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

REPLY BRIEF FOR DEFENDANT-APPELLANT CEDRIC RAY JONES

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INTRODUCTION

Cedric Ray Jones is "actually innocent" of violating the unconstitutionally vague residual clause of Section 924(c). *United States v. Reece*, 938 F.3d 630, 634 n.3 (5th Cir. 2019). He "was convicted and sentenced for a crime he did not commit as a matter of law," *United States v. Picazo-Lucas*, 821 F. App'x 335, 342 (5th Cir. 2020) (per curiam), under a statute that is "no law at all," *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The Government nonetheless attempts to bar Jones from seeking relief from that conceded constitutional violation by invoking the appeal waiver in Jones's plea agreement. This Court's decisions foreclose the Government's arguments and require this Court to vindicate Jones's *Davis* challenge to his unconstitutional conviction and sentence.

ARGUMENT

I. This Court should review all of Jones's arguments de novo.

A. Jones had no meaningful opportunity to object to the magistrate judge's report and recommendations below, so plain error review does not apply.

The Government contends that plain error-review applies because Jones did not file written objections to the magistrate judge's recommendation. *See* Gov't Br. 10. Ordinarily, when a party does not file objections to a magistrate judge's recommendation, this Court reviews the district court's determination for plain error. *See, e.g.*, *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1424, 1428-29 (5th Cir. 1996).

But the Government is wrong that plain-error review applies here, where Jones did not have a meaningful opportunity to offer his objections because quarantine-lockdown prevented him from timely accessing the prison library. Jones promptly asked the court

for more time to object for that reason, and the court refused. In the criminal context, Rule 51(b), which describes the objection necessary to avoid plain-error review under Rule 52(b), notes that "[i]f a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party." Fed. R. Crim. P. 51(b). In the same vein, this Court has insisted that "[o]ur forfeiture caselaw … should be remoored to the opportunity to object," *United States v. Diggles*, 957 F.3d 551, 560 (5th Cir. 2019) (en banc), and refused to apply plain-error review where a defendant "had no opportunity to object" to "the condition of supervised release" imposed by the district court. *See United States v. Martinez*, 987 F.3d 432, 434 (5th Cir. 2021); *see also United States v. Vega*, 332 F.3d 849, 851 n.1 (5th Cir. 2003) (same); *United States v. Franklin*, 838 F.3d 564, 567-68 (5th Cir. 2016).

Although developed in the criminal context, this rule protects parties in civil cases who likewise did not have an opportunity to object to a magistrate judge's recommendations. As this Court explained in *Douglass*, it makes sense to harmonize forfeiture rules across the criminal and civil contexts; the uniform goal of the forfeiture doctrine is to promote efficiency, not to foreclose access to judicial relief. *See Douglass*, 79 F.3d at 1428. There is no legally significant distinction between the failure to object to a magistrate judge's report and recommendation and a failure to object to a sentencing condition imposed on a defendant. *Id.* In both, "[t]here is a failure to object, nothing more." *Id.* And in both, plain error does not apply where a party lacked a meaningful opportunity to object.

Following similar logic, other courts of appeal refuse to penalize prisoners like Jones who did not file objections to magistrate judges' recommendations when they had no

meaningful opportunity to do so. In *Ingram v. Clements*, 705 F. App'x 721 (10th Cir. 2017), a prisoner "timely notified the district court of his intention to object and requested additional time, citing pain and cognitive impairment, as well as difficulties conducting legal research and writing," and the district court denied his request. *Id.* at 724-25. The Tenth Circuit held that he made a "sufficient showing of [his] efforts to comply and his reasons for being unable to do so." *Id.* at 725. Similarly, in *Alspaugh v. McConnell*, 643 F.3d 162 (6th Cir. 2011), the Sixth Circuit excused a prisoner's untimely filing of objections where he "made every effort possible to respond in a timely manner." *Id.* at 166; *see also Broadus v. Corr. Corp. of Am., Inc.*, 167 F. App'x 13, 16 (10th Cir. 2006).

