NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

TIMOTHY JAMARAS BURNS
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 17-60358

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by ruling that Mr. Burns § 2255 claims are barred by the Waiver of Appeal provision in his Plea Agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Timothy J. Burns on February 7, 2003. Mr. Burns was convicted of two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (counts 1 and 3), and one count of brandishing a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (count 2). The district Court's Judgment is attached hereto as Appendix 1. The district court case number for the criminal cause is 3:02cr86-WHB. The subject § 2255 case is based on the criminal conviction.

In 2015, after Mr. Burns' conviction and sentence, this Court ruled that the "residual clause" portion of the "violent felony" definition in the Armed Career Criminal Act (hereinafter "ACCA") is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). The holdings in *Johnson* affect Mr. Burns' sentence in this case and his conviction for brandishing a firearm during a crime of violence.

Mr. Burns filed the subject § 2255 Petition to Vacate on July 13, 2016. He filed the Petition *pro se*, but the undersigned filed supplemental briefing after the court appointed counsel to Mr. Burns in this § 2255 proceeding.

The district court assigned this civil § 2255 action case number 3:16cv445-WHB. Invoking the holdings in *Johnson*, Mr. Burns argued that he should be resentenced without application of the career offender provisions of the Sentencing

Guidelines. He also argued that under *Johnson*, the conviction and sentence for brandishing a firearm during a crime of violence should be vacated.

The district court denied Mr. Burns' Petition to Vacate on May 9, 2017. The final page of the Order states that a Certificate of Appealability is denied. The court filed a Final Judgment on the same day. The district Court's Order and its Final Judgment are attached hereto as composite Exhibit 2.

Mr. Burns appealed the case to the United States Court of Appeals for the Fifth Circuit on May 9, 2017. The Fifth Circuit case number is 17-60358. On June 29, 2017, Mr. Burns filed a Motion for COA in the Fifth Circuit. The court granted a COA on January 23, 2018. Specifically, the Fifth Circuit stated "a COA is GRANTED for his claims that U.S.S.G. § 4B1.2(a)(2) (2000) and 18 U.S.C. § 924(c)(3)(B) are unconstitutionally vague under *Johnson v. United States*, 135 S.Ct. 2551 (2015)."

On May 10, 2019, the Fifth Circuit entered an Opinion and a Judgment that affirmed the district court's rulings. The Fifth Circuit's Order and its Final Judgment are attached hereto as composite Exhibit 3. The Order was not designated for publication, but it appears in the Federal Appendix at 770 Fed. App'x 187. The rendition of the Opinion as it appears in the Federal Appendix is attached hereto as Appendix 4.

Rather than address the merits of the arguments in the § 2255 Petition, the Fifth Circuit found that it lacked jurisdiction to consider Mr. Burn's arguments because he waived the right to appeal pursuant to the Plea Agreement in the underlