

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

KASMON COX,	:	MOTION TO VACATE
Fed. Reg. No. 58891-507,	:	28 U.S.C. §2255
Movant,	:	
	:	CRIMINAL NO.
v.	:	1:21-CR-277-ELR-JSA-3
	:	
UNITED STATES,	:	CIVIL ACTION NO.
Respondent.	:	1:25-CV-3075-ELR-JSA

**MAGISTRATE JUDGE’S FINAL REPORT AND RECOMMENDATION**

Movant Kasmon Cox filed the instant *pro se* motion to vacate pursuant to 28 U.S.C. §2255 and seeks to challenge the constitutionality of his convictions and sentences in the Northern District of Georgia. (Doc. 259). The Government filed its response [Doc. 265], and Movant submitted a reply thereto [Doc. 267].

I. Factual and Procedural History

A. Procedural History

On July 20, 2021, a grand jury in the Northern District of Georgia entered a ten-count indictment against Movant and five co-defendants. (Doc. 1). Specifically, Movant was charged with conspiracy to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §846 (Count One), possession with intent to distribute at least 500 grams of cocaine in violation of 21 U.S.C. §§841(b)(1)(B), 841(a)(1), and 18 U.S.C. §2 (Count Two), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c)(1)(A) (Count Three), and

possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g)(1) (Count Four). (*Id.*).

On October 18, 2022, Movant entered a guilty plea to Counts One and Three, that is, conspiracy to possess with intent to distribute cocaine and possession of a firearm in furtherance of a drug trafficking crime. (Doc. 171). When Movant entered into the plea agreement, he was aware that he was subject to a mandatory minimum term of five years on both counts. ((Doc. 171-1 (“Plea Agreement”) ¶¶7, 19). On March 16, 2023, Movant was sentenced to sixty months of imprisonment on each count to be served consecutively, for a total of 120 months. (Doc. 213). Movant did not file a direct appeal with the Eleventh Circuit.

Movant executed the instant §2255 motion on May 19, 2025. (Doc. 259). Therein, Movant argues that his conviction under 18 U.S.C. §924(c) violated his rights under the Second Amendment. As the basis for this claim, Movant cites to the Supreme Court’s decision in *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), which held that to survive constitutional scrutiny the Government must justify a legislative limitation on the Second Amendment right to keep and bear arms by demonstrating that any such legislation or regulation “is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 24. Movant also argues that the Court incorrectly calculated his guideline range. (Doc. 259).

The Government responds that the §2255 motion is untimely, that the collateral waiver in the plea agreement prohibits Movant from raising these claims, the claims are procedurally defaulted, and Movant cannot prevail on his *Bruen* claim. (Doc. 265). The Court agrees.

B. The Motion to Vacate Is Untimely.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), federal prisoners must file a 28 U.S.C. §2255 motion to vacate within one year of the latest of four specified events:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2255(f). After Movant was sentenced on March 16, 2023, he had fourteen days to file an appeal with the Eleventh Circuit. *See* Fed. App. P. 4(b)(1)(A). Because Movant did not file an appeal, his convictions became final on March 30, 2023, and under §2255(f)(1) he had one year, or until April 1, 2024, to file a §2255 motion.<sup>1</sup> The instant motion, filed over one year after the limitation period expired on May 19, 2025, is untimely.<sup>2</sup>

C. The Collateral Waiver Precludes Movant’s Claims.

Movant’s claim that his sentence should be vacated also is precluded by his plea, which contains a “Limited Waiver of Appeal.” (Plea Agreement ¶36). That waiver is not ambiguous, and explicitly states that Movant waives the right to appeal “*and the right to collaterally attack his conviction in any post-conviction proceeding (including, but not limited to, motions filed pursuant to 28 U.S.C. §2255)*” – except under circumstances not relevant here. *Id.* (emphasis added).<sup>3</sup> Thus, even if Movant’s §2255 motion was not untimely, the collateral waiver precludes his claims.

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<sup>1</sup> Because March 30, 2024 fell on a Saturday, Movant had until the next business day, or until Monday, April 1, 2024 to file an appeal. Fed. R. App. P. 26(a)(1)(C).

<sup>2</sup> Because *Bruen* was decided before Movant was convicted and sentenced, §2255(f)(3) and (4) would not apply.

