement of the charges the government agreed to dismiss with prejudice.

ARGUMENT

I. *Dimaya* affirms that the district court was correct in holding that § 924(c)(3)(B) is unconstitutionally vague.

In *Dimaya*, the Supreme Court held that § 16(b) is unconstitutionally vague because it contains the "constitutionally problematic" "ordinary-case requirement and ill-defined risk threshold." 138 S. Ct. at 1213-16, 1223. Section 16(b) is worded identically to § 924(c)(3)(B), the statute at issue in this case: both define a "crime of violence" as an "offense" that "by its nature, involves a substantial risk that physical force against the person or property of another may be used." As a result, § 924(c)(3)(B) also is unconstitutionally vague. The two circuits to address this question since *Dimaya* have agreed. *See United States v. Salas*, 889 F.3d 681, 685-86 (10th Cir. 2018) ("*Dimaya*'s reasoning for invalidating § 16(b) applies equally to 924(c)(3)(B)"); *United States v. Eshetu*, No. 15-3020, -- F.3d --, 2018 WL 3673907, at *1 (D.C. Cir. Aug. 3, 2018) ("[The Defendants] argue that *Dimaya* dictates vacatur of their

section 924(c) convictions. We agree."). Even the government previously treated §§ 16(b) and 924(c)(3)(B) identically, including in their briefs before the Supreme Court in *Dimaya*. *See* Reply Brief for Pet'r on Cert., *Dimaya*, 2016 WL 4578842, at *9; Br. for Pet'r, *Dimaya*, 2016 WL 6768940, at *47.

In its opening brief in this appeal, the government argued solely that § 924(c)(3)(B) is constitutional because its language is different than the ACCA provision that the Supreme Court struck down as unconstitutionally vague in *United States v. Johnson,* 135 S. Ct. 2551 (2015). *See* Gov. Opening Br. at 8-12. The government made these exact same textual arguments in *Dimaya* in arguing that § 16(b) was constitutional, but the Supreme Court held in *Dimaya* that each of these "textual discrepancies" "turns out to be the proverbial distinction without a difference."[2] 138 S. Ct. at 1218. As the Court reasoned, none of the government's defenses of § 16(b) "relates to the pair of features—

[2] First, the government argued that while the ACCA concerned "risk of physical injury" generally, § 924(c)(3)'s language limits the inquiry to risk arising "in the course of committing the offense." Gov. Opening Br. at 9-10. The Court rejected this argument in *Dimaya*, holding that this temporal distinction "makes no difference" because "[e]very offense that could have fallen within ACCA's residual clause might equally fall within" a statute that contains this temporal language. 138 S. Ct. at 1220. Second, the government argued in this case that while the ACCA concerned a risk of physical "injury," § 924(c)(3) concerns the use of "physical force," a distinction which it claimed limits the inquiry to the actual conduct involved in the crime. Gov. Opening Br. at 10. Again, the Supreme Court rejected this exact argument in *Dimaya*, holding that the "force/injury distinction is unlikely to affect a court's analysis" as "the same crimes might—or, then again, might not—satisfy both requirements." 138 S. Ct. at 1221 (stating that "we struggle to see how that statutory distinction would matter"). Finally, the government held up the identical language in § 16(b) as an example of each of these textual differences, with the apparent belief that § 16(b) was "materially narrower" than the ACCA and would withstand a vagueness challenge in *Dimaya*. Gov. Opening Br. at 9-11. *Dimaya* rejected these precise arguments with respect to the identical language in § 16(b). 138 S. Ct. at 1221 ("this variance in wording cannot make ACCA's residual clause vague and § 16(b) not").

the ordinary-case inquiry and the hazy risk threshold—that *Johnson* found to produce impermissible vagueness." *Id.* at 1218. The Court therefore held that § 16(b) too was unconstitutionally vague because it "invited arbitrary enforcement, and failed to provide fair notice". *Id.* at 1223.

Dimaya thus forecloses every argument raised by the government in its opening brief in this case as "distinction[s] without a difference." *Id.* at 1218. It also confirms that this court was correct in *Cardena*, and the district court was correct in this case, in holding that this same statutory language in § 924(c)(3) is unconstitutionally vague. *Id.*; *see also Salas*, 889 F.3d at 685-86; *Eshetu*, 2018 WL 3673907, at *1.

II. The government's argument that the court can and should abandon the categorical approach is waived, does not follow from *Dimaya*, and is wrong.

The government appears to concede that *Dimaya* forecloses all of the arguments it made previously in this case, as it abandons those arguments in its supplemental brief. The government instead raises an entirely new argument, for the first time in its supplemental brief, that this court can and should abandon the well-settled precedent that applies the "categorical approach" to § 924(c)(3)(B). The government waived this argument in this case. It also fails on the merits, because it does not follow from *Dimaya* and is foreclosed by binding precedent.

A. The government's argument is waived.

Forfeiture and wavier "can stymie an appellee as well as an appellant" if a party fails to "assert [an argument] adequately in the district court." *Cross v.*

United States, 892 F.3d 288, 294 (7th Cir. 2018); *see also Williams v. Dieball*, 724 F.3d 957, 961-62 (7th Cir. 2013) (holding that an argument is waived if the party fails to present the specific argument to the district court, or if they are "underdeveloped, conclusory, or unsupported by law"). On appeal, "[a] party waives arguments that are not presented in the opening brief," *Bernard v. Sessions*, 881 F.3d 1042, 1048 (7th Cir. 2018) (internal citation and quotation marks omitted), or that are made for the first time in a supplemental brief. *See United States v. Shah*, 665 F.3d 827, 843 (7th Cir. 2011) ("But the government raised this waiver argument for the first time in its supplemental brief, and thus has waived waiver."); *United States v. Cunningham*, 405 F.3d 497, 503 (7th Cir. 2005) (holding that defendant could not raise an argument for the first time in a supplemental brief where he "executed a waiver of this issue long before the filing of his supplemental brief").

