

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 11 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DONOVAN JAMES BOLEN,

No. 17-35379

Petitioner-Appellant,

D.C. Nos. 1:16-cv-00233-BLW
1:11-cr-00143-BLW-2

v.

UNITED STATES OF AMERICA,

MEMORANDUM*

Respondent-Appellee.

DAVID JOSEPH VON BARGEN,

No. 17-35380

Petitioner-Appellant,

D.C. Nos. 1:16-cv-00261-BLW
1:11-cr-00143-BLW-1

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted February 4, 2020**

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

In these consolidated appeals, federal prisoners Donovan James Bolen and David Joseph Von Bargaen appeal from the district court's judgments dismissing their 28 U.S.C. § 2255 motions to vacate their sentences. We have jurisdiction under 28 U.S.C. § 2253. Reviewing de novo, *see United States v. Swisher*, 811 F.3d 299, 306 (9th Cir. 2016) (en banc), we vacate and remand.

Appellants contend that their convictions for conspiracy to maliciously damage federal property, in violation of 18 U.S.C. § 844(f)(1), and conspiracy to use explosive materials, in violation of 18 U.S.C. § 844(i), are not crimes of violence under 18 U.S.C. § 924(c). During the pendency of this appeal, the Supreme Court issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that section 924(c)'s residual clause is unconstitutionally vague. *Id.* at 2336. The government concedes, and we agree, that remand is warranted for the district court to reconsider its ruling in light of *Davis*, including whether the challenged convictions are crimes of violence under 18 U.S.C. § 924(c)(3)(A).

VACATED AND REMANDED.