PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4536

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MYRON HENDERSON, a/k/a Charlie,

Defendant – Appellant.

Appeal from the United States District Court for the Northern District of West Virgina, at Wheeling. John Preston Bailey, District Judge. (5:21-cr-00024-JPB-JPM-2)

Argued: September 16, 2026 Decided: November 24, 2026

Before RUSHING, Circuit Judge, KEENAN, Senior Circuit Judge, and Susan C. RODRIGUEZ, United States District Judge for the Western District of North Carolina, sitting by designation.

Dismissed by published opinion. Judge Rushing wrote the opinion, in which Senior Judge Keenan and Judge Rodriguez joined.

ARGUED: John Miles Morgan, J. MILES MORGAN, PLLC, Charleston, West Virginia, for Appellant. Clayton John Reid, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee. **ON BRIEF:** Matthew L. Harvey, United States Attorney, Carly Cordaro Nogay, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

RUSHING, Circuit Judge:

Myron Henderson pled guilty to a federal drug charge pursuant to a plea agreement that waived his right to appeal. After he was sentenced, Henderson appealed to this Court, arguing that his sentence was unreasonable. The Government did not assert the appeal waiver. We vacated the sentence and remanded for resentencing. After resentencing, Henderson appealed again. This time the Government asserted the appeal waiver. Henderson argues that the Government forfeited its right to enforce the waiver by not asserting it in the first appeal. We disagree and so dismiss Henderson's appeal.

I.

In November 2021, Henderson pled guilty to distributing methamphetamine within 1,000 feet of a protected location, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 860. He pled in reliance on a plea agreement that includes an appeal waiver. The waiver states, in relevant part, that Henderson "knowingly and expressly waives all rights conferred by 18 U.S.C. § 3742 to appeal whatever sentence is imposed (including any fine, term of supervised release, or order of restitution) for any reason." J.A. 25.

In April 2022, the district court sentenced Henderson to 110 months in prison. At the sentencing hearing, Henderson's counsel urged the court to impose a sentence below the range recommended by the Sentencing Guidelines based on Henderson's difficult childhood, but the court declined to do so. Henderson appealed, and his counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Government gave notice that it would not file a response brief. This Court then directed the parties to file supplemental briefs addressing whether the district court adequately explained its reasons

for rejecting Henderson's variance argument. In its supplemental brief, the Government argued that the sentence was procedurally reasonable; it did not assert the appeal waiver. This Court concluded that the district court's sentencing explanation was inadequate and so vacated Henderson's sentence and remanded for resentencing. *United States v. Henderson*, No. 22-4235, 2024 WL 1193098, at *2 (4th Cir. Mar. 20, 2024) (per curiam).

In September 2024, the district court resentenced Henderson to 110 months' imprisonment. Henderson appealed this new judgment. After Henderson filed his opening brief, the Government moved to dismiss the appeal because Henderson "waived his right to appeal" in the plea agreement. Dkt. 16 at 1. Henderson opposed that motion, arguing that the Government forfeited its right to assert the appeal waiver by failing to raise it during his first appeal.

II.

We begin with the plain language of the plea agreement. "'When interpreting plea agreements, we draw upon contract law as a guide to ensure that each party receives the benefit of the bargain, and to that end, we enforce a plea agreement's plain language in its ordinary sense.'" *United States v. Under Seal*, 902 F.3d 412, 417 (4th Cir. 2018) (quoting *United States v. Warner*, 820 F.3d 678, 683 (4th Cir. 2016)). In his plea agreement, Henderson expressly waived his right "to appeal whatever sentence is imposed . . . for any reason." J.A. 25. After his initial appeal, we vacated his original sentence and remanded for resentencing. The district court imposed a new sentence. Because the plain language of Henderson's appeal waiver encompasses "whatever sentence is imposed," the waiver

applies to this new sentence. Accordingly, the Government appropriately relied on the waiver to move for dismissal of this appeal.

Henderson argues that the Government forfeited its right to assert the appeal waiver. Forfeiture is "'the failure to make the timely assertion of a right.'" *Hunter v. United States*, 146 S. Ct. 1702, 1710–1711 (2026) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). This Court has made clear at what time the Government must assert its right to enforce an appeal waiver. "Motions to dismiss" on "procedural grounds"—like the existence of an appeal waiver—"should be filed within the time allowed for the filing of the response brief." 4th Cir. R. 27(f)(2). When a defendant files a merits brief on appeal, if the Government "'fail[s] to raise the issue of waiver and instead address[es] the merits'" of the defendant's claim in its response brief, it forfeits its right to enforce the waiver with respect to that claim. *United States v. Goode*, 177 F.4th 563, 568–569 (4th Cir. 2026) (ellipsis omitted) (quoting *United States v. Hairston*, 754 F.3d 258, 260 (4th Cir. 2014)). Similarly, when the defendant files an *Anders* brief, if the Government responds—which it need not do "unless we order otherwise"—it must assert the appeal waiver "in the first brief it file[s] that ma[kes] arguments regarding the proper disposition of claims it contend[s] [a]re covered by the waiver." *United States v. Ashford*, 103 F.4th 1052, 1055–1056 (4th Cir. 2024).