The government's new argument that the court should abandon the categorical approach and instead apply its new case-specific approach to § 924(c)(3) is waived under these well-established principles. The government not only failed to raise this argument, but in fact *argued the opposite* multiple times before the district court and the Seventh Circuit in this case. The government conceded in the district court that "[t]he court may not look at the underlying facts of the conviction, only the elements" under § 924(c)(3)(B). Dkts. 80 and 81 (Gov. Response to Defendant's Petition for Habeas Corpus) at 4. It further conceded that "a panel . . . would not appear free to reconsider the wisdom of the categorical approach in Section 924(c) cases" in light of this

circuit's precedent. *Id.* at 4-5 n.4. Finally, in its opening brief in this appeal, the government stated that § "924(c)(3)(B) . . . requires the court to assess the risk posed by the ordinary case of a particular offense." Gov. Opening Br. at 5.

As Justice Gorsuch noted in his concurring opinion in *Dimaya*, when declining to reconsider the categorical approach in light of the government's concession that it applied, "courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government." 138 S. Ct. at 1232. This court similarly should not rescue the government from its concessions in this case that the categorical approach applies to § 924(c)(3).

Nor can the government overcome its waiver by purporting to withdraw all prior arguments and submit all new arguments in its supplemental brief because *Dimaya* significantly altered the "relevant legal landscape." Gov. Supp. Br. at 1. As a threshold matter, the premise of this argument is incorrect, because *Dimaya* does not support abandoning the categorical approach, much less require doing so. *See infra* at II.B. This argument also runs afoul of the court's supplemental briefing order. The government asked this court to strike the prior briefs in this case and allow it to brief the case anew in light of *Dimaya*, but the court did not grant that request. *See* App. Dkts. 31, 32. The court's order instead directed the government only to file "a supplemental brief addressing *Sessions v. Dimaya*." *See* App. Dkt. 32; *see also Cunningham*, 405 F. 3d at 503 (holding that order to file supplemental briefing on the effect of a new Supreme Court case did not open the door to other

arguments the defendant previously waived). The government thus has far exceeded what the court's order permitted it to do. Accordingly, as a result of its multiple, explicit concessions to the contrary, the government has waived its new argument.

B. *Dimaya* does not support the government's argument.

Even if this court could reach the government's argument that the court can and should jettison the categorical approach, this argument does not follow from *Dimaya*. The Court in *Dimaya* applied the categorical approach. *See, e.g.,* 138 S. Ct. at 1211. This followed from settled precedent, as the Supreme Court had already held in *Leocal* that this statutory language defining an offense "by its nature" requires application of the categorical approach. 543 U.S. at 7 (holding that § 16(b) requires application of the categorical approach).

As this court recently recognized, "only a minority of justices [in *Dimaya*] cast aspersions on the categorical approach," and they did so "in dissent." *Cross*, 892 F.3d at 302-03. The four-justice plurality in *Dimaya* wrote that the Court was bound by precedent in conducting an "ordinary case" inquiry because the statute describes a crime "by its nature." 138 S. Ct. at 1211, 1216-17. Justice Gorsuch, concurring in the judgment, agreed that the Court's precedent "requires this [categorical] approach," despite indicating his willingness to reconsider it in "another case." *Id.* at 1232-33. Chief Justice Roberts, in dissent, also acknowledged that "under [the Supreme Court's] decisions . . . court[s] must take into account how those elements will *ordinarily* be fulfilled." *Id.* at 1235-36 (emphasis added). Only Justice Thomas,

writing in dissent, argued that the "Court *should have taken* this opportunity to abandon the categorical approach" and that *stare decisis* should not have been determinative. *Id.* at 1259 (emphasis added).[3] Thus, as the D.C. Circuit recently put it, "*Dimaya* nowise calls into question [the] requirement of a categorical approach" to § 924(c)(3)(B). *Eshetu*, 2018 WL 3673907, at *1-2 (holding that "circuit precedent demands a categorical approach to section 924(c)(3)(B)" and rejecting the government's position that *Dimaya* permitted a reevaluation of that precedent); *see also Cross*, 892 F.3d at 303 (noting that "[u]nless and until a majority of the Court overrules the majority opinions in *Johnson* and *Dimaya*, they continue to bind us").

C. The government's argument is foreclosed by binding precedent.

Supreme Court precedent, unchanged by *Dimaya*, establishes that a statutory "crime of violence" that involves risk "by its nature" *must* be analyzed using the categorical approach. *See, e.g., Leocal*, 543 U.S. at 7; *Taylor v. United States*, 495 U.S. 575 (1990). Section 924(c)(3)(B) defines "crime of violence" as an "offense" that "by its nature, involves a substantial risk that physical force against the person or property of another may be used." The government does not cite *Leocal* at all in its supplemental brief, much less attempt to explain how a dissent in *Dimaya* might function to abrogate *Leocal*.

[3] While Justices Kennedy and Alito joined Justice Thomas' dissent as to other parts, Justice Thomas alone wrote in Part III that the Court "should . . . abandon the categorical approach for § 16(b) once and for all." *Dimaya*, 138 S. Ct. at 1259.

