No. 21-10117

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States of America,

Plaintiff-Appellee

v.

Cedric Ray Jones,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
No. 3:18-cv-584, Hon. Jane J. Boyle

OPENING BRIEF FOR DEFENDANT-APPELLANT CEDRIC RAY JONES

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May 12, 2021

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UNITED STATES OF AMERICA,

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v.

CEDRIC RAY JONES,

Defendant-Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Defendant-Appellant

Cedric Ray Jones

Plaintiff-Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Cedric Ray Jones requests oral argument and believes it would significantly aid the Court. The issues presented in this appeal concern possible grounds for reaching the merits of Jones's motion to vacate his conviction despite the appeal waiver in his plea agreement. Among other benefits, oral argument would allow the Court to explore with counsel the scope of the appeal waiver and its enforceability.

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INTRODUCTION

Defendant-Appellant Cedric Ray Jones was convicted and sentenced to 84 months in prison for violating an unconstitutionally vague federal statute—that is, for violating a law that is "no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The Government acknowledges that Jones's conviction is "problematic" because it lacks any statutory basis, but it insists that Jones's motion to vacate his conviction cannot be heard on its merits. The Government relies only on the appeal waiver in Jones's plea agreement to argue that Jones is not entitled to relief.

But that general appeal waiver does not bar Jones from challenging his conviction. This Court's precedent offers three doctrinal paths to the same result. Whether analyzed as a problem of contract formation and interpretation, contract enforcement, or basic notions of justice and fairness, the result is the same: Jones's appeal waiver does not bar him from challenging a conviction with no basis in law.

STATEMENT OF JURISDICTION

Jones appeals from a final judgment of the United States District Court for the Northern District of Texas denying his motion, filed under 28 U.S.C. § 2255, to vacate his conviction. ROA.155. The district court had jurisdiction under 28 U.S.C. § 1331. The district court denied Jones's motion and issued a certificate of appealability on December 29, 2020. ROA.155. Jones timely filed a notice of appeal on February 3, 2021. ROA.159. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether, under principles of contract formation and interpretation, a boilerplate appeal waiver bars Jones from challenging his invalid conviction.

2. If this Court interprets the appeal waiver to apply to Jones's challenge, whether the waiver is enforceable even though the district court lacked any valid statutory authority to convict and sentence Jones.

3. If the waiver applies to Jones's challenge and is otherwise enforceable, whether this Court should adopt the miscarriage-of-justice exception to the enforcement of appeal waivers and decline to enforce Jones's appeal waiver.

STATEMENT OF THE CASE

I. Jones's criminal conviction

Jones's indictment. In 2015, a grand jury returned a second superseding indictment against Jones and two co-defendants for robberies at stores in Dallas, Texas. ROA.220-21. The eight-count indictment included one count of conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. § 1951(a), or conspiracy to commit Hobbs Act robbery (Count 1), and one count of using, carrying, and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (Count 2). ROA.220-27.[1]

As relevant to Count 2, Section 924(c) imposes additional criminal liability on "any person who, during and in relation to any crime of violence … uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). Section 924(c) offenses require that a defendant commit a predicate crime of violence.

[1] Jones challenges only his conviction under Count 2, for which the predicate crime of violence is Count 1. ROA.227. The other six counts are not at issue here.

United States v. Reece, 938 F.3d 630, 632 (5th Cir. 2019). When Congress enacted Section 924(c), it defined a crime of violence under two separate clauses. *Id.* First, under the "force clause," a crime of violence is a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Second, under the (now-defunct) "residual clause," a crime of violence is a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). Here, the Government relied on conspiracy to commit Hobbs Act robbery, as alleged in Count 1, as the predicate crime of violence for Count 2. ROA.227.

Jones's plea agreement. Jones pleaded guilty to six counts under a written plea agreement. ROA.140, 522-32. In exchange for Jones's plea, the Government dismissed the indictment's two remaining offenses (Counts 4 and 6). ROA.527 ¶ 8. The plea agreement states that Jones's plea was freely and voluntarily made, ROA.527 ¶ 10, and Jones agreed that the district court would impose his sentence after it considered the Sentencing Guidelines, ROA.525 ¶ 4. Jones agreed that "the actual sentences imposed (so long as they are within the statutory maximum) are solely in the discretion of the Court." *Id.*

Jones's plea agreement also addressed future appellate and collateral litigation:

> **11. Waiver of right to appeal or otherwise challenge sentence:** Jones waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his convictions and sentences. He further waives his right to contest his convictions and sentences in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Jones, however, reserves the rights: (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or

> (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of his pleas of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

ROA.528 ¶ 11.

Following a sentencing hearing, the district court sentenced Jones to a total term of 573 months' imprisonment: 189 months together for Counts 1, 3, 5, and 7 to run concurrently; 84 months on Count 2 to run consecutively; and 300 months on Count 8 to run consecutively. ROA.141, 336.