Here, Jones did everything in his power to timely object to the magistrate judge's recommendation, only to be thwarted by restrictive prison conditions and the magistrate judge's denial of his motion for an extension. He "attempted to comply with the rule requiring timely objection by promptly filing a motion for an extension of time in which to object after he received a copy of the magistrate judge's Report and Recommendation." *See Broadus*, 167 F. App'x at 16. In that motion, Jones explained that he received the recommendation on December 22, 2020, and "is not in agreement with the Magistrate's Report and plan[s] to object to it." D. Ct. Dkt. 28. He requested a 30-day extension because he was in "quarantine-lockdown" due to the COVID-19 pandemic and, therefore, did not have adequate access to the law library to draft his objections. *Id.* Jones's motion for an extension was summarily denied without explanation on January 25, 2021, cutting off the court's opportunity to consider Mr. Jones's objections. *See* D. Ct. Dkt. 29. Without that extension, Jones—confined in lockdown without adequate access to a law library—lacked a meaningful opportunity

to object to the magistrate judge's recommendation, and his arguments on appeal should be analyzed de novo. *See Martinez*, 987 F.3d at 434.[1]

In any event, the plain-error standard is satisfied. A district court plainly errs when (1) there was an error; (2) the error was clear or obvious; (3) the error affected the litigant's substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings such that this Court should exercise its discretion to reverse. *United States v. Oti*, 872 F.3d 678, 690 (5th Cir. 2017). As to the first two prongs, as discussed below (at 6-13), the district court clearly and obviously erred under this Court's existing precedent by holding that Jones's appeal waiver barred his *Davis* challenge. *See United States v. Picazo-Lucas*, 821 F. App'x 335, 341 n.7 (5th Cir. 2020) (per curiam). The Government concedes that the third prong of the test is satisfied. *See* Gov't Br. 23 n.7. And, as explained below (at 13-14), the district court's error seriously affects the fairness, integrity, and public reputation of judicial proceedings because it results in the imprisonment of an actually innocent man. *See United States v. Jackson*, 2021 WL 3185850, at *3 (5th Cir. July 28, 2021) (per curiam). Under either a de novo standard

[1] Counsel has been informed that, on or about August 16, 2021, Jones filed a notice of appeal from the magistrate judge's decision denying his motion seeking an extension of time to object to the magistrate judge's recommendation. The notice of appeal has not yet been docketed. For the reasons already explained, the district court's decision rejecting Jones's *Davis* challenge should be reviewed de novo. But to the extent that this Court believes that Jones's purported failure to object to the magistrate judge's recommendation demands plain-error review in this appeal, Jones will maintain that the court's refusal to extend the time to allow him to file objections was an abuse of discretion and that the district court's decision should be reversed to allow the district court to consider his objections on their merits.

or a plain-error standard, this Court should vindicate Jones's *Davis* challenge and vacate his conviction.

B. Jones's arguments are properly before this Court.

The Government also asserts that this Court should avoid the merits because some of Jones's contentions were (supposedly) not raised below. *See* Govt. Br. 12-13. Jones's arguments were properly preserved. "There is no bright-line rule for determining whether a matter was raised below." *United States v. Brown*, 561 F.3d 420, 435 n.12 (5th Cir. 2009) (quoting *Castillo v. Cameron Cnty*, 238 F.3d 339, 355 n.21 (5th Cir. 2001)) (alterations omitted). The purpose of requiring litigants to raise arguments before the district court is to ensure "that the district court has an opportunity to rule on [them]." *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1996). Even where a litigant "might have raised the issue more specifically," "the threshold level [of argumentation] to avoid forfeiture" requires only that the district court be put on notice of the litigant's arguments. *See id.* The requirement that a litigant raise an issue before the lower court "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Put otherwise, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

Jones's pro se filings below easily meet this threshold. At bottom, Jones makes one straightforward argument: that his appeal waiver does not bar a challenge to his unconstitutional conviction and sentence under Section 924(c). He vigorously pressed

that argument below. In his district-court filings, Jones invoked the language of the appellate waiver, disputed the Government's attempt to enforce the waiver to bar his challenge to his Section 924(c) conviction, and argued that denying relief would be a "manifest injustice." Dkt. 23 at 4-6. And, critically, the magistrate judge considered the applicability and enforceability of Jones's appeal waiver in considerable detail, *see* ROA.146-51, which the district court then reviewed and accepted in full, ROA.154-55. Nothing more is required for this Court to reach all of the arguments raised in Jones's opening brief.