Moreover, the Seventh Circuit has repeatedly held §§ 16(b) and 924(c)(3)(B) lack any material differences, meaning both require the application of the categorical approach. In *United States v. Vivas-Ceja*, this court held that § 16(b) "mandates the use of . . . the categorical approach, to determine whether a crime is a violent felony" and therefore is unconstitutionally vague following *Johnson*. 808 F.3d 719, 721 (7th Cir. 2015). This court then held in *Cardena* that §§ 16(b) and 924(c)(3)(B) contain "the same residual clause[s]" and therefore are unconstitutional for the same reasons. 842 F.3d at 996. *Cardena*, too, therefore applied the categorical approach to § 924(c)(3)(B). *Id.* *Cardena*'s holding that § 924(c)(3)(B) requires a categorical approach and is unconstitutional cannot be overturned by a panel of this court.[4] *See*, *e.g.*, *United States v. Wolvin*, 62 F. App'x 667, 668 (7th Cir. 2003) (holding that a three-judge panel cannot overturn circuit precedent by itself). Moreover, the Seventh Circuit recently declined the government's request in another case to reconsider *en banc* its precedent that § 924(c)(3)(B) requires application of the categorical approach. *See Jenkins*, No. 14-2898, at ECF No. 96 (stating that

[4] The Government points to two cases that the Supreme Court granted, vacated, and remanded ("GVR") for reconsideration in light of *Dimaya*: *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017), *judgment summarily vacated and remanded*, 138 S. Ct. 1980 (2018) and *United States v. Jackson*, 865 F.3d 946 (7th Cir. 2017), *judgment summarily vacated and remanded*, 138 S. Ct. 1983 (2018). *Cardena* was not before the Court and was not vacated, meaning it remains binding precedent on this court. Moreover, GVR orders "are not reversals and do not indicate that the lower court's decision was erroneous." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 375 n.3 (7th Cir. 2015) (holding that a GVR order "does not negate the precedential authority or persuasiveness of the holding and reasoning" of the case). *Jackson* and *Jenkins* were GVR-ed along with numerous other petitions that all raised the same question of § 924(c)(3)(B)'s constitutionality, the majority of which arose from circuits that had previously upheld § 924(c)(3)(B).

"no judge in active service has requested a vote on the petition for hearing en banc, and it is therefore **ORDERED** that hearing *en banc*[] in this case is **DENIED**").

D. The government's textual argument is wrong.

Even assuming that the government could overcome its waiver and binding precedent, its argument that § 924(c)(3)(B) should be read to require a "case specific" approach still fails given the statute's plain text. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *accord Ortega v. Holder*, 592 F.3d 738, 743 (7th Cir. 2010). The statutory terms "offense" and "by its nature" provide a "general definition of the term 'crime of violence' to be used throughout the Act . . . [with] language [that] requires us to look at the elements and the nature of the offense of conviction, rather than to the particular facts." *Leocal*, 543 U.S. at 6-7. This is the only sensible reading of the statutory language. Indeed, every circuit to address the issue of § 924(c)(3)(B)'s constitutionality has held that the statute's plain language, including the essential phrase "by its nature," require the categorical approach.[5]

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[5] *See United States v. Acosta*, 470 F.3d 132, 134-37 (2d Cir. 2006); *United States v. Fuertes*, 805 F.3d 485, 497-98 (4th Cir. 2015); *United States v. Williams*, 343 F.3d 423, 431-34 (5th Cir. 2003); *United States v. Taylor*, 814 F.3d 340, 378 (6th Cir. 2016), *cert denied* 138 S. Ct. 1975 (2018); *United States v. Amparo*, 68 F.3d 1222, 1224-26 (9th Cir. 1995); *United States v. Serafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. McGuire*, 706 F.3d 1333, 1337 (11th Cir. 2013); *United States v. Kennedy*, 133 F.3d 53, 58 (D.C. Cir. 1998).

The government's proposed interpretation of § 924(c)(3)(B) is fundamentally inconsistent with the plain text of the statute under three principles of statutory construction. First, the government's interpretation would render the phrase "by its nature" superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting a construction of a statute that would render a term "insignificant, if not wholly superfluous" because it is the Court's duty "to give effect, if possible, to every clause and word of a statute" (internal quotation marks and citation omitted)). The government proposes no textual justification for why the terms "offense" and "by its nature" should be read to mean "according to the defendant's actual conduct."

Second, the government's approach would require that a court read identically-worded statutes—§ 16(b), § 924(c)(3)(B), the residual clause of the ACCA, and others—differently with no indication that doing so is in line with Congressional intent. In all three statutes, the term "offense" refers to the "statutory elements of the offenses in question and not . . . by reference to conduct proved at trial." *Schmuck v. United States*, 489 U.S. 705, 706 (1989) (applying a categorical approach to Criminal Rule 31(c)). When Congress enacts a statute with the intention of considering a defendant's actual conduct, it avoids using the word "offense" or otherwise makes clear in the text that the inquiry must be on the specific facts of a defendant's conduct. *See, e.g., Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (holding there is a specific, conduct-based exception about passport forgery, which comes *after* the description of the "offense" in 18 U.S.C. § 1365(a), language which "cannot

possibly refer to a generic crime"). Section 924(c)(3)(B) does not give any special, textual meaning to the word "offense," and thus invokes the categorical approach in this context.[6]

Third, the government's proposed reading would require reading immediately adjoining statutory provisions within the same subsection through entirely different interpretive lenses. The statute requires a categorical approach in the "elements clause" of § 924(c)(3)(A) when defining an "offense" that "has as an element the use, attempted use, or threatened use of physical force." *Cardena*, 842 F.3d at 996 (holding that "we apply the 'categorical approach' and look to the statutory definition to see whether the elements of the offense satisfy § 924(c)(3)(A)" (citing *Taylor*, 495 U.S. at 600)). When "Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations." *Nijhawan,* 557 U.S. at 39 (citation omitted). It would be highly unusual to apply the categorical approach to § 924(c)(3)(A) while carving out an underlying-conduct exception for § 924(c)(3)(B), despite the similar language in that clause.[7]

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[6] In its supplemental brief, the government argues that the case-specific approach is appropriate for § 924(c)(3)(B) for "practical and constitutional reasons." In support of this proposition, the government cites the example of § 4B1.2 of the Sentencing Guidelines. Gov. Sup. Br. at 18. However, U.S.S.G. § 4B1.2 does not include a residual clause. U.S.S.G. § 4B1.2. Further, the case cited by the government for this proposition does not reach the question of whether the sentencing guidelines mandate a case-specific approach. *See United States v. Musgraves*, 883 F.3d 709, 714 (7th Cir. 2018) ("Musgraves argues that the categorical framework controls questions about the current offense of conviction, too. . . . We need not decide this question.").