II. Jones's post-conviction motion and the proceedings below

Jones's motion to vacate. In 2018, Jones moved to vacate his sentence under 28 U.S.C. § 2255, alleging that his trial and appellate counsel were constitutionally ineffective. ROA.17. Jones then amended his motion to seek vacatur of his Section 924(c) conviction under Count 2 following this Court's decision in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018) (per curiam), *aff'd in part, vacated in part on other grounds*, 139 S. Ct. 2319 (2019). ROA.71-73, 75-80.

In *Davis*, this Court held that Section 924(c)'s residual-clause definition of a crime of violence is unconstitutionally vague. 903 F.3d at 486. Further, a conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)'s force clause. *Id.* at 485. Thus, Jones maintained that his Section 924(c) conviction under Count 2—which is premised on conspiracy to commit Hobbs Act robbery—lacked any statutory basis. ROA.72, 75-78. While Jones's motion was pending, the Supreme Court granted certiorari in *Davis*. ROA.84. The district court then granted the Government's motion to stay the proceedings and administratively closed his case pending the Supreme Court's decision. ROA.89-90.

A few months later, the Supreme Court affirmed, concluding that Section 924(c)'s residual clause is unconstitutionally vague because it provides "no reliable way to determine which offenses qualify as crimes of violence." *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). The Court reasoned that when Congress exercises its "power to write new federal criminal laws," it must provide people "fair warning" of the consequences that will attach to their conduct. *Id.* at 2323. Thus, if Congress passes a vague law, the courts must "treat the law as a nullity" because, in "our constitutional order, a vague law is no law at all." *Id.* Thereafter, this Court held that *Davis* announced a new rule of constitutional law that applies retroactively to cases on collateral review. *Reece*, 938 F.3d at 635.

In light of *Davis*, Jones moved to lift the stay in his case and reiterated his request for relief. ROA.91-92. The "Government concede[d]" that Jones's conviction under Count 2 is "'problematic' because a conspiracy to commit Hobbs Act robbery does not satisfy" Section 924(c)'s force clause, and following *Davis*, Section 924(c)'s residual clause could "no longer support it." ROA.146 (quoting ROA.121). Nevertheless, the Government maintained that the appeal waiver in Jones's plea agreement bars his motion. ROA.122-23.

The district court's decision. The magistrate judge recommended that Jones's amended motion be denied based on the appeal waiver. ROA.150. First, the magistrate judge concluded that Jones's *Davis* claim did not fall within one of the enumerated exceptions in his appeal waiver. ROA.147. Second, she found that Jones's waiver was knowing and voluntary, and therefore valid. ROA.148, 150. Finally, she refused to apply the miscarriage-of-justice exception, under which a court may refuse to enforce an

otherwise valid appeal waiver, noting that this Court had "declined explicitly either to adopt or reject" the exception. ROA.151.

In sum, the magistrate judge concluded that Jones waived any collateral review of his conviction. ROA.151. She recommended that Jones receive a certificate of appealability on two issues: (1) whether the appeal waiver bars his *Davis* claim; and (2) whether the waiver is unenforceable under the miscarriage-of-justice exception. ROA.151-52.

On December 29, 2020, the district court adopted the magistrate judge's findings, conclusions, and recommendation, rendered a final judgment, and granted a certificate of appealability on the two issues. ROA.154-55.

SUMMARY OF ARGUMENT

I. As a matter of contract formation and interpretation, Jones's challenge to his conviction does not fall within the terms of the appeal waiver in his plea agreement. The general language is insufficient to waive Jones's right not to be convicted for conduct that is not a criminal offense. Rather, the plea agreement makes clear that Jones waived only challenges to convictions based on validly criminalized conduct. Moreover, when Jones signed his plea agreement, the residual clause of Section 924(c) had not yet been held unconstitutionally vague. Therefore, under this Court's precedent, Jones did not knowingly and intelligently waive his *Davis* claim.

II. Even if the waiver encompasses Jones's *Davis* claim, it is unenforceable because the district court lacked statutory authority to convict and sentence him. As the Government concedes, Jones's conviction under Count 2 rested on the unconstitutionally vague residual clause of Section 924(c). A court may not give effect

to appeal waivers where the defendant's conviction and sentence are not authorized by law. Moreover, courts do not enforce appeal waivers that would bar a defendant's challenge to a sentence that exceeds the statutorily authorized maximum punishment. Here, Jones's sentence exceeds the statutory maximum: For conduct that Congress failed to validly criminalize, he cannot be sentenced to more than zero months in prison.

III. Even if Jones's appeal waiver is otherwise valid and enforceable, this Court should decline to enforce it under the miscarriage-of-justice exception. Several courts of appeals have adopted this exception, under which courts can reach the merits of a challenge to an unlawful conviction despite an appeal waiver. This Court should do the same. Forcing Jones to serve a seven-year sentence for a conviction under an unconstitutionally vague statute would be a miscarriage of justice. Adopting the exception here would be consistent with this Court's precedent and district-court decisions that have declined to enforce appeal waivers in identical and similar circumstances.

STANDARD OF REVIEW

This Court reviews de novo the question whether an appeal waiver bars an appeal. *See United States v. Leal*, 933 F.3d 426, 430 (5th Cir. 2019).