<sup>3</sup> Movant appears to argue that he did not voluntarily agree to the collateral waiver; however, he simply provides general theories as to how a waiver could be found to be involuntary instead of supporting the argument with facts specific to him

D. Movant's Claims Are Procedurally Defaulted.

“[C]ollateral review is not a substitute for a direct appeal[.] . . .” *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (per curiam). Generally, “[a] claim is procedurally defaulted, such that the prisoner cannot raise it in a collateral proceeding, when a defendant could have raised an issue on direct appeal but did not do so.” *Hill v. United States*, 569 F. App’x 646, 648 (11th Cir. 2014) (per curiam); *see also Black v. United States*, 373 F.3d 1140, 1142 (11th Cir. 2004) (“Generally, if a challenge to a conviction or sentence is not made on direct appeal, it will be procedurally barred in a 28 U.S.C. §2255 challenge.”).

The movant can avoid the procedural bar by establishing that either of the following exceptions applies: (1) cause and prejudice, or (2) a miscarriage of justice based on actual innocence.” *Hill*, 569 F. App’x at 648. “[T]o show cause for procedural default [the movant] must show that some objective factor external to the defense prevented [the movant] or his counsel from raising his claims on direct appeal and that this factor cannot fairly be attributable to [the movant]’s own conduct.” *Lynn*, 365 F.3d at 1235. “Actual prejudice means more than just the possibility of prejudice; it requires that the error worked to [the movant’s] actual and substantial disadvantage[.]” *Ward v. Hall*, 592 F.3d 1144, 1178 (11th Cir. 2010).

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– *i.e.*, specific facts supporting his claim that he did not voluntarily enter into the waiver in the plea agreement. (See generally Doc. 267 at 13-15).

To demonstrate a miscarriage of justice based on actual innocence, the movant must demonstrate that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Lynn*, 365 F.3d at 1234-35 (internal quotation marks and citations omitted).

A movant claiming that he is actually innocent must show factual innocence rather than legal innocence. *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Rozelle v. Sec’y, Fla. Dep’t of Corr.*, 672 F.3d 1000, 1012-15 (11th Cir. 2012) (per curiam). And in order to do so, the movant must present “new, reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence” which demonstrates that “it is more likely than not that no reasonable juror would have convicted him” of the underlying offenses. *Schlup v. Deno*, 513 U.S. 298, 327 (1995); *Carruth v. Comm’r, Ala. Dep’t of Corr.*, 93 F.4th 1338, 1355 (11th Cir. 2024). Put another way, a movant claiming he is innocent “‘must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt’ in light of the new evidence of innocence.” *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011) (quoting *Schlup*, 513 U.S. at 327).

Importantly, “new” evidence that provides the basis of an actual innocence claim means evidence that was both “newly discovered” *and* not available while the criminal proceedings were pending. *See Herrera v. Collins*, 506 U.S. 390, 400

(1993) (describing evidence of actual innocence as “newly discovered” evidence that “could not reasonably have been presented to the state trier of facts”); *Woodruff v. Crockett*, No. 16-16845-H, 2017 WL 11680250, at \*2 (11th Cir. Sept. 19, 2017) (“A claim of actual innocence is also required to contain newly discovered evidence that was not available at the time of trial.”). The *Schlup* standard “is demanding and permits review only in the ‘extraordinary’ case.” *House v. Bell*, 547 U.S. 518, 538 (2006).

Since Movant did not file an appeal with the Eleventh Circuit, he did not raise either of his claims on direct appeal. Thus, all of his claims are procedurally defaulted unless he can demonstrate cause and prejudice or that he is actually innocent. To that end, Movant has not even attempted to allege cause or prejudice to excuse the procedural default of his claims. To the degree that this Court could construe Movant’s argument that a miscarriage of justice could invalidate a collateral waiver [*see* Doc. 267 at 14-15], he has not provided any evidence, let alone new and reliable evidence, to demonstrate that he is actually innocent. Consequently, Movant has failed to overcome the procedural default of his claims.

E. Movant Has Failed to State a Claim Relief under §2255.

1. *18 U.S.C. §924(c) Does Not Violate the Second Amendment.*

Finally, Movant’s claims are without merit. First, according to Movant, his conviction and sentence under 18 U.S.C. §924(c) is “an unconstitutional

infringement on his Second Amendment right to possess a firearm” and violates his due process rights under the Fifth Amendment. (Doc. 259 at 4-5). Movant’s argument, however, is fundamentally wrong.

Indeed, the Second Amendment is not unlimited, and despite Movant’s conclusory statements to the contrary, “the Supreme Court and [the Eleventh Circuit] have repeatedly held that the Second Amendment guarantees a right to ‘law-abiding citizens.’” *United States v. Lopez*, No. 2213036, 2024 WL 2032792, at \*3 (11th Cir. May 7, 2024) (per curiam); *see also Bruen*, 597 U.S. at 8-9, 26, 29, 30, 38, 60, 70 (describing that the Second Amendment right to keep and bear arms applies to law-abiding citizens); *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (stating that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”); *United States v. Dubois*, 139 F.4th 887, 892 (11th Cir. 2025) (emphasizing that Supreme Court Second Amendment decisions “repeatedly describe[] the right as extending only to ‘law-abiding, responsible citizens.’”). Consequently, statutes prohibiting felons – who by definition are not law-abiding citizens – from possessing firearms are “presumptively lawful.” *Heller*, 554 U.S. at 626; *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 986 (2010) (plurality opinion) (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures



as ‘prohibitions on the possession of firearms by felons[.]’. . . We repeat those assurances here.”) (quoting *Heller*, 554 U.S. at 626).

Thus, a violation of §924(c), which prohibits a person who possesses a firearm in furtherance of a drug trafficking crime, does not violate the Second Amendment. *See Lopez*, 2024 WL 2032792, at \*3 (rejecting challenge to §924(c) since the Second Amendment applies to law-abiding citizens and “[b]ecause the statute necessarily requires that a person not be engaging in law-abiding activity, namely be engaging in a . . . drug trafficking crime, [the movant] cannot show that the plain text of the Second Amendment or the case law analyzing it establishes that §924(c) is unconstitutional”); *United States v. Cash*, No. 22-2713, 2023 WL 6532644, at \*3 (3d Cir. Oct. 6, 2023) (“[C]ircuit courts have repeatedly rejected Second Amendment challenges to §924(c)[.] . . .”) (collecting cases); *see also United States v. Thorton*, 395 F. App’x 574, 577 (11th Cir. 2010) (per curiam) (“As the Supreme Court observed in *Heller*, ‘the right secured by the Second Amendment is not unlimited.’ . . . Nothing in that decision suggests that §924(c) violates the Second Amendment.”).

## 2. *Movant’s Guidelines Claim Is Not Cognizable Here.*

Finally, to the degree that Movant claims that the Court incorrectly calculated his guidelines range [Doc. 259 at 6-8], any such claim fails, since alleged errors concerning the Sentencing Guidelines are not generally cognizable on collateral

review. *Spencer v. United States*, 773 F.3d 1132, 1138-40 (11th Cir. 2014) (en banc); *see also Marion v. United States*, No. 16-15971-G, 2017 WL 8233896, at \*7 (11th Cir. Oct. 24, 2017) (stating that the movant’s direct challenge to the reasonableness of his sentence “is not cognizable in a §2255 proceeding, as it fails to allege a constitutional violation”). Instead, a prisoner only may challenge a sentencing error if he can prove that he is either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated, *Spencer*, 773 F.3d at 1139, neither of which Movant has shown.

Regardless, because Movant was sentenced to the mandatory minimum on both charges, Movant would not be entitled to relief based on an alleged guidelines error. *See, e.g., United States v. Bethel*, No. 22-14025, 2023 WL 7436912, at \*2 (11th Cir. Nov. 9, 2023) (per curiam) (“We’ve emphasized that mandatory minimum sentences, having been established by Congress, take precedence over the guideline range.”); *United States v. Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (“We emphasize that the district court was, and still is, bound by the statutory minimums.”); *United States v. Clark*, 274 F.3d 1325, 1328 (11th Cir. 2001) (per curiam) (holding district court has no discretion to depart downward from a mandatory minimum sentence established by Congress).

### III. Conclusion

Based on the foregoing reasons, **IT IS RECOMMENDED** that Kasmon Cox’s motion to vacate his sentence [Doc. 259] be **DENIED WITH PREJUDICE**.

### IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing §2255 Cases, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” 28 U.S.C. §2253(c)(2) provides that a certificate of appealability (“COA”) may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” In order for the certification requirement to fulfill its function of weeding out frivolous appeals, a court should not automatically issue a COA; rather, the applicant must prove “something more than the absence of frivolity” or “the existence of mere ‘good faith’ on his or her part.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citations omitted).

Movant need not prove, however, that some jurists would grant the §2255 motion. *See id.* “The question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *See Lamarca v. Secretary, Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El*, 537 U.S. at 325). In other words, Movant need only demonstrate that “reasonable jurists would find the district

court's assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based on the foregoing discussion, reasonable jurists would not find “debatable or wrong” the undersigned’s determination that Movant’s claims are untimely, barred by the collateral waiver, are procedurally defaulted, and/or fail on the merits. *See Slack*, 529 U.S. at 484.

Accordingly, **IT IS FURTHER RECOMMENDED** that a COA be denied.

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

**IT IS SO RECOMMENDED** this 22nd day of May, 2026.



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JUSTIN S. ANAND  
UNITED STATES MAGISTRATE JUDGE