[7] Additionally, when the Supreme Court in *Johnson* struck down § 924(e)(2)(B), that statute also implicated the categorical approach and contained the same two-part

Left with no textual justification for its theory, the government instead relies on the canon of constitutional avoidance and contextual arguments. *See* Gov. Supp. Br. at 11. The canon of constitutional avoidance is inapplicable in this case because the statute is not ambiguous. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[The doctrine of 'constitutional doubt'] requires that we interpret statutes to avoid 'grave and doubtful constitutional consequences. . . . That doctrine enters in only 'where a statute is susceptible of two constructions.'" (internal citations omitted)); *INS v. St. Cyr*, 533 U.S. 289, 335-36 (2001) (Scalia, J., dissenting) ("constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril . . . [i]t is a device for interpreting what the statute says—not for *ignoring* what the statute says"); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that *ambiguous* statutory language be construed to avoid serious constitutional doubts." (emphasis added)).

The government's arguments resting on context fail, as well. A jury's deliberations, it argues, would determine whether the offense giving rise to the § 924(c)(3) charge carried a substantial risk of violence "by its nature" in the

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structure for defining a "violent felony" (an "elements clause" and a "residual clause"). 135 S. Ct. at 2556. Contrary to the government's claim, this two-part structure in a vague criminal statute does not invite a categorical approach for the elements clause and an underlying-conduct approach for its immediately-adjoining residual clause. There is simply no precedent or common-sense reason to apply a different interpretive approach to these immediately-adjoining clauses.

same case as it considers the underlying conviction for the offense. This purported temporal distinction between § 924(c)(3)(B) and other statutes, however, is merely another "distinction without a difference." *Dimaya* 138 S. Ct. at 1218. Regardless of the moment of the determination of whether an offense carried a substantial risk of physical force, the statutory definition still relies on the categorical terms "offense" and "by its nature." The government's arguments for jettisoning the categorical approach therefore fail.

III. Even assuming that the case-specific approach applies, the government's appeal is without merit.

Even if this court agrees that § 924(c)(3)(B) requires a case-specific approach, Petitioners are still entitled to relief under 28 U.S.C. § 2255. The government's arguments to the contrary are both waived and wrong.

A. The government's procedural default argument is waived and fails on the merits.

The government did not raise any procedural default argument in its district court briefing or prior appellate briefing. Its failure to do so waives any procedural default argument now, because "procedural default is an affirmative defense" that must be asserted by the government in the district court. *See Williams v. United States*, 879 F.3d 244, 248 (7th Cir. 2018) ("[P]rocedural default is an affirmative defense and can itself be waived," and the government's failure to adequately raise and present this issue in the district court constitutes a waiver of that defense.); *Cross*, 892 F.3d at 294 ("[T]he government waived its procedural default argument vis-à-vis [defendant] by

failing to assert it adequately in the district court"). It certainly cannot be raised for the first time as part of a supplemental brief on appeal.

Even assuming that this court could consider the government's new procedural default argument, this argument fails. The government discusses procedural default only briefly, within its argument section applying its case-specific approach to the facts of this case. Gov. Supp. Br. at 19. The government thus (again) concedes that procedural default does not bar a court from hearing Petitioners' claims altogether. Instead, the government's sole procedural default argument is that the doctrine bars Petitioners' claims in the event that the court ultimately agrees with the government on the merits and adopts its case-specific approach to § 924(c)(3)(B). This is incorrect.

Procedural default is a threshold inquiry that takes place before the court proceeds to the merits of a petitioner's claim. *See, e.g., Cross*, 892 F.3d at 294-296, 299. It does not bar a habeas petition when there is "cause for the default and actual prejudice," regardless of whether the petitioner can also make the alternative showing of actual innocence. *Id.* at 294; *see also Bousley v. United States*, 523 U.S. 614, 623-24 (1998). "Cause for the default and actual prejudice" also is a threshold inquiry that the court makes before proceeding to the merits of the claim; it does not require that the petitioner ultimately succeeds on the merits. *See, e.g., Cross*, 892 F.3d at 294-96, 299 ("Having dispensed with these procedural hurdles, we are at last ready to resolve the central issue on appeal: whether, under *Johnson*, relief is available to [petitioners]."); *see also Coleman v. Thompson*, 501 U.S. 722, 745 (1991)

(requiring showing of "'cause' for his failure to challenge the composition of the grand jury before trial and actual prejudice as a result of the alleged constitutional violation"); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (requiring showing of "a factual or legal basis for a claim which was not reasonably available" when the petitioner was tried or sentenced); *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977) (requiring "some showing of actual prejudice resulting from the alleged constitutional violation").