ARGUMENT

I. Jones did not waive the right to challenge on collateral review a conviction for conduct that the law did not validly criminalize.

This Court "analyze[s] waivers of appeal in plea agreements using contract law." *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006). Applying those principles here, the waiver does not bar Jones's challenge to his conviction under Count 2. First, the

terms of Jones's plea agreement are too general to embrace waiver of his claim that, after *Davis*, his conviction under the now-defunct residual clause of Section 924(c) is invalid. Second, Jones did not knowingly and intelligently waive his claim because, when Jones signed his appeal waiver, *Davis* had not yet held the residual clause of Section 924(c) to be unconstitutionally vague.

A. Based on the language of his plea agreement, Jones did not waive the right to bring his *Davis* claim.

A valid and enforceable waiver "only precludes challenges that fall within its scope." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). In other words, a challenge is foreclosed by an appeal waiver only if, "under the plain language of the plea agreement, the waiver applies to the circumstances at issue." *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). To determine an agreement's scope, a court must "ascertain and give effect to the parties' intention[s]" based on its language and the surrounding context. *See* 11 Williston on Contracts § 32.2 (4th ed. 2020). Here, the appeal-waiver language in Jones's plea agreement does not embrace waiver of his *Davis* claim.

1. The appeal waiver language is too general to include the right not to be convicted for conduct that did not violate a criminal statute.

Plea agreements are interpreted "narrowly, and against the government." *United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006). Given the fundamental rights involved in plea agreements, *see id.*, "courts are to indulge every reasonable presumption against waiver," *Salts v. Epps*, 676 F.3d 468, 476 (5th Cir. 2012) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (quotation marks omitted). Accordingly, this Court has refused to interpret broadly worded appeal waivers to bar a defendant from asserting his right to

be free from a conviction or sentence imposed without statutory authorization. Indeed, an appeal waiver does not bar collateral review of a claim asserting this right even where a defendant's plea agreement expressly reserves the ability to bring only certain claims on direct appeal but purportedly waives all collateral review. *See United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (per curiam).

For instance, in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), the defendant challenged his conviction for possession of a firearm after supposedly having two prior "misdemeanor crime of domestic violence" convictions. *Id.* at 376. On appeal, he argued that the relevant count "fail[ed] to state an offense" because the predicate convictions the government relied on were not, as a matter of law, crimes of domestic violence. *Id.* at 376, 379. This Court held that the defendant's appeal waiver—which provided that the defendant "waives *any appeal*, including collateral appeal" of "*any error*" concerning his conviction or sentence—did not bar his claim. *Id.* at 380 (emphasis added). This Court reasoned that the general phrasing—*any* appeal of *any* error—"fail[ed] to embrace" the defendant's weighty right to be free of prosecution for conduct that did not violate a criminal statute. *See id.*

Similarly, in *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019), this Court held that the defendant was not barred from challenging a restitution order imposed above the statutorily authorized maximum, notwithstanding his appeal waiver. *Id.* at 428, 430-31. His plea agreement "waive[d] his rights … to appeal his conviction, sentence, fine, order of restitution, and forfeiture order" and "any collateral proceeding" challenging the same. *Id.* at 428. Relying on *White*, this Court again held that, given the appeal waiver's generic phrasing, the defendant did not waive the weighty right "to be free of a sentence

exceeding the statutory maximum"—that is, a punishment that is "expressly foreclosed by statute." *Id.* at 431.

Likewise, in *United States v. Hollins*, 97 F. App'x 477, after pleading guilty to two federal crimes, the defendant challenged his sentence, which exceeded the statutory maximum. *Id.* at 478. On collateral review, he argued that his counsel was ineffective in failing to object to the erroneous sentence. *Id.* His plea agreement reserved direct appeal for only above-maximum sentences and "waived, *without exception*, his right to bring a collateral attack." *Id.* at 479 (emphasis added). But this Court held that the broad appeal waiver did not bar the defendant's collateral challenge to his sentence. *Id.* In so holding, this Court joined a chorus of circuit courts that have "indicat[ed] that a waiver of the right to appeal a sentence would be unenforceable if the challenged sentence exceeded the statutory maximum." *Id.* (collecting cases).

In *White*, *Leal*, and *Hollins*, then, a general waiver purported to bar the defendant from raising his challenge. But this Court held that the defendants' challenges could proceed. These precedents together establish the rule that the relinquishment of a weighty right—namely freedom from conviction unless the conduct is validly criminalized and the punishment falls within the bounds of the law—demands more than general waiver language.