II. Jones did not waive the right to challenge his conviction on collateral review.

A. The language of Jones's plea agreement shows that he did not waive his *Davis* claim.

Jones's appeal waiver states that "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. As our opening brief explains (at 8-11), this Court analyzed nearly identical broad and general appeal waiver language in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), and *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019). In *White*, the defendant's appeal waiver provided that he "waives any appeal, including collateral appeal" of "any error" concerning his conviction or sentence. *See* 258 F.3d at 380. And in *Leal*, the appeal waiver similarly "waive[d] [the defendant's] rights … to appeal his conviction, sentence, fine, order of restitution, and forfeiture order" and "any collateral proceeding" challenging the same. 933 F.3d at 428; *see also United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (per curiam) (plea

agreement "waived, without exception, [the defendant's] right to bring a collateral attack" on his sentence). This Court has repeatedly held that such language is insufficient to waive a defendant's right to be free from punishment that is not authorized by statute. *White*, 258 F.3d at 380; *Leal*, 933 F.3d at 431; *Hollins*, 97 F. App'x at 479.

The Government does not dispute that the broad and general appeal-waiver language present in *White* and *Leal* is functionally identical to the language in Jones's appeal waiver but contends that "the language [of the appeal waivers] was not determinative" in these cases. Gov't Br. 18. The opinions say otherwise. In *White*, this Court "conclude[d] that *the language* of White's conditional plea agreement … is insufficient to accomplish an intelligent waiver of the right not to be prosecuted (and imprisoned) for conduct that does not violate the law." 258 F.3d at 380 (emphasis added). Similarly, in *Leal*, this Court described *White* as considering "the essential nature of the substantive right on the one hand, and the *generic phrasing* of White's appeal waiver on the other." 933 F.3d at 431 (emphasis added). As in those cases, Jones's appeal waiver contains generic phrasing, which does not suffice to waive his right to be free from conviction and imprisonment for a charge under Section 924(c)'s residual clause—a charge of which, under this Court's precedent, Jones is actually innocent as a matter of law. *See United States v. Reece*, 938 F.3d 630, 634 n.3 (5th Cir. 2019).

Moreover, the Government concedes that, "[b]ased on this Court's caselaw, the collateral-review waiver here would not be enforceable if Jones's sentence exceeded the statutory maximum." Gov't Br. 19. But, according to the Government, this Court's cases do not apply because *Leal* and *Hollins* concerned "sentences that exceeded the

statutory maximum at the time the sentences were imposed" and *White* concerned "a conviction premised on an indictment that failed to state an offense at the time it was initiated." *Id.* at 18. The Government then asserts that, unlike in *Leal*, *Hollins*, and *White*, "[a]t the time of Jones's indictment and sentence, he was appropriately charged under then-existing law, and he was sentenced well within the statutory maximum of life imprisonment." *Id.*; *see also* Gov't Br. 20 ("Jones's sentence was within the statutory maximum at the time of its imposition.").

The Government is wrong because it ignores the significance of the retroactively applied holding in *Davis*, which leaves no relevant distinction between this case and this Court's existing precedents. *See United States v. Picazo-Lucas*, 821 F. App'x 335, 341 & n.7 (5th Cir. 2020) (per curiam). In *White*, the indictment "as a matter of law … itself affirmatively reflect[ed] that the offense sought to be charged was not committed." 258 F.3d at 380. In other words, White was actually innocent as a matter of law because he had been "prosecuted … for conduct that d[id] not violate the law." *Id.* So too here. As this Court explained in *Reece*, *Davis* applies retroactively, so a defendant charged under the residual clause of Section 924(c) is "*actually innocent* of those charges." 938 F.3d at 634-35 & n.3 (emphasis added); *see also Picazo-Lucas*, 821 F. App'x at 342 (describing the defendant prosecuted under the residual clause of Section 924(c) as "convicted and sentenced for a crime he did not commit as a matter of law"). Jones's indictment, conviction, and sentencing occurred under an unconstitutional law that was invalid the day it was enacted—a law that, according to the Supreme Court, "is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). And where a defendant is actually innocent

of charges brought under an unconstitutionally vague law, the valid statutory maximum at the time the sentences were imposed is *zero* years in prison.

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

Jones's appeal waiver also fails to encompass his *Davis* challenge because Jones did not knowingly and intelligently waive his right to bring the challenge. In *United States v. Wright*, 681 F. App'x 418 (5th Cir. 2017) (per curiam), this Court held that where "a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time." *Id.* at 420. And in *Picazo-Lucas*, 821 F. App'x 335, this Court applied that principle to circumstances nearly identical to this case, holding 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. *Id.* at 337-38. As in *Wright* and *Picazo-Lucas*, Jones could not have knowingly and intelligently waived his right to bring a *Davis* challenge to his conviction because, at the time of the plea agreement, *Davis* had not yet held Section 924(c)'s residual clause to be unconstitutionally vague.