Petitioners satisfy the "cause for the default and actual prejudice" standard. In their § 2255 petition, they argued that their convictions and sentences under § 924(c)(3) were unconstitutional following *Johnson*. As this court recently held, reliance on *Johnson* constitutes "cause for default" because "no one—the government, the judge, or the [defendant]—could reasonably have anticipated *Johnson*." *Cross*, 892 F.3d at 295 (internal quotation marks omitted); *see also Bousley*, 523 U.S. at 622. And Petitioners suffered "actual prejudice" as a result of the constitutional violation alleged in their petitions, as it undoubtedly constitutes "actual prejudice" to require Petitioners to serve years in prison for a crime that cannot exist under the Constitution. *See Cross*, 892 F.3d at 295 ("We have no doubt that an extended prison term—which was imposed on both men as a result of their designation as career offenders [in violation of the Constitution]—constitutes prejudice."); *see also* Dkt. 56 (sentencing Petitioner Bufkin to 60 months in prison for violating § 924(c)), Dkt. 69 (sentencing Petitioner Toney to 84 months in prison for

violating § 924(c)). As a result, Petitioners' "inability to anticipate *Johnson* excuses their procedural default." *Cross*, 892 F.3d at 296.[8]

B. Even under the government's theory of the case, Petitioners are entitled to habeas relief.

Even if the court were to agree with the government that it can and should abandon the categorical approach in § 924(c)(3)(B) cases, Petitioners would still be entitled to habeas relief. For a plea to support a judgment of guilt, it must be voluntary, meaning it must constitute an "intelligent admission that [the defendant] committed the offense." *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). This requires that the defendant receive "real notice of the true nature of the charge against him, the first and most universally required requirement of due process," including all material elements that the government must prove to support a conviction. *Id.* at 645 (internal citation omitted); *see also United States v. Fernandez*, 205 F.3d 1020, 1025 (7th Cir. 2000).

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[8] The court therefore need not reach the government's argument that Petitioners do not satisfy the alternative "actual innocence" means of overcoming procedural default. But that argument is wrong, in any event. The government's only "actual innocence" argument is that "[a]dopting the case-specific approach, the defendants cannot show that they are factually innocent of violating § 924(c)." *See* Gov. Supp. Br. at 20-21. The premise of that argument is flawed, because Petitioners' claim is not based on the case-specific approach. Rather, Petitioners claimed in their petition that they are factually innocent of violating § 924(c): that there are no facts the government has shown or could show to obtain a valid conviction against them under § 924(c). *See, e.g., Bousley*, 523 U.S. at 623-24. And even if the premise of the government's argument were correct, Petitioners did not plead guilty to violating § 924(c) under the case-specific approach, *see infra* at III.B, and therefore should be permitted to "attempt to make a showing of actual innocence." *Id.* at 623. Finally, the government has waived any other arguments regarding "actual innocence" by failing to make them in its supplemental brief (or elsewhere).

Had the case proceeded to trial under the case-specific approach, the government would have had to prove an *additional, essential element* to secure a conviction under § 924(c)(3)(B): that *under the facts of this case*, there was a "substantial risk" of the use of "physical force against the person or property of another" in the course of committing the offense. This of course is not an element of the crime under the categorical approach, since the categorical approach looks only at the "offense" "by its nature." Indeed, as the government concedes, "[i]t is true that at the change of plea hearings the district court (understandably) did not tell the defendants the government would have to prove their crime involved a substantial risk that physical force against another may be used." Gov. Supp. Br. at 21.

This error plainly affected Petitioners' substantial rights. "[A] defendant's clear understanding of the nature of the charge to which he is pleading guilty relates to the very heart of the protections afforded by the Constitution and Rule 11." *Fernandez,* 205 F.3d at 1028. Accordingly, an error that results in a defendant not understanding the nature of the charges to which he pleaded guilty renders the plea constitutionally invalid. *Bousley*, 523 U.S. at 618-19 ("Petitioner nonetheless maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a § 924(c)(1) offense. . . . Were this contention proved, petitioner's plea would be . . . constitutionally invalid.")*; see also Fernandez*, 205 F.3d at 1028; *Henderson*, 426 U.S. at 645-46. Accordingly, even if the court were to adopt the case-specific approach to § 924(c)(3)(B), Petitioners still would be entitled to

habeas relief, because they did not knowingly and voluntarily plead guilty to violating § 924(c)(3)(B) under the case-specific approach.

IV. The government's arguments for resentencing on dismissed charges and reinstating dismissed charges are waived, do not follow from *Dimaya*, and are wrong.

The government failed to raise any arguments about the parties' plea agreements in the briefing on Petitioners' § 2255 petitions or in its opening brief on appeal. Now, only after losing in the district court and having all of its previous arguments rejected by the Seventh Circuit and Supreme Court, the government argues that it should be entitled to invoke the parties' plea agreement to have the court enter judgment and resentence Petitioners on charges it agreed to dismiss with prejudice, or in the alternative to reinstate those charges. These arguments all have been waived, are unrelated to *Dimaya*, and fail on their merits.

A. The government waived its arguments.

The government waived all of its arguments invoking the plea agreements or their waiver provisions by failing to raise them in its district court briefing on Petitioners' § 2255 petitions or its opening appellate brief. *See* Section II.A, *supra*; *see also Williams v. United States*, 150 F.3d 639, 639-40 (7th Cir. 1998) ("Whether vacating even the [challenged] conviction was appropriate, given Williams' guilty plea, is something [the court] need not consider, because the United States does not protest [the plea]."); *United States v. Kieffer*, 794 F.3d 850, 852 (7th Cir. 2015) ("[T]he Government's brief is silent about Mr. Kieffer's

appeal waiver [in his plea], so the Government has waived reliance on that waiver.").

The government failed to raise any arguments based on the plea agreements in the district court, and the district court correctly held that this constituted waiver or forfeiture:

> The Court will not second-guess the government, which knows its cases from the outset and knows them best. Whatever the reason, the plea agreement waiver question is not before the Court and the outcome of the § 2255 petition rests on the merits of the parties' arguments about whether kidnapping is a crime of violence as defined in § 924(c)(3).