That rule governs here. Jones's appeal waiver includes only general language: "Jones waives his rights … to appeal from his convictions and sentences" and "further waives his right to contest his convictions and sentences in any collateral proceeding." ROA.528 ¶ 11. In *White* and *Leal*, this Court held nearly identical appeal-waiver language that also covered "any appeal" and "any collateral proceeding" to be insufficient to bar

review. *See White*, 258 F.3d at 380; *Leal*, 933 F.3d at 428, 431. Moreover, Jones's waiver purports to waive all collateral review and preserve direct review of only narrow categories of potential challenges to his sentence. ROA.528 ¶ 11. But, as in *Hollins*, Jones's ability to bring challenges is not limited to those exceptions, and he may seek collateral review of his sentence. *Hollins*, 97 F. App'x at 479. Assuming the right at issue here—the right not to be convicted for conduct that is not validly criminalized—is ever waivable, a valid appeal waiver must contain a more precise, definitive statement to do so. *See White*, 258 F.3d at 380. Because Jones's appeal waiver lacks this specificity, it does not bar his *Davis* claim.

2. A separate provision in Jones's plea agreement further demonstrates that neither Jones nor the Government intended the appeal waiver to encompass his *Davis* claim.

A separate provision in Jones's plea agreement further establishes that he did not waive his *Davis* claim. When interpreting contracts, this Court "construe[s] the writing in its entirety, and consider[s] each part with every other part." *Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1193 (5th Cir. 1985). The parties' intent is determined by considering "the whole instrument." *See* 11 Williston on Contracts § 30.2 (4th ed. 2020). Jones's appeal-waiver provision, therefore, must be interpreted in light of all the provisions in his plea agreement, including that "Jones fully understands that the actual sentences imposed (so long as they are within the statutory maximum) are solely in the discretion of the Court." ROA.525 ¶ 4.

When a plea agreement expressly states that any sentences will be imposed "within the statutory maximum," this Court construes the entire agreement to reach only promises within the bounds of the law. In *Leal*, the defendant's plea agreement included

this exact same provision, which this Court relied on to hold, as explained above (at 10), that the defendant's appeal waiver did not bar his challenge to a restitution order above the statutory maximum. 933 F.3d at 431. *Leal* reasoned that this provision meant that neither party intended the plea agreement to bar challenges to illegal sentences—that is, a punishment above the statutory limit. *See id.*

Like the defendant in *Leal*, Jones waived his right to challenge only those convictions and sentences that were statutorily authorized. The Government concedes that there is no statutory basis for Jones's conviction under Count 2. ROA.121, 146. Jones's Section 924(c) conviction therefore imposes a punishment that is not statutorily authorized. And so, the plea agreement does not bar Jones's *Davis* challenge.

B. Jones did not knowingly and intelligently waive his right to challenge his conviction following *Davis*.

A defendant's appeal waiver is valid and bars future litigation only if he knowingly and intelligently enters into the agreement. *See United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007). At the time of Jones's plea agreement, *Davis* had not yet held Section 924(c)'s residual clause to be unconstitutionally vague. Jones therefore could not knowingly and intelligently contract away the right to collaterally challenge his conviction based on conduct that, after *Davis*, did not violate a valid criminal statute.

1. Jones did not knowingly and intelligently waive the right announced in *Davis* because it did not exist at the time of the plea agreement.

Waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Arisvo-Mata*, 442 F.3d 382, 384 (5th Cir. 2006). A party cannot knowingly and intelligently waive a right that did not exist at the time of a plea agreement. When a new

right is announced after a defendant pleads guilty and waives any appeals, a defendant may invoke that right in a challenge to his conviction because "[a]t the time he entered his plea," there was "no recognized right … he could elect to forgo." *Halbert v. Michigan*, 545 U.S. 605, 623 (2005).

Accordingly, in several decisions, this Court has refused to interpret appeal waivers to bar challenges based on precedent handed down after the defendant's plea agreement. This Court recently held, in circumstances nearly identical to Jones's case, that a defendant did not intelligently waive a challenge to his Section 924(c) conviction where the predicate crime was not a crime of violence under the force clause and, after *Davis*, could not be sustained by the residual clause. *United States v. Picazo-Lucas*, 821 F. App'x 335, 337 (5th Cir. 2020). Similarly, in *United States v. Wright*, 681 F. App'x 418 (5th Cir. 2017), a defendant challenged his conviction by arguing that his conduct did not fall within the Sentencing Guidelines' definition of "controlled substance offense." *Id.* at 420. His argument relied on *Mathis v. United States*, 136 S. Ct. 2243 (2016), which was handed down after he entered his plea agreement and appeal waiver. *Wright*, 681 F. App'x at 420. This Court held that the appeal waiver did not bar the defendant's *Mathis* challenge, reasoning that where "a right is established by precedent that does not exist at the time of the purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time." *Id.* (citing *Smith v. Blackburn*, 632 F.2d 1194, 1195 (5th Cir. 1980) (per curiam)).