The Government resists the conclusion compelled by *Wright* and *Picazo-Lucas* in several ways, none convincing. *First*, the Government insists that because Jones "was aware of the possibility for a change in the legal landscape of Section 924(c) before he was sentenced," his waiver was knowing and voluntary. Gov't Br. 16. That argument flies in the face of *Wright* (a case the Government simply ignores), which squarely held that "[w]here … a right is established by precedent that does not exist at the time of

purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time." *Wright*, 681 F. App'x at 420. Thus, a defendant like Jones *cannot* knowingly and intelligently waive a right that does not yet exist, even when the defendant is aware of the possibility of a future legal ruling in his favor.

Second, the Government contends that *Picazo-Lucas* is distinguishable, and its rule inapplicable, because there "it was unclear whether [the defendant's] conduct qualified under Section 924(c) because, even if the residual clause was invalid, there was a question of whether hostage-taking qualified under the still-valid elements clause." Gov't Br. 21-22. The Government fails to explain the persuasive force of that observation, given that the critical issue in both *Picazo-Lucas* and this case is whether the waiver bars an appeal over "conduct that does not violate the law." *Picazo-Lucas*, 821 F. App'x at 337. *Picazo-Lucas* applied *White*'s rule—that broad and generic language in a plea agreement is "insufficient to accomplish an intelligent waiver of the right not to be prosecuted (and imprisoned) for conduct that does not violate the law," *Picazo-Lucas*, 821 F. App'x at 338 (quoting *White*, 258 F.3d at 380)—and held that the trial court plainly erred by accepting the defendant's guilty plea and convicting and sentencing him "for a crime he did not commit as a matter of law," thereby increasing his sentence by five years, *id.* at 342. The Government thus offers no relevant distinction between *Picazo-Lucas* and this case.

Third, the Government seeks to apply the holding in *United States v. Barnes*, 953 F.3d 383 (5th Cir. 2020)—that a defendant "needn't have understood all the possible eventualities that could, in the future, have allowed him to challenge his conviction or sentence," *id.* at 388—to this case. *See* Gov't Br. 16-17. But, as our opening brief

explains, *Barnes* is inapposite here because it concerned only appeal waivers of sentence-enhancement challenges that do not implicate the statutory maximum, whereas Jones's Section 924(c) sentence does exceed the valid statutory maximum (zero years) for conduct that does not violate the law. Opening Br. 15; *see Barnes*, 953 F.3d at 389 n.10 ("Barnes didn't cite *Hollins* or make any argument—in either his district-court briefing or on appeal—that his sentence exceeded the applicable statutory maximum."). The Government offers no coherent response to that crucial distinction, even acknowledging that "the Court [in *Barnes*] did not address" the statutory maximum issue because "Barnes failed to argue that his collateral-review waiver should not be enforced because his sentence exceeded the statutory maximum." Gov't Br. 16 n.4.

Fourth, the Government suggests that Jones's argument that he did not knowingly and intelligently waive his *Davis* claim on collateral review is "procedurally defaulted because Jones did not raise it on direct appeal." Gov't Br. 15 n.3. That argument runs headlong into *Reece*, where this Court explained that the stringent test for procedurally defaulted claims does not apply in an "extraordinary case of actual innocence," and a defendant convicted under the residual clause of Section 924(c) is "actually innocent of those charges under *Davis*." 938 F.3d at 634 n.3 (quotation marks omitted).

In sum, it is "obvious and not subject to reasonable dispute" that, under *Wright* and *Picazo-Lucas*, a defendant cannot knowingly and intelligently waive a right that he does not yet know exists. *See Picazo-Lucas*, 821 F. App'x at 341 & n.7.

III. Jones's appeal waiver cannot be enforced to bar him from challenging his conviction.

Jones's waiver does not bar his *Davis* challenge for yet another reason: It is unenforceable. This Court will not enforce an appeal waiver to bar a challenge to a sentence that exceeds the statutory maximum, *United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019); *United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021), or a challenge to a conviction where the defendant's conduct does not actually match the crime charged, *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002); *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001). As already explained (at 7-9), a defendant like Jones, who is charged under the residual clause of Section 924(c), is actually innocent of that offense, and there is no statutorily authorized term of imprisonment for an actually innocent person. *See United States v. Davis*, 139 S. Ct. 2319, 2323 (2019); *United States v. Reece*, 938 F.3d 630, 634 & n.3 (5th Cir. 2019); *United States v. Picazo-Lucas*, 821 F. App'x 335, 342 (5th Cir. 2020) (per curiam).