Gov. Opening Br. at App. 2. The government again failed to raise any arguments based on the plea agreements in its opening Seventh Circuit brief. It cannot now raise these arguments for the first time in its supplemental brief that was supposed to address the *Dimaya* decision. These arguments of course have nothing to do with *Dimaya*.[9]

The government concedes in its supplemental brief that it "forewent" the remedy of specific enforcement in this case. Gov. Supp. Br. at 32. It nevertheless argues that it still should be able "to enforce the remedy of rescission" that it also forewent until now. *Id.* It cannot do so, however. The

[9] The government also has a pending motion in the district court seeking to rescind the plea agreements and reinstate the dismissed charges. *See* Dkt. 92. The government filed that motion only *after* the district court granted Petitioners' habeas petitions, but *before* it filed its opening brief in the Seventh Circuit and before the Supreme Court's decision in *Dimaya*. At the government's request, the district court stayed that motion pending this appeal. *See* Dkt. 127. The fact that the government filed that motion before the Court's decision in *Dimaya* was published makes plain that its reinstatement arguments have nothing to do with *Dimaya*. Moreover, the fact the government filed that motion before its opening brief in this appeal underscores that it waived making the arguments in this appeal.

government waived its argument that it is entitled to rescission by failing to raise it at the outset, and instead "urg[ing] the court to go forward" by litigating only on the merits. *United States v. Alexander*, 869 F.2d 91, 94 (2d Cir. 1989) (holding that the government waived rescission remedy when, following an alleged breach by the defendant, the government elected to proceed to sentencing); Gov. Supp. Br. at 32 (conceding that the government permitted Petitioners to go forward in court to "argue on the merits that their admitted misconduct no longer constitutes a crime"); *see also Saverslak v. Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th Cir. 1979) (recognizing that party to a contract "may not lull another into a false assurance that strict compliance with a contractual duty will not be required and then sue for non-compliance"). The government thus waived all of its arguments based on the plea agreements by failing to raise them prior to its supplemental brief addressing *Dimaya*.

B. The government is bound by the plea agreements.

Even if the court could reach the government's new arguments, the relief the government now seeks is foreclosed by the parties' plea agreements. In both Petitioners' plea agreements, the government agreed to dismiss Count 1 of the Indictment, a charge of federal kidnapping. *See* Dkt. 24 at Para. 7(c); Dkt. 32 at Para. 7(d). It further agreed that these dismissals would be with prejudice. *See* Dkt. 32 at Para. 7(d); Dkt. 50. The government did not reserve the right to revive the dismissed counts should there be a change in law, nor did it reserve the right to revive the dismissed counts should Petitioners' counts of conviction cease to constitute a constitutional criminal offense. *See, e.g.,*

United States v. Barron, 172 F.3d 1153, 1161 (9th Cir. 1999) (noting that the government presumably could have "included a provision protecting the government's interest" in the event of a change in the law, and that its failure to do so "does not justify recission [sic] of the agreement").

"'[A] plea agreement is a contract and generally governed by ordinary contract law principles" that are "'tempered by a recognition of limits that the Constitution places on the criminal process.'" *Hurlow v. United States*, 726 F.3d 958, 964 (7th Cir. 2013), *citing United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005). Thus, if the government makes a material promise that induces a defendant to plead guilty, the government is bound by that promise in the same way that a party to a contract remains bound by its terms, even if subsequent changes in law excuse performance by the other party. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *see also United States v. Adame-Hernandez*, 763 F.3d 818, 831 (7th Cir. 2014).

Similarly, a court may not "withdraw its prior approval of a plea bargain that accurately reflects the terms of the parties' agreement and with which the defendant has complied." *United States v. Ritsema*, 89 F.3d 392, 400-01 (7th Cir. 1996); *see also United States v. Hallahan*, 756 F.3d 962, 972 (7th Cir. 2014). Thus, once a plea has been accepted, "the judge is bound by the agreement's terms. And he can't retract that acceptance even if [the appellate court's] remand makes the judge regret having accepted it." *United States v. Sanford*, 806 F.3d 954, 960-61 (7th Cir. 2015). A petitioner's successful challenge to one aspect of his sentence therefore does not allow a court to

revisit other aspects of the sentence in his plea agreement. *Id.* It certainly does not allow the court to unwind the agreement to revive dismissed charges. *Ritsema*, 89 F.3d at 400-01.

Petitioners have complied with all of their obligations under their plea agreements. And as the Supreme Court recently reaffirmed, a defendant does not waive his right to challenge the constitutionality of the statute under which he was convicted where—as here—his plea agreement does not clearly waive that right. *See* Section IV.D.1, *infra; see also Class v. United States*, 138 S. Ct. 798, 802-03, 807 (2018). Petitioners' successful challenge to the constitutionality of their statute of conviction thus is not a breach of the plea agreements. In short, Petitioners have upheld their obligations under their plea agreements, and the government must do the same.

C. The government's arguments about resentencing are wrong.

The government first argues that the court should "remand for resentencing and entry of judgement" on the dismissed charges. *See* Gov. Supp. Br. at 22. Pursuant to the plea agreements, however, the government agreed to dismiss the kidnapping charges against both Petitioners with prejudice. *See* Dkt. 24 at Para. 7(c); Dkt. 32 at Para. 7(d); Dkt. 50. Even if the government could have reserved the right in the plea agreements to seek resentencing on the dismissed charges, it failed to do so.