These decisions faithfully apply the principles laid out in the Supreme Court's and this Court's controlling precedent. In *Halbert*, the Supreme Court held that the defendant did not, as a part of his *nolo contendere* plea agreement, knowingly and

intelligently waive his right to appointed appellate counsel. 545 U.S. at 623. A knowing and intelligent waiver was impossible because, at the time of the defendant's plea, he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.* The Court noted that the defendant had not agreed to a "conditional waiver" "in which [he] agrees that, if he has a right, he waives it," and "nothing in [his] plea colloquy indicates that he waived an 'unsettled,' but assumed, right." *Id.* n.7 (alterations omitted). Similarly, in *Smith v. Blackburn*, 632 F.2d 1194 (5th Cir. 1980) (per curiam), this Court held that the defendant "clearly did not waive a 'known right or privilege'" to collaterally challenge his conviction by a five-member jury because the Supreme Court did not recognize that such convictions were unconstitutional until three years later. *Id.* at 1195. In so holding, this Court rejected the government's argument that the defendant "should have been able to anticipate the Supreme Court's holding." *Id.*

Applying those precedents here, Jones did not knowingly and intelligently waive his right to challenge his Section 924(c) conviction. In November 2015, at the time of his plea agreement and appeal waiver, the residual clause had not yet been held unconstitutionally vague. This Court invalidated the clause in September 2018, and the Supreme Court affirmed in June 2019. *See United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018), *aff'd in part, vacated in part on other grounds*, 139 S. Ct. 2319, 2336 (2019); *see also United States v. Reece*, 938 F.3d 630, 635 (5th Cir. 2019) (holding that *Davis* applies retroactively). Jones could not have "intentionally relinquished" a claim based on *Davis* "because it [was] unknown at th[e] time" he signed the appeal waiver. *Wright*, 681 F. App'x at 420 (citing *Smith*, 632 F.2d at 1195).

2. Because *United States v. Barnes* concerns only appeal waivers of sentence-enhancement challenges that do not implicate the statutory maximum, it does not control here.

The magistrate judge's recommendation that the district court deny Jones's motion relied on *United States v. Barnes*, 953 F.3d 383 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 438 (2020). ROA.148-50. But neither *Barnes* nor any other sentence-enhancement decision applies here. *See, e.g.*, *United States v. Creadell Burns*, 433 F.3d 442 (5th Cir. 2005). *Barnes* announced a narrow holding that controls waivers only in the context of sentencing appeals where the sentence does not exceed the statutory maximum.

In *Barnes*, this Court held that the defendant's appeal waiver barred a challenge to a sentence enhancement for "violent felon[ies]" under the residual clause of the Armed Career Criminal Act, which was later held unconstitutionally vague in *Johnson v. United States*, 576 U.S. 591, 606 (2015). *Barnes*, 953 F.3d at 385. *Barnes* rejected the defendant's argument that he did not knowingly and intelligently waive the right to bring that challenge. *Id.* at 386-87. In so holding, *Barnes* relied on cases that concerned appeal waivers in the sentence-enhancement context. *See id.* at 386-88. For instance, *Barnes* relied heavily on *United States v. Creadell Burns*, a case that distinguished a sentence-enhancement challenge, which could be waived, from a more fundamental right, such as the right to counsel in *Halbert*, which could not. *See id.* at 387-88; *Creadell Burns*, 433 F.3d at 448-49.

In rejecting the "theory that [a defendant] can't waive his right to challenge an illegal or unconstitutional sentence," *Barnes* observed that the defendant had not argued "that his sentence exceeded the applicable statutory maximum" under *Leal*. *See Barnes*, 953

F.3d at 389 & n.10. As explained further below (at 18-19), Jones makes precisely that argument here.

Barnes also briefly distinguished *Smith v. Blackburn* by claiming that there the defendant had not "agreed to an appellate or collateral-review waiver." *Barnes*, 953 F.3d at 387. But *Smith* is, in fact, a case about waiver: The Government argued that the defendant waived his right to be convicted only by a unanimous six-person jury by "elect[ing] to be tried by a five-member jury," and this Court disagreed, "find[ing] no waiver in this case." *Smith*, 632 F.2d at 1195. That the defendant had not signed a written document entitled "appeal waiver" is irrelevant.

Smith's reasoning therefore controls here. But even if *Barnes* were viewed as conflicting with *Smith*'s holding that a defendant cannot knowingly and intelligently waive a right that does not yet exist, *Smith* controls for another reason: "one panel of [this] court may not overturn another panel's decision," *Jacobs v. Nat'l Drug Intell. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008), and when two panel opinions conflict, "the older opinion controls," *Team Contrs., LLC v. Waypoint NOLA, LLC*, 976 F.3d 509, 518 (5th Cir. 2020).

II. Jones's appeal waiver cannot be enforced to bar him from challenging a conviction that the district court lacked the authority to impose.

Jones did not waive his right to challenge his Section 924(c) conviction. But even if he did, the waiver is not enforceable. *Davis* held that Section 924(c)'s residual clause was unconstitutionally vague. In light of that holding, which applies retroactively, the district court that convicted and sentenced Jones *never* had the statutory authority to do so. And, as this Court has recognized, an appeal waiver does not bar a defendant's challenge to

a punishment that a court lacked the authority to impose in the first place. Thus, Jones's appeal waiver does not prohibit him from bringing his *Davis* claim on collateral review.

A. An appeal waiver that bars a defendant's challenge to an unlawful conviction and sentence is unenforceable.

This Court has refused to enforce an appeal waiver where a conviction or sentence lacked a basis in fact or law.