The Government followed those rules here. After Henderson filed his merits brief, the Government filed a motion to dismiss asserting the appeal waiver within the time for filing a response brief and in lieu of a brief that addressed the merits. *See* 4th Cir. R. 27(f)(2); *Goode*, 177 F.4th at 568–569. Under this Court's forfeiture rules, the Government

has timely asserted its right. *See Hunter*, 146 S. Ct. at 1710–1711. To be sure, the Government did *not* timely assert its right in the prior appeal. There, Henderson filed an *Anders* brief, so the Government did not initially respond. *See Ashford*, 103 F.4th at 1055. But once this Court ordered supplemental briefing, the Government filed a brief that addressed the merits without asserting the appeal waiver. Under *Ashford*, the Government thereby forfeited its right to enforce the waiver in that appeal. *Id.* at 1056.

But the Government's forfeiture of its right to enforce the waiver provision in response to Henderson's first appeal has no bearing on its ability to enforce that provision in response to this second appeal. This is a new appeal from a newly imposed sentence. In that sense, it is a new breach of the parties' agreement, distinct from any breach caused by Henderson's first appeal. As we have recognized, the Government, like any party to a contract, has "the right to waive [a] breach" of the plea agreement. *Under Seal*, 902 F.3d at 419. When it does so, the agreement is not terminated but remains in force; if there is a subsequent breach, the injured party may still enforce the agreement. *Id.* at 418 ("'[W]here one party commits a material breach, the non-breaching party may elect to terminate the entire agreement or seek to enforce the remainder of the contract.'" (quoting *United States v. Hallahan*, 756 F.3d 962, 973 (7th Cir. 2014)); *see also Blackrock Enters., LLC v. BB Land, LLC*, 902 S.E.2d 455, 468 (W. Va. 2024) (recognizing that when an injured party waives a breach, it treats the contract as continuing and "'insists that the defaulting party continue to render future performance'" (quoting 14 R. Lord, Williston on Contracts § 43:15, p. 678 (4th ed. 2013)); *Kamco Supply Corp. v. On the Right Track, LLC*, 49 N.Y.S.3d 721, 728 (N.Y. App. Div. 2017) ("Whereas an election to continue the

performance of a contract despite the occurrence of a material breach would bar the right to terminate the contract based on that breach, it would not preclude an action based on a subsequent breach." (citation omitted)); Restatement (First) of Contracts § 309 cmt. d (1932) ("[E]xcuse at a given time . . . of the performance of the promise is not of itself a dispensation for the future."). This accords with a "classic rule of contract law," that "a party should be prevented from benefitting from its own breach." *Hallahan*, 756 F.3d at 973 (internal quotation marks omitted) (citing 23 R. Lord, Williston on Contracts § 63:8, p. 456 (4th ed. 2002)). The Government's decision not to assert the waiver provision of the plea agreement in response to Henderson's prior appeal does not prevent it from asserting that provision in response to this new appeal.

This conclusion also comports with the broad scope of our prior remand. When "an appellate court sets aside a defendant's 'entire sentence and remand[s] for a *de novo* resentencing' pursuant to a general mandate, the district court on resentencing is not bound by its prior consideration of the case." *United States v. Susi*, 674 F.3d 278, 284 (4th Cir. 2012) (quoting *Pepper v. United States*, 562 U.S. 476, 507 (2011)). The district court may then reconsider arguments it decided at the initial sentencing or address new arguments, so long as it does not "'reconsider issues the mandate laid to rest.'" *United States v. Alston*, 722 F.3d 603, 607 (4th Cir. 2013) (quoting *Susi*, 674 F.3d at 283); *see also United States v. Fields*, 552 F.3d 401, 404 (4th Cir. 2009); *United States v. Henoud*, 81 F.3d 484, 487 n.8 (4th Cir. 1996). In Henderson's first appeal, this Court "vacate[d] his sentence and remand[ed] for resentencing." *Henderson*, 2024 WL 1193098, at *2. At resentencing, Henderson could raise new arguments and revive old ones. The district court rendered a

new sentence and a new judgment, from which Henderson took a new appeal, where he also could raise new arguments and revive old ones. It is only fitting that the Government would be entitled to raise new arguments and revive old ones to the same extent. *Cf. Stokes v. Stirling*, 64 F.4th 131, 137 (4th Cir. 2023) (We "[e]nforc[e] waiver and forfeiture rules . . . on a consistent basis." (internal quotation marks omitted)).

III.

Having concluded that the Government has the right to assert Henderson's appeal waiver, we turn to enforcement. Generally speaking, we will enforce an appeal waiver "if the waiver is valid and the issue sought to be appealed falls within the scope of the waiver." *United States v. Cohen*, 459 F.3d 490, 494 (4th Cir. 2006). Henderson's appeal waiver is valid because, as he rightly concedes, it was "knowing and voluntary." *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014). As for scope, Henderson waived "all rights conferred by 18 U.S.C. § 3742 to appeal whatever sentence is imposed . . . for any reason," excepting ineffective assistance of counsel and prosecutorial misconduct. J.A. 25. The only issue he seeks to appeal is the procedural reasonableness of his sentence, which falls squarely within the scope of his waiver. Because the waiver is valid and enforceable, we grant the Government's motion to dismiss this appeal.

DISMISSED