The government's argument fares no better under the law. Petitioners did not agree to plead guilty to *any* crime other than § 924(c). Accordingly, the government is now asking the court to convict and sentence Petitioners for a

crime of which they were neither convicted by a jury, nor knowingly and voluntarily agreed to plead guilty. Punishment in such circumstances would violate fundamental tenants of Due Process. *See, e.g.*, *Bousley*, 523 U.S. at 618; *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

The government tellingly does not point to any case in which a criminal defendant was resentenced to a crime that was dismissed pursuant to a plea agreement, much less after the grant of habeas relief. Instead, the government relies on a handful of out-of-circuit cases holding that, where a jury's guilty verdict on one count is overturned on direct appeal because there was insufficient evidence, the court may resentence on a lesser included offense necessarily found by the jury that excludes this problematic element.[10] That of course is a far cry from this case: a jury did not find Petitioners guilty of anything, Petitioners did not plead guilty to anything other than the § 924(c) charge, and Petitioners' petitions do not rest on an allegation that there was insufficient evidence to support one element of the charged crime. Indeed, this circuit has recognized that even resentencing a habeas petitioner on unchallenged counts for which he was convicted by a jury, after his conviction

[10] *See United States v. Sepulveda-Hernandez*, 752 F.3d 22, 28-29 (1st Cir. 2014); *United States v. Thomas*, 274 F.3d 655, 672-73 (2d Cir. 2001); *United States v. Smith*, 13 F.3d 380, 383 (10th Cir. 1993); *United States v. Skipper*, 74 F.3d 608, 612 (5th Cir. 1996); *Austin v. United States*, 382 F.2d 129, 142-43 (D.C. Cir. 1967). The other cases on which the government relies do not grant resentencing on a lesser included offense. *See, e.g., Rutledge v. United States*, 517 U.S. 292, 306 (1996) (holding that defendant could not be simultaneously convicted of greater included offense and lesser included offense, and stating that "[t]here is no need for us now to consider the precise limits on the appellate courts' power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense"); *United States v. Peterson*, 622 F.3d 196, 202-07 (3d Cir. 2010) (affirming jury conviction on lesser included offense).

on another count was vacated, "stretched the conceptual fiction of the sentencing package to its limit." *United States v. Binford*, 108 F.3d 723, 730 (7th Cir. 1997). The government's proposal to allow resentencing on dismissed counts would, of course, go far beyond that limit.

The government's argument also depends on the assumption that federal kidnapping is a "lesser included offense" of § 924(c). That is wrong. The government's cases establish merely that kidnapping is one of numerous predicate crimes that can support a § 924(c) conviction. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); *United States v. Moore*, 763 F.3d 900, 908 (7th Cir. 2014). As the Second Circuit has explained, "while the commission of a crime of violence . . . is a necessary predicate for a conviction under § 924(c), we cannot consider the underlying violent felony to be a 'lesser' offense" for purposes of a lesser included offense analysis. *United States v. Khalil*, 214 F.3d 111, 120 (2d Cir. 2000) (citations omitted). "Plainly, the statutory penalties do not suggest that the substance of [the underlying violent felony] is of less importance than the use or carrying of a firearm as an instrumentality of [the underlying violent felony]. *See id.* In fact, federal kidnapping is punishable "by imprisonment for any term of years or for life and, if the death of any person results, shall be punishable by death or life imprisonment." 18 U.S.C. § 1201(a). Nor did Congress intend the underlying violent felony to be merged into the firearms offense as a lesser included offense, since a defendant can be convicted of both the underlying violent felony and § 924(c). *See* 18 U.S.C. § 924(c)(1)(A), (D)(ii); *see also Khalil*, 214

F.3d at 121. The government's argument that the court can and should remand the case for resentencing therefore fails.

D. The government's arguments about reinstatement are wrong.

In seeking reinstatement of the dismissed charges in the alternative, the government again asks the court to enforce a bargain it failed to make. The government's arguments fall apart under scrutiny.

1. The government's breach of contract argument is wrong.

The government is wrong that Petitioners breached their plea agreements, and therefore is wrong that this breach can provide a basis for reinstating the dismissed charges. Petitioners' § 2255 petitions raised a claim that "judged on its face . . . would extinguish the government's power to constitutionally prosecute [them] if the claim were successful." *Class*, 138 S. Ct. at 805-06 (internal quotation marks omitted). A criminal defendant does not waive his right to appeal the constitutionality of his statute of conviction by pleading guilty. *Id.* at 802. Nor does a plea agreement waive the right to challenge the constitutionality of the statute of conviction when the plea agreement "sa[ys] nothing about the right." *Id.* at 802-03, 807.

While Petitioners' plea agreements in this case contain a waiver of the right to "contest my conviction and my sentence," they "sa[y] nothing about the right" to challenge the constitutionality of the statute under which they were convicted. *See* Dkts. 24 and 32. Petitioners thus "neither expressly nor implicitly waived" their right to challenge the constitutional validity of the statute of conviction. *Class*, 138 S. Ct. at 807; *see also Blackledge v. Perry*,

417 U.S. 21, 31 (1974) (holding that a guilty plea does not bar a defendant from seeking habeas relief on the basis that the charges against him constituted an unconstitutional malicious prosecution); *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) ("[A] plea of guilty to a charge does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute."); *Barron*, 172 F.3d at 1158 (holding that a claim that a conviction is invalid because the underlying acts do not constitute a crime "did not attack the plea agreement in any way"). Accordingly, Petitioners' challenge to the constitutionality of their statute of conviction did not violate their plea agreements, and thus does not allow the government to rescind the agreements and reinstate dismissed charges. *See, e.g., United States v. Sandoval-Lopez*, 122 F.3d 797, 802 (9th Cir. 1997) ("[T]hey merely did what the agreements permitted them to do. The government is therefore not free to reinstate the dismissed counts.").

The government's reliance on *United States v. Worthen*, 842 F.3d 552 (7th Cir. 2016) and *United States v. Carson*, 855 F.3d 828 (7th Cir. 2017), *cert denied*, 138 S. Ct. 268 (2017), is misplaced. In those cases, the government did not waive its appellate waiver argument, as it has done here. *See Carson*, 855 F.3d at 831; *Worthen*, 842 F.3d at 554; *see also* Section IV.A, *supra*. Moreover, to the extent that *Worthen* or *Carson* could be read to bar constitutional challenges to statutes of conviction, such holdings do not survive the Supreme Court's holding in *Class*. Petitioners therefore did not breach their plea agreements.