The Government does not dispute that appeal waivers are unenforceable where a conviction lacks a basis in fact or law. Instead, it attempts to distinguish *Spruill* and *White* by pointing out that, in those cases, "the defendants' actual conduct never met the definition of the crime with which they were charged." Gov't Br. 21. In *Spruill*, the district court accepted the defendant's guilty plea despite finding that one element of the crime of conviction had not been met, *see* 292 F.3d at 215, and, in *White*, "the indictment itself affirmatively reflect[ed] that the offense sought to be charged was not committed," 258 F.3d at 380. Contrary to the Government's argument, there is no meaningful difference between the *Spruill* and *White* defendants and Jones here. Jones

was convicted and sentenced under a law that was invalid the day it was enacted, rendering him "actually innocent" of the offense on the day he was convicted, just like the defendants in *Spruill* and *White*. *See Reece*, 938 F.3d at 634 & n.3; *Picazo-Lucas*, 821 F. App'x at 342. Thus, it is "obvious and not subject to reasonable dispute" that his appeal waiver is unenforceable. *See Picazo-Lucas*, 821 F. App'x at 341 & n.7.

In a brief aside, the Government cites *United States v. Timothy Burns*, 770 F. App'x 187, 190 (5th Cir. 2019) (per curiam), for the proposition that "this Court has applied appellate-review waivers to bar review of unlawful and unconstitutional sentences." Gov't Br. 20. That may be true as a general proposition but, as discussed above (at 12), this Court will not enforce an appeal waiver to bar a defendant's challenge to a sentence above the statutory maximum, *see Leal*, 933 F.3d at 431; *Kim*, 988 F.3d at 811, or to a defendant's challenge to a conviction under a statute that did not validly criminalize his conduct, *Spruill*, 292 F.3d at 215; *White*, 258 F.3d at 380.

IV. The enforcement of Jones's waiver would result in a miscarriage of justice and, even if plain-error review applies, this Court should exercise its discretion to reverse.

Jones is actually innocent of the crime for which he was convicted and sentenced. As explained above (at 6-13), it is "obvious and not subject to reasonable dispute" that the district court erred by holding that Jones's appeal waiver barred him from bringing a *Davis* challenge. *United States v. Picazo-Lucas*, 821 F. App'x 335, 341 & n.7 (5th Cir. 2020) (per curiam). The Government concedes that "if the district court committed a clear or obvious error, Jones's substantial rights were violated." Gov't Br. 23 n.7. But the Government argues that this Court should not exercise its discretion to reach the

merits of Jones's challenge to his unconstitutional conviction and sentence because, under the Government's telling, "holding Jones to his end of [the] bargain works no miscarriage of justice and does not seriously affect the fairness, integrity, or public reputation of judicial proceedings." Gov't Br. 25.

The Government's tacit contention that keeping an innocent man in prison does not undermine judicial integrity is repugnant to "the basic notions of justice and fair play embodied in the Constitution." *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991). Unsurprisingly, this Court consistently exercises its discretion at prong four of the plain-error test to correct district-court convictions of actually innocent defendants because their "conviction[s] would impugn the fairness, integrity, or public reputation of the judicial system." *United States v. Jackson*, 2021 WL 3185850, at *3 (5th Cir. July 28, 2021); *see also United States v. Palmer*, 456 F.3d 484, 491-92 (5th Cir. 2006) ("[A] guilty plea based on facts precluding the conviction has the … effect" of "color[ing] the fundamental fairness of the entire [plea] proceeding."); *United States v. Suarez*, 879 F.3d 626, 637 (5th Cir. 2018) (holding prong four satisfied and vacating sentencing order where defendant showed that he received an additional five years of imprisonment "for which there was no conviction"). If plain-error review applies here, this Court should do the same. And, if de novo review applies, as our opening brief explained (at 20-26), this Court should join its sister circuits in adopting the miscarriage-of-justice exception to set aside Jones's appeal waiver.

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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August 24, 2021

*Counsel gratefully acknowledges the work of Chun Hin Tsoi, a student at Georgetown University Law Center who assisted researching and drafting of this brief.

CERTIFICATE OF SERVICE

I certify that on August 24, 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.

s/ Hannah Mullen
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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 4,204 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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