

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 31, 2026

Lyle W. Cayce
Clerk

No. 19-40930

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KEELON JMAR SENEGAL,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:16-CV-163

Before KING, HIGGINSON, and WILLETT, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:*

We withdraw our previous opinion, reported at 2022 WL 4594608, and substitute the following:

Keelon Jmar Senegal challenges the sentences he received under the Armed Career Criminal Act (ACCA) on two counts of an eight-count conviction for which he also received two consecutive life sentences. This opinion presents our second pass at his argument that the two ACCA-

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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enhanced sentences are unconstitutional under *Johnson v. United States*, 576 U.S. 591 (2015), which invalidated the statute’s residual clause. On the first go, we concluded that the sentencing court more likely than not relied on the residual clause in determining that Senegal’s two Texas robbery convictions were “violent felon[ies]” under the statute. 18 U.S.C. § 924(e). But we found that error harmless, relying on our caselaw at the time interpreting Texas’s robbery statute to separately qualify under ACCA’s elements clause. Since then, we have recognized that the basis on which we interpreted Texas’s robbery statute was mistaken. When Senegal moved to recall the mandate on these grounds, we appointed counsel, granted his motion, and set the case for rehearing. On this round, we see no reason to revisit our earlier determination that the sentencing court more likely than not relied on the residual clause in enhancing Senegal’s sentence under ACCA. Because we decline to apply the discretionary concurrent sentence or sentencing package doctrines—and decline to impose procedural default—we VACATE the sentences for Counts 4SS and 8SS and REMAND for resentencing on only those counts.

I.

In 2007, a jury convicted Keelon Jmar Senegal of conspiracy to commit bank robbery with a firearm (Count SS1); bank robbery with a firearm (Count SS2); using, carrying, and brandishing a firearm during a crime of violence (Count SS3); two counts of being a felon in possession of a firearm (Counts SS4 and SS8); conspiracy to tamper with a witness (Count SS5); tampering with a witness (Count SS6); using, carrying, brandishing, and discharging a firearm during a crime of violence (Count SS7). Senegal’s indictment on Counts SS4 and SS8—those most relevant on appeal—alleged that he was subject to the sentencing provisions of ACCA because he had “three previous convictions for a violent felony, serious drug offense, or both.”

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ACCA mandates a sentencing enhancement for convictions under 18 U.S.C. § 922(g) where the defendant has three predicate convictions for a “violent felony, “serious drug offense, or “both” that meet a few other qualifications. 18 U.S.C. § 924(e). The statute defines “violent felony” as one that “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the elements clause), “is burglary, arson, or extortion, involves use of explosives” (the enumerated offense clause), or “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the residual clause). *Id.* § 924(e)(2)(B).

In 2007, a jury found Keelon Jmar Senegal guilty on eight counts relating to a bank robbery and its coverup, including witness tampering. At Senegal’s 2008 sentencing, the district court adopted the presentence report, determining that Senegal’s prior Texas robbery convictions and conviction for possession of cocaine with intent to deliver qualified as the three violent felonies or serious drug offenses mandating enhancement for Counts 4SS and 8SS under ACCA. The district court imposed 360-month sentences for each of these counts, to run concurrently with Senegal’s sentences for Counts 1SS (60 months), 2SS (300 months), 5SS (240 months), and 6SS (240 months). The district court also sentenced Senegal to two consecutive terms of life imprisonment on Counts 3SS and 7SS. Senegal did not challenge the ACCA enhancements on direct appeal. *See United States v. Senegal*, 371 F. App’x 494, 495 (5th Cir. 2010) (per curiam).

At the time of Senegal’s sentencing, we had held that Texas robbery qualified as a violent felony under ACCA’s residual clause. *See United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007). We had also held that Texas robbery did not satisfy the parallel force clause of former U.S.S.G. § 2L1.2. *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 379 (5th Cir.