2. The government's mutual mistake argument is wrong.

The government's alternative argument that it should be permitted to rescind the agreements because of a "mutual mistake" also fails. This is not a mutual mistake case. The government instead seeks to be relieved of its obligation to adhere to the plea agreements because a subsequent change in the law makes § 924(c)(3)(B) unconstitutional.

"In a contract (and equally in a plea agreement) . . . 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. . . ." *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005). This court has repeatedly held that a change in the law does not undo the binding nature of a plea agreement. *See id*; *United States v. McGraw*, 571 F.3d 624, 631 (7th Cir. 2009) (noting that the Seventh Circuit has "consistently rejected arguments that an appeal waiver is invalid because the defendant did not anticipate subsequent legal developments"); *United States v. Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005) ("The fact that [the defendant], the government, and the district court failed to anticipate *Booker* or its sweeping effect on federal guidelines sentencing . . . [does not] preclude enforcement of an otherwise valid appeal waiver.").

While the government contends that reinstatement of charges here would be "consistent with this Court's well-established precedent," this is not correct. The government cites no case applying the "mutual mistake" doctrine where a petitioner successfully challenged the constitutionality of his statute of

conviction under § 2255. Nor does the government cite a single case where the Seventh Circuit has applied the mutual mistake doctrine when the mistake was not present at the time the plea agreement was made and accepted by the district court—*i.e.*, where the plea bargain or colloquy was unknowing, involuntary, or in some other respect improper at its outset. It relies primarily on two Seventh Circuit cases that underscore that, for a plea to be rescinded because of mutual mistake, the "mistake" must be present at the time of the plea. *See United States v. Bradley*, 381 F.3d 641, 647 (7th Cir. 2004) (holding that the defendant could withdraw his guilty plea where he pleaded guilty to a crime other than the one charged in the indictment); *United States v. Anderson*, 514 F.2d 583 (7th Cir. 1975) (holding that the defendant was entitled to withdraw his guilty plea where the parties misunderstood the maximum penalty permitted under the statute).[11] And while the government argues that its purpose in entering the pleas would be frustrated if the agreements are upheld, it fails to cite a Seventh Circuit case recognizing "frustration of purpose" as a reason to discharge the government's obligations under a plea agreement after a substantial change in law. *See* Gov. Supp. Br. at 28-31.

In this case, the district court correctly held that following *Johnson*, the conduct to which Petitioners pleaded guilty can no longer constitute a crime under the constitution. Petitioners have not challenged, and do not seek to

[11] The other Seventh Circuit cases on which the government relies do not apply the mutual mistake doctrine. *See* Gov. Supp. Br. at 27-29, *citing United States v. Barnett*, 415 F.3d 690, 693 (7th Cir. 2005); *United States v. Angelos*, 763 F.2d 859, 862 (7th Cir. 1985).

withdraw, their plea agreements. *See, e.g., Class*, 138 S. Ct. at 802-03, 807. This case therefore does not involve a "mutual mistake" at the time of the parties' agreement, and instead is more analogous to *Binford*, in which the petitioner successfully petitioned the district court under § 2255 to vacate his § 924(c) conviction following *Bailey v. United States*, 516 U.S. 137 (1995). 108 F.3d at 725. The remedy was not to reinstate the dismissed count, as the government demands here. *See id.* Rather, the court ordered resentencing only on the remaining count of conviction. *See id.* at 728–30.

The government's reliance on 18 U.S.C. § 3296, *see* Gov. Supp. Br. at 26, similarly is in error. Section 3296 allows a district court to reinstate counts of an indictment dismissed pursuant to a plea agreement only when a "guilty plea was subsequently vacated on the motion of the defendant." 18 U.S.C. § 3296(a)(3). Counsel for Petitioners are not aware of any court of appeals decisions applying § 3296(a)(3) in habeas proceedings or when a defendant seeks to enforce, rather than withdraw, his plea agreement. Rather, the Fourth Circuit's recent decision declining to allow the government to "reinstate the dismissed counts . . . pursuant to 18 U.S.C. § 3296" following a petitioner's successful habeas petition is instructive. *United States v. Adams*, 814 F.3d 178, 184 (4th Cir. 2016). As the Fourth Circuit explained, because a subsequent decision made clear the conduct to which the petitioner pleaded guilty no longer constituted a crime, "[t]he government treads dangerously close to punishing [the petitioner] for pursuing what we have ultimately determined to be a meritorious claim of actual innocence." *Id.* at 185 ("To

punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (quoting *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). The government's arguments about rescission and reinstatement of the dismissed charge therefore fail.

CONCLUSION

For the foregoing reasons, the court should affirm the judgment of the District Court for the Northern District of Indiana.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This Brief complies with page limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,283 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This Brief complies with the typeface and type style requirements in Rules 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Bookman Old Style font for the main text and 11-point Bookman Old Style font for footnotes.

Dated: August 17, 2018

s/ Sarah M. Konsky
Sarah M. Konsky

CERTIFICATE OF SERVICE

I, Sarah M. Konsky, an attorney, hereby certify that on August 17, 2018, I caused the foregoing **Supplemental Response Brief of Petitioners-Appellees Dedrick Bufkin and Diamond Toney** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Supplemental Response Brief of Petitioners-Appellees Dedrick Bufkin and Diamond Toney** to be transmitted to the Court via hand delivery within 7 days of that notice date.

Dated: August 17, 2018

s/ Sarah M. Konsky
Sarah M. Konsky