First, a defendant may appeal a conviction notwithstanding an unconditional appeal waiver if the facts underlying the guilty plea are insufficient to satisfy the statutory elements of the conviction. In *United States v. Spruill*, 292 F.3d 207 (5th Cir. 2002), the district court accepted the defendant's guilty plea despite finding that one element of the conviction had not been met: The court had not held "a hearing of which [the defendant] received actual notice," as required by the criminal statute of conviction, before issuing a court order making it unlawful for the defendant to carry a firearm while subject to a protective order. *Id.* at 209, 214-15. This Court held that, because the factual record before the court revealed the absence of one statutorily required element, the otherwise valid appeal waiver did not bar the defendant's challenge to his wrongly imposed conviction. *Id.* at 215. Enforcing the waiver in that circumstance, this Court reasoned, would "risk[] depriving a person of his liberty for conduct that does not violate the law." *Id.* (quoting *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001)).

Similarly, in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), this Court rejected the Government's contention that the defendant's appeal waiver blocked him from challenging his conviction when neither of the predicate offenses was a "crime of domestic violence" as required by statute. *Id.* at 379-80, 384. This Court analyzed the

general language of the plea agreement, as discussed above (at 9-10), but also emphasized that "as a matter of law, the indictment itself affirmatively reflects that the offense sought to be charged was not committed." *Id.* at 380. And *United States v. Baymon*, 312 F.3d 725 (5th Cir. 2002), held that even if the defendant unconditionally pleaded guilty or waived his appeal, "this Court has the power to review if the factual basis for the plea fails to establish an element of the offense which the defendant pled guilty to." *Id.* at 727 (citing *Spruill*, 292 F.3d at 214-15, and *White*, 258 F.3d at 380, 384); *see also United States v. Alvarado-Casas*, 715 F.3d 945, 951 (5th Cir. 2013) ("[The defendant] may challenge the factual basis underlying his guilty plea notwithstanding his conditional appeal waiver.").

Second, this Court has refused to enforce an appeal waiver when the defendant challenges a sentence that exceeds the statutory maximum. In *Leal*, as discussed earlier (at 10), this Court examined the defendant's appeal waiver in light of *White*'s "contract-interpretation and contract-formation concerns." *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019). This Court then stated that those concerns "apply with considerable force to the right to be free of a sentence exceeding the statutory maximum" and held that a defendant who signed an appeal waiver could nonetheless argue on appeal that the restitution he was ordered to pay exceeded the amount commensurate with the harm he proximately caused. *Id.* at 429, 431. Leal's appeal waiver did not bar him from challenging the amount of restitution because "[e]ven when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law." *Id.* at 430-31 (quoting *United States v. Gibson*, 356 F.3d 761, 766 (7th Cir. 2004)). Just this year, this Court reaffirmed that "an otherwise valid appeal waiver

is not enforceable to bar a defendant's challenge on appeal that his sentence … exceeds the statutory maximum, notwithstanding the lack of an express reservation to bring such a challenge." *United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021).

Under this precedent, Jones's appeal waiver is unenforceable because his conduct was not validly criminalized and his sentence exceeds the applicable statutory maximum. The conviction and resulting sentence are "not authorized by law." *Leal*, 933 F.3d at 431. Under the retroactively applied holding in *Davis*, Jones's conviction under Section 924(c)'s residual clause was never valid because the law was always unconstitutionally vague. *See* ROA.121, 146. Accordingly, under *Spruill*, *White*, and *Baymon*, Jones's Section 924(c) conviction is unsupportable, and enforcing the appeal waiver would deprive him "of his liberty for conduct that does not constitute an offense." *Spruill*, 292 F.3d at 215 (citing *White*, 258 F.3d at 380). And under *Leal* and *Kim*, Jones's sentence "exceeds the statutory maximum," *Kim*, 988 F.3d at 811; *Leal*, 933 F.3d at 431, because the maximum term of years the court could impose based on the invalid residual clause of Section 924(c) is zero.

B. A defendant must be able to challenge a punishment that has no legal basis.

The principle that a court may not enforce an appeal waiver to bar review of a conviction without any basis in law is consistent with the Supreme Court's insistence that a defendant be able to challenge a "punishment that the law cannot impose on him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). For example, in *Class v. United States*, 138 S. Ct. 798 (2018), the Court held that a guilty plea does not bar a defendant from challenging his statute of conviction as unconstitutional on direct appeal. *Id.* at 803.

The Court reasoned that such a challenge implicates "the Government's power to criminalize [his] (admitted) conduct" and "call[s] into question the Government's power to constitutionally prosecute him." *Id.* at 805 (quotation marks omitted); *see also Menna v. New York*, 423 U.S. 61, 62 n.2 (1975).

Class relied in part on *Blackledge v. Perry*, 417 U.S. 21 (1974), which held that a defendant who pleaded guilty could still challenge on collateral review the court's underlying power to convict or sentence him. *Id.* at 30-31. *Blackledge* emphasized that guilty pleas do not waive claims that implicate "the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. The Court recognized the same principle in *Menna*, holding that a defendant's guilty plea could not bar him from bringing a double-jeopardy challenge to the State's power to "hal[e] him into court." *Menna*, 423 U.S. at 62.

The Supreme Court's concern for a defendant's ability to "challenge the Government's power to criminalize" his conduct, *Class*, 138 U.S. at 805, further reinforces this Court's precedent discussed above (at 17-19), under which Jones's appeal waiver is unenforceable. The law cannot impose Jones's conviction and sentence under the now-void residual clause of Section 924(c), so an appeal waiver cannot shield that conviction from this Court's review.

III. The enforcement of Jones's waiver would result in a miscarriage of justice.

This Court has neither explicitly adopted nor rejected the miscarriage-of-justice exception to enforcing otherwise valid appeal waivers. *See United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020). Instead, it has left the question open, setting forth three considerations for determining whether to adopt the exception: (1) an explanation of

"the proper scope of that exception;" (2) citations to "cases purporting to" adopt the exception; and (3) an argument for "why and how it should apply" to the case under consideration. *Id.* This Court has suggested that if it were to adopt a miscarriage-of-justice exception, it would not apply to "relatively standard" claims, like challenges to a sentencing court's guidelines range calculation. *United States v. De Cay*, 359 F. App'x 514, 516 (5th Cir. 2010).

If this Court determines that Jones otherwise waived his *Davis* claim, it should adopt the exception and hold that enforcing his appeal waiver would be a miscarriage of justice.

A. Other courts of appeals have recognized that challenges to illegal sentences and convictions fall within the miscarriage-of-justice exception.

Several courts of appeals have already adopted the miscarriage-of-justice exception. *See United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016); *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (en banc); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). These courts recognize that the general rule of enforcing appeal waivers must be limited to some extent and "appellate courts must remain free to grant relief from them in egregious cases." *Teeter*, 257 F.3d at 25.

These courts all recognize the principle that "a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." *Andis*, 333 F.3d at 891-92. Convictions and sentences are illegal when, for example, a sentence exceeds the statutory maximum, *see id.* at 892; *Hahn*, 359 F.3d at 1327; when a district court, in

imposing a punishment, does not meet its "obligations to satisfy applicable constitutional requirements" or "utterly fails to advert to the factors in 18 U.S.C. § 3553(a)" during sentencing, *Guillen*, 561 F.3d at 530-31; when the conviction or sentence imposed is based on a constitutionally impermissible factor, such as race, *see Hahn*, 359 F.3d at 1327; *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); and when a defendant makes "[a] proper showing of actual innocence," *Adams*, 814 F.3d at 182 (quotation marks omitted). These courts acknowledge, then, that in some circumstances, enforcing an appeal waiver would lead to intolerably unjust results.

The Fourth Circuit has applied the miscarriage-of-justice exception in circumstances identical to this case. In *Sweeney v. United States*, 833 F. App'x 395 (4th Cir. 2021) (per curiam), the court refused to enforce the defendant's appeal waiver to bar his challenge to his Section 924(c) conviction. *Id.* at 397. The court observed that the defendant's Section 924(c) conviction could not stand because his predicate offense—conspiracy to commit Hobbs Act robbery—was not a crime of violence under the force clause, the only grounds to support the Section 924(c) offense after *Davis*. *Id.* at 396. And, because the defendant's Section "924(c) conviction [was] not supported by a valid predicate," he established "a proper showing of actual innocence" that justified the application of the miscarriage-of-justice exception. *Id.* at 397. The court vacated the defendant's Section 924(c) conviction. *Id.* This Court should reach the same conclusion and vacate Jones's sentence under the miscarriage-of-justice exception.

B. The miscarriage-of-justice exception demands vacatur of Jones's Section 924(c) conviction and sentence.

This Court need not define every contour of the miscarriage-of-justice exception. But it should join its sister circuits in recognizing that, at the very least, appeal waivers cannot bar defendants' challenges to illegal sentences or convictions. *See, e.g.*, *Andis*, 333 F.3d at 891-92.

That consensus rule applies here. As the Government recognizes, Jones's Section 924(c) conviction cannot stand after *Davis* because his predicate offense—conspiracy to commit Hobbs Act robbery—is not a crime of violence under the force clause of Section 924(c), and the residual clause can no longer sustain his conviction. ROA.121. Accordingly, Jones's indictment failed to charge a valid offense under Count 2, *see United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001), and he is actually innocent of the Section 924(c) charge in that Count, *see Sweeney*, 833 F. App'x at 397. Thus, enforcement of Jones's appeal waiver—the only thing preventing him from receiving the relief he seeks—would allow his incarceration to be extended under a law that is "no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

Jones's claim—that he is entitled to have his conviction under Count 2 vacated because it lacks a statutory foundation—is not a "relatively standard" claim against which this Court regularly enforces appeal waivers. *See De Cay*, 359 F. App'x at 516. Rather, *Davis* is a rarity: In invalidating the residual clause of Section 924(c), *Davis* held a federal statute that criminalized primary conduct to be unconstitutionally vague, thereby implicating the "constitutional pillars of due process and separation of powers." *Davis*, 139 S. Ct. at 2325. Leaving Jones's conviction in place and keeping him

imprisoned for conduct "the law does not make criminal," *Davis v. United States*, 417 U.S. 333, 346 (1974), would be a miscarriage of justice.

C. Declining enforcement of Jones's appeal waiver under the miscarriage-of-justice exception would be consistent with this Court's precedent.

1. This Court has questioned whether, "in a civilized system of justice," a defendant can waive the right not to be convicted for conduct that the law does not validly criminalize. *See White*, 258 F.3d at 380. The answer to this question is no, because to enforce such a waiver would result in a miscarriage of justice. Indeed, this Court routinely acknowledges that unyielding enforcement of appeal waivers is untenable. Examples abound. This Court declined to enforce a facially valid appeal waiver when:

- this Court could not determine, based on the record from the plea hearing, that a defendant "knowingly and voluntarily waived her rights to appeal," *United States v. Robinson*, 187 F.3d 516, 518 (5th Cir. 1999);
- a defendant alleged that his "plea agreement generally, and [his] waiver of appeal specifically, were tainted by ineffective assistance of counsel," *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995);
- a defendant alleged that his sentence exceeded the statutorily authorized punishment despite his failure to expressly reserve the right to bring the claim in his appeal waiver, *see, e.g.*, *United States v Leal*, 933 F.3d 426, 430-31 (5th Cir. 2019); and
- enforcement of a defendant's appeal waiver "risk[ed] depriving a person of his liberty for conduct that does not constitute an offense," *White*, 258 F.3d at 380.

And as explained above (at 13-14), under circumstances nearly identical to this case, this Court in *United States v. Picazo-Lucas*, 821 F. App'x 335 (5th Cir. 2020), applied *White* to conclude that the defendant's otherwise valid appeal waiver did not prevent him from challenging the invalidity of his Section 924(c) conviction where the predicate offense—there, hostage taking—was not a crime of violence under the statute's force clause. *Id.* at 337, 340.

Evident in each of these holdings is the concern that enforcing an appeal waiver could result in a miscarriage of justice. That risk is particularly pronounced here. It is well established that a miscarriage of justice results when a defendant is convicted and punished without any statutory basis. *See Davis*, 417 U.S. at 346. Equally well established is the principle that procedural impediments, like appeal waivers, should not stand in the way of a defendant demonstrating on the merits that his "conviction and punishment are for an act that the law does not make criminal," *id.* (law-of-the-case doctrine); *see Finley v. Johnson*, 243 F.3d 215, 220-21 (5th Cir. 2001) (procedural default); *Class v. United States*, 138 S. Ct. 798, 803 (2018) (guilty plea). To allow an appeal waiver to obstruct a defendant from showing that his "judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law," 28 U.S.C. § 2255(b), as Jones seeks to do here, would result in a miscarriage of justice.

2. District-court decisions in this Circuit have recognized that the miscarriage-of-justice exception demands relief for claims identical to Jones's. In *Thompson v. United States*, 2020 WL 1905817 (N.D. Tex. Apr. 17, 2020), the defendant, like Jones, was charged with "using, carrying, or brandishing a firearm during a crime of violence, namely, conspiracy to interfere with commerce by robbery." *Id.* at *2 (quotation marks

omitted). And like Jones, Thompson signed a "waiver of post-conviction relief in his plea agreement." *Id.* at *1. Drawing on this Court's holding in *White*, the court held that where the defendant's conviction under the residual clause of Section 924(c) was invalidated by *Davis* and his conviction could no longer be supported by a proper predicate, the appeal waiver did not bar the defendant's appeal because the indictment failed to charge a valid offense. *Id.* at *2-3 (citing *White*, 258 F.3d at 380). The district court concluded that depriving a defendant of the opportunity to challenge the unconstitutional conviction "'inherently results in a complete miscarriage of justice' and 'presents exceptional circumstances that justify collateral relief under § 2255.'" *Id.* at *2 (quoting *Davis*, 417 U.S. at 346-47); *see also Caldwell v. United States*, 2021 WL 462435, at *3 (N.D. Tex. Feb. 8, 2021) (holding unenforceable the defendant's appeal waiver under the miscarriage-of-justice exception because the defendant "was convicted under an indictment that did not charge a valid offense"); *Damarius Ornelas-Castro v. United States*, 2020 WL 7321059, at *3 (N.D. Tex. Dec. 11, 2020) (same); *Juan Jose Ornelas-Castro v. United States*, 2021 WL 1117172, at *3 (N.D. Tex. Mar. 23, 2021) (same).

In sum, Jones's case provides an opportunity for this Court, under the miscarriage-of-justice exception, to correct the injustice of Jones serving seven years of incarceration under an unconstitutional law that could never support a valid conviction. Denying Jones relief because he signed an appeal waiver would be a miscarriage of justice.

CONCLUSION

This Court should hold that Jones's motion is not barred by his appeal waiver and vacate his Section 924(c) conviction under Count 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 12, 2021 this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Garamond.

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