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2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541, 547–63 (5th Cir. 2013) (en banc).¹

In 2015, however, the Supreme Court in *Johnson v. United States* invalidated ACCA’s residual clause as unconstitutionally vague. *See* 576 U.S. at 597; *see also Welch v. United States*, 578 U.S. 120, 135 (2016) (holding *Johnson* applicable retroactively in cases on collateral review). Senegal sought authorization to file a successive habeas motion based on *Johnson*. After errantly filing a pro se petition raising a *Johnson* claim in the Middle District of Florida—where he was incarcerated—Senegal sought permission to file a successive 28 U.S.C. § 2255 motion in this court. We transferred his motion to the district court.

Both the district court and our court wrestled with two interrelated questions: whether the sentencing court “more likely than not” relied on the now unconstitutional residual clause in sentencing Senegal and, if so, whether that error was harmless. In 2022, we determined that Senegal had shown reliance, but that any error was harmless because Texas robbery qualified as an ACCA predicate under the elements clause. *See United States v. Senegal*, 2022 WL 4594608, at *1 (5th Cir. 2022) (per curiam). Our harmlessness conclusion rested on *United States v. Garrett*, a case holding that Texas robbery-by-threat qualified as an ACCA predicate under the modified categorical approach. *See* 24 F.4th 485, 489, 491 (5th Cir. 2022); *see also* TEX. PENAL CODE § 29.02(a). We declined to address the government’s argument—raised for the first time on appeal—that Senegal had procedurally defaulted his *Johnson* claim. *Senegal*, 2022 WL 4594608, at *1. We summarily denied Senegal’s motion for rehearing.

¹ We have treated cases interpreting the use of physical force prongs in § 2L1.2 and § 924(e) interchangeably. *See United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011).

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More than two years after the mandate issued, however, our court issued a decision in *United States v. Rose* that recognized that Texas’s highest criminal court had “unequivocally abrogated” *Garrett*. 127 F.4th 619, 620 (5th Cir. 2025) (per curiam). Specifically, in *Floyd v. State*, the Texas Court of Criminal Appeals held that Texas robbery-by-threat and robbery-by-injury—the two components of the Texas robbery statute—“were simply alternative methods of committing the same robbery offense” and that jurors needed not reach unanimity about which type of robbery a defendant committed. 714 S.W.3d 9, 10, 15 (Tex. Crim. App. 2024). Before *Floyd*, we had understood Texas robbery-by-injury did not qualify as a “violent felony” under ACCA because it could be committed recklessly. *See Garrett*, 24 F.4th at 488–89 (discussing *Borden v. United States*, 593 U.S. 420 (2021)). But we had found Texas’s robbery statute divisible, determining that the recklessness mens rea applicable to robbery-by-injury did not apply to robbery-by-threat, and therefore held that robbery-by-threat sufficed as a violent felony. *See id.* at 488–90. *Floyd* upended that conclusion.

Again proceeding pro se, Senegal moved to recall the mandate. We appointed counsel, granted the motion, and ordered supplemental briefing.

II.

We now turn to the heart of the case: whether Senegal’s sentence was unconstitutionally enhanced and, if so, what relief is warranted. Reaching an answer requires us to consider four questions, three pertaining to discretionary tools we may choose to employ. First, should we apply the concurrent sentence doctrine, which the government did not raise at the district court? Second, should we invoke procedural default, belatedly raised by the government for the first time to us in 2022? Third, should we revisit our previous determination that the sentencing court more likely than not relied on the residual clause in enhancing Senegal’s sentence on Counts 4SS

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and 8SS? Last, should the sentencing package doctrine guide us to remand for complete resentencing, a request timely raised by Senegal? We address each in turn.

First, the concurrent sentence doctrine. The concurrent sentence doctrine is a discretionary “tool used to promote judicial economy” under which the existence of one valid conviction resulting in a sentence of equal or longer length renders unnecessary the review of other challenged convictions or sentences that “run concurrently with the valid [one].” *United States v. Stovall*, 825 F.2d 817, 824 (5th Cir. 1987); *see also United States v. Nelson*, 574 F.2d 277, 281 (5th Cir. 1978). We applied the doctrine frequently in previous decades, *see Stovall*, 825 F.2d at 824 (collecting cases), but have more recently recognized its limitations, *see United States v. Collins*, 774 F.3d 256, 261–62 (5th Cir. 2014) (discussing *Ray v. United States*, 481 U.S. 736, 737 (1987)). In the last thirty years, we have twice declined to address the continued validity of the concurrent sentence doctrine in habeas petitions under 28 U.S.C. § 2254 and have not addressed the doctrine in § 2255 proceedings. *See Austin v. Cain*, 660 F.3d 880, 885–86 (5th Cir. 2011) (per curiam); *Davis v. Thaler*, 373 F. App’x 446, 450 (5th Cir. 2010) (per curiam). Despite the doctrine’s diminution—and the fact that Senegal’s unchallenged life sentences are consecutive, not concurrent—the government urges us to apply the discretionary doctrine here. We decline to do so.

Second, procedural default. When Senegal’s successive habeas petition first came to our court, we declined to address the government’s argument—then “raised for the first time”—that Senegal procedurally defaulted his *Johnson* claim. *Senegal*, 2022 WL 4594608, at *1. Since the government failed to raise a procedural default argument at the district court, the government acknowledges that whether we apply the bar is within our discretion. *See Trest v. Cain*, 522 U.S. 87, 89 (1997) (“A court of appeals is not ‘required’ to raise the issue of procedural default *sua sponte*.”); *see also*

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United States v. Willis, 273 F.3d 592, 595 (5th Cir. 2001) (“[I]n order to raise the procedural bar at the appellate level, the government must attempt to invoke it in the district court first.”). We again pass on the government’s invitation.²

Third, the meat of Senegal’s *Johnson* claim. On the earlier iteration of Senegal’s appeal, we examined our caselaw in place at the time of Senegal’s sentencing and concluded that Senegal demonstrated “it is more likely than not that the district court relied on the residual clause at sentencing.” *Senegal*, 2022 WL 4594608, at *1. The government has presented nothing that would cause us to alter our conclusion. In light of the legal landscape at the time of Senegal’s sentencing, we once again hold that

² Although we *may* address procedural default even where the government fails to raise it at the district court, we decide it is inappropriate to do so here for several reasons. First, as noted in Senegal’s brief and as discussed with both parties at oral argument, the government appears to have had a policy of waiving procedural objections in *Johnson* cases. See Leah M. Litman, *The Exceptional Circumstances of Johnson v. United States*, 114 MICH. L. REV. FIRST IMPRESSIONS 81, 88 (2016); see also, *Welch*, 578 U.S. at 139 (THOMAS, J., dissenting) (noting that the government “expressly waiv[ed]” its procedural default defense); *United States v. Taylor*, 873 F.3d 476, 479 n.7 (5th Cir. 2017). If true, this policy would be consistent with the government’s original decision not to assert procedural default. The government does not explain how Senegal, who raised his *Johnson* claim immediately after the case came down, differs from the defendants who benefited from this policy. Second, at the time of Senegal’s direct appeal, the Supreme Court had just handed down *James v. United States*, rejecting the contention that ACCA’s residual clause was void for vagueness over an explicit dissent. See 550 U.S. 192, 210 n.6 (2007); see also *United States v. Redrick*, 841 F.3d 478, 480 (D.C. Cir. 2016) (“[I]t is fair to say that no one—the government, the judge, or the appellant—could reasonably have anticipated *Johnson*.”). Notably, the government cites in its brief no circuit decision keeping an ACCA defendant in jail without prison-enhancing ACCA predicates because the defendant did not anticipate and preserve a *Johnson* argument. When asked at oral argument, the government again pointed to no *Johnson* case. Regardless, we have not received full adversary briefing on procedural default. Last and most importantly, we note the asymmetry that would result if we applied the procedural bar here—forgiving the government for its failure to raise an issue (procedural default) below, while faulting Senegal for his failure to raise an issue (vagueness) on direct appeal.

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Senegal has met his burden of showing that it is more likely than not that the district court relied on the residual clause at sentencing. *See, e.g., Davis*, 487 F.3d at 287 (holding that Texas robbery qualifies as a violent felony under ACCA’s residual clause); *Santiesteban-Hernandez*, 469 F.3d at 379 (concluding that Texas robbery did not satisfy an identically interpreted Guidelines force clause). With *Garrett* now abrogated by *Floyd*, however, nothing renders this error harmless. The ACCA enhancement to Senegal’s sentence on Counts 4SS and 8SS is unconstitutional under *Johnson*.

Last, the sentencing package doctrine. The sentencing package doctrine is a “common sense” doctrine dictating that “[w]hen a conviction on one or more of the component counts [in a multicount indictment] is vacated,” the district court “should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand if that appears necessary in order to ensure that the punishment still fits both the crime and the criminal.” *United States v. Miller*, 594 F.3d 172, 180 (3d Cir. 2010) (citation omitted); *see also United States v. McRae*, 795 F.3d 471, 483–84 (5th Cir. 2015) (describing the doctrine). We typically apply the doctrine to cases in which we have reversed convictions, or occasionally just sentences, on fewer than all counts and determined that the “sentences or counts are interrelated or interdependent,” for example, where “the reversal of the sentence on one count *necessarily* requires the review of the entire sentence.” *United States v. Clark*, 816 F.3d 350, 360 (5th Cir. 2016) (emphasis in original). Senegal recognized both in briefing and at oral argument that nothing mandates our use of the doctrine. Because Senegal has not convincingly explained how the ACCA-enhanced sentences for Counts 4SS and 8SS interrelate to his separate, statutory maximum sentences for his other counts of conviction—especially two consecutive life sentences—or why those sentences depend on the assigned sentences for Counts 4SS and 8SS, we decline to do so.

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III.

For the reasons set out, VACATE the sentences for Counts 4SS and 8SS and REMAND for resentencing on only those counts.

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DON R. WILLETT, *Circuit Judge*, dissenting:

I agree with much of the majority opinion: by imposing an ACCA-enhanced sentence, the district court violated Senegal’s due-process rights under *Johnson v. United States*;¹ the concurrent-sentence doctrine does not bar Senegal’s *Johnson* claim; and the sentencing-package doctrine does not require us to treat counts unaffected by *Johnson* as implicitly infected by the constitutional error on other counts.²

I part ways on just one narrow (but dispositive) issue: procedural default. As the majority explains, the Government did not raise procedural default below, and we have discretion to decline to consider a late-breaking procedural-default defense. But judicial discretion is never “unbounded.”³

¹ 576 U.S. 591, 606 (2015) (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.”).

² Ordinarily, we apply the sentencing-package doctrine to cases on direct appeal. See, e.g., *United States v. McRae*, 795 F.3d 471, 483–84 (5th Cir. 2015). Although other circuits have held that the doctrine applies with equal force to § 2255 motions, see, e.g., *United States v. Chaney*, 911 F.3d 222, 226 (4th Cir. 2018), we have never explicitly addressed that question. Section 2255’s remedial text differs from § 2106: although the appellate-remedies statute allows us to “vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before [us] for review” and to “require such further proceedings to be had as may be just under the circumstances,” 28 U.S.C. § 2106, § 2255 does not mirror that broad appellate-remedies language. Subsection (a) permits a prisoner to move “to vacate, set aside or correct *the* sentence”—that is, the sentence that “was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose,” or that “was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a) (emphasis added). Subsection (b), in turn, directs the court upon finding a qualifying defect to “vacate and set the judgment aside” and then “discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” *Id.* § 2255(b). Because, as the majority explains, the sentencing-package doctrine does not apply here even assuming it is available in § 2255 proceedings, we can leave the broader remedial question for another day.

³ *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc).

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An appeal to our discretion is not an appeal to our “inclination, but to [our] judgment; and [our] judgment is to be guided by sound legal principles.”⁴ Precedent is one of those principles: “a court must exercise its discretion within the bounds set by . . . relevant, binding precedents.”⁵

Here, our precedent points the other way: it counsels us to address the Government’s procedural-default defense, and that defense is meritorious. I therefore respectfully dissent.

I. SENEGAL’S PROCEDURAL DEFAULT

Sentencing errors come in many forms. A district court may, for example, rely on an erroneous factual premise or an impermissible consideration, miscalculate the relevant sentencing-guidelines range, or—as here—apply an unconstitutional sentence enhancement. Direct appeal and, in appropriate cases, § 2255 review provide vehicles for correcting these errors. But the system works best when objections are raised at the first opportunity, while the district court can still correct any error. Federal Rule of Criminal Procedure 51(b) therefore requires a defendant to “inform[] the court” of “the party’s objection to the court’s action” at the time “the court ruling or order is made or sought.”⁶

Failure to comply with Rule 51(b) has important down-the-road consequences. On direct appeal, an unpreserved error must satisfy the “stringent and difficult” plain-error standard.⁷ A defendant who waits until a § 2255 motion must instead overcome the more demanding requirements

⁴ *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (MARSHALL, C.J.)).

⁵ *In re Volkswagen of Am.*, 545 F.3d at 310.

⁶ FED. R. CRIM. P. 51(b).

⁷ *United States v. Escalante-Reyes*, 689 F.3d 415, 422 (5th Cir. 2012) (en banc).

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of procedural default, showing “both cause for his procedural default and actual prejudice due to any such errors.”⁸ These strictures protect the finality of criminal convictions—and with it, the deterrent effect of the criminal law⁹—and preserve trial and sentencing as “the ‘main event,’ . . . rather than a ‘tryout on the road’” for later proceedings.¹⁰

Here, Senegal did not challenge the residual clause at sentencing or on direct appeal. His *Johnson* claim is procedurally defaulted.¹¹ The claim can therefore support relief “only if [Senegal] can first demonstrate either [1] cause and actual prejudice or [2] that he is actually innocent.”¹² He has not attempted to demonstrate either—and our precedent forecloses both routes in any event.¹³ Accordingly, procedural default bars his *Johnson* claim.

⁸ *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996).

⁹ See *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (“Without finality, the criminal law is deprived of much of its deterrent effect.” (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989))).

¹⁰ *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

¹¹ See *Placente*, 81 F.3d at 558.

¹² *Bousley v. United States*, 523 U.S. 614, 622 (1998) (cleaned up).

¹³ Because demonstrating either cause and prejudice or actual innocence was Senegal’s burden, see *McQueen v. Whitley*, 989 F.2d 184, 185 (5th Cir. 1993) (cause and prejudice); *Bosley v. Cain*, 409 F.3d 657, 664 (5th Cir. 2005) (actual innocence), Senegal’s failure to offer any attempt to avoid his procedural default is dispositive. But even if we were to make arguments on his behalf, they would fail. Senegal cannot rely on the actual-innocence exception because “‘actual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley*, 523 U.S. at 623. Under *United States v. Vargas-Soto*, constitutional infirmities in recidivism-based enhancements like ACCA show “at best legal innocence—not factual innocence” and thus do not establish actual innocence. 35 F.4th 979, 1000 (5th Cir. 2022). *Vargas-Soto* likewise forecloses any argument that Senegal’s challenge to the residual clause was not reasonably available at the time of sentencing. See *id.* at 994.

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II. THE GOVERNMENT FORFEITED — BUT DID NOT WAIVE — THE DEFENSE

But the Government has a preservation problem of its own. “[P]rocedural default is normally a ‘defense’ that the [Government] is ‘obligated to raise.’”¹⁴ If the Government does not do so, it “lose[s] the right to assert the defense thereafter.”¹⁵ Here, the Government did not assert Senegal’s procedural default until its briefing in this court. The majority is therefore right that we are not obligated to consider the belated defense.¹⁶

But forfeiture does not end the inquiry. Our precedent permits us to consider a defendant’s procedural default even when the Government did not raise it below.¹⁷ And our cases guide the exercise of that discretion, identifying the “relevant concerns” as (1) whether the Government intentionally waived the procedural-default defense or merely forfeited it, and (2) whether the defendant “has been given notice that procedural default will be an issue for consideration” and “a reasonable opportunity to argue against application of the bar.”¹⁸ Thus, although we do not resurrect a forfeited procedural-default defense “lightly,”¹⁹ in *Smith v. Johnson* we excused the Government’s forfeiture of the procedural-default issue because

¹⁴ *Trest v. Cain*, 522 U.S. 87, 89 (1997) (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996)).

¹⁵ *Gray*, 518 U.S. at 166.

¹⁶ *See Trest*, 522 U.S. at 89.

¹⁷ *See Smith v. Johnson*, 216 F.3d 521, 523–24 (5th Cir. 2000) (per curiam); *see United States v. Willis*, 273 F.3d 592, 596–97 (5th Cir. 2001) (extending *Smith* to § 2255 proceedings).

¹⁸ *Willis*, 273 F.3d at 597 (quoting *Smith*, 216 F.3d at 524); *see Fisher v. Texas*, 169 F.3d 295, 301–02 (5th Cir. 1999).

¹⁹ *Willis*, 273 F.3d at 597.

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(1) “[t]he record [did] not suggest that the [Government] intentionally waived the defense,” and (2) the defendant “received notice that procedural default would be an issue for consideration and an opportunity to argue against its application.”²⁰

Smith supplies the framework. And both considerations favor reaching the defense. First, the Government forfeited the defense; it did not waive it. Forfeiture occurs when a party “fail[s] to preserve” a claim or defense.²¹ Waiver, by contrast, requires both (1) “a known right” and (2) “intentional relinquishment” of that right or “intentional conduct inconsistent with claiming” it.²² “To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right.”²³ And there is one category of actions that our precedent clearly defines as mere forfeiture (rather than waiver): “fail[ing] to raise a claim or argument in the first instance in the proceedings below.”²⁴

That is exactly what happened here. The Government failed to raise default below, then raised it in its first brief on appeal. The delay was lengthy,

²⁰ *Smith*, 216 F.3d at 524.

²¹ *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012).

²² *In re Langston*, 159 F.4th 346, 354 (5th Cir. 2025) (quoting *Matador Petroleum Corp. v. St. Paul Surplus Lines*, 174 F.3d 653, 660 (5th Cir. 1999)).

²³ *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022).

²⁴ *Indigenous Peoples of Coastal Bend v. U.S. Army Corps of Eng’rs*, 132 F.4th 872, 882 (5th Cir. 2025); accord *Morrow v. Jones*, 140 F.4th 257, 261 (5th Cir. 2025) (“Failure to raise a claim to the district court constitutes a forfeiture, not a waiver, of that right for the purposes of appeal.” (cleaned up)). Courts apply waiver and forfeiture principles evenhandedly to the Government and to private parties. See *United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023) (HARDIMAN, J.).

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but delay is not waiver. Nothing in the record shows an intentional relinquishment—much less an express abandonment—of the defense.²⁵

Second, Senegal had had ample notice and a fair chance to respond. The Government first raised default more than four-and-a-half years ago. Senegal could have addressed the issue in his reply brief, his motion to recall the mandate, or in his supplemental briefing after we recalled the mandate. Both *Smith* factors point one way. Senegal had repeated opportunities to answer the defense; he chose not to use them.

III. THE MAJORITY’S REMAINING CONCERNS

The majority offers several other reasons for declining to consider the procedural-default argument. Respectfully, none changes the analysis.

First, waiver elsewhere is not waiver here. The majority explains that the Government—apparently as a matter of policy—waived procedural default in other *Johnson* cases. But the Government’s choice to forgo the defense in other cases says nothing about whether it intentionally relinquished the defense in this case. Waiver is case-specific, and this record shows forfeiture, not waiver.

Second, the court notes that, at the time of Senegal’s sentencing, *Johnson* had not yet been decided, and the Supreme Court had rejected the “suggestion . . . that the residual [clause] is unconstitutionally vague” in *James v. United States*.²⁶ But procedural-default doctrine already accounts for

²⁵ Cf. *Wood*, 566 U.S. at 474 (finding deliberate waiver where the State twice told the district court it would not challenge the petition’s timeliness); *Day v. McDonough*, 547 U.S. 198, 211 (2006) (finding no abuse of discretion in reaching a forfeited defense where “nothing in the record suggest[ed] that the State ‘strategically’ withheld the defense or chose to relinquish it”).

²⁶ 550 U.S. 192, 210 n.6 (2007).

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novelty: a defendant can show cause for his default by showing that the “claim [was] so novel that its legal basis [was] not reasonably available” at the time of the default.²⁷ That avenue sets a deliberately high bar, and we held in *United States v. Vargas-Soto* that challenges to a nearly-identical residual clause were reasonably available before *Johnson*—in spite of *James*.²⁸ We should not recreate a more forgiving novelty inquiry one step earlier under the label of discretion. Doing so allows that “perceived futility” to do work our precedent says it cannot.²⁹

Third, the briefing concern cuts the other way: the Government briefed the issue fully, both in its original brief and in supplemental briefing after we recalled the mandate. Senegal simply chose not to respond. Usually, a party’s failure to brief an issue cuts against that party, not in its favor.³⁰ Our precedent points the same way, asking whether the defendant had the “opportunity” to brief procedural default, not whether he seized it.³¹

Finally, the majority notes a real concern: the asymmetry of forgiving the Government’s forfeiture while letting it rely on Senegal’s default. But habeas doctrine allows that imbalance.³² The same tension exists whenever we excuse the Government’s forfeiture of a procedural-default defense, just

²⁷ *Reed v. Ross*, 468 U.S. 1, 16 (1984).

²⁸ *See* 35 F.4th at 993–99.

²⁹ *Contra Engle v. Isaac*, 456 U.S. 107, 130 n.36 (1982) (“[W]e are confident that perceived futility alone cannot constitute cause.”).

³⁰ *See, e.g., Merriott v. City of Bossier City*, 179 F.4th 393, 417 (5th Cir. 2026) (“Merriott effectively concedes this point by failing to respond to it in his reply brief.”).

³¹ *Smith*, 216 F.3d at 524.

³² *See, e.g., Shinn v. Ramirez*, 596 U.S. 366, 371, 375 n.1 (2022) (choosing “to forgive the State’s forfeiture before the District Court” even though the forfeited defense was that the petitioners had “failed to develop the factual basis of [their] claim[s] in State court proceedings”).

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as we did in *Smith*. Asymmetry may be a reason to question our precedent, but it is not grounds to distinguish it.

IV. CONCLUSION

My disagreement with the majority is narrow: whether to exercise our discretion to consider a procedural-default defense the Government first raised on appeal. Because the Government forfeited rather than intentionally waived the procedural-default defense, and because Senegal had ample notice and a fair chance to respond, our precedent points toward reaching it. On the merits, Senegal's *Johnson* claim is procedurally defaulted, so I would affirm the denial of § 2255 relief. Because the majority does otherwise, I respectfully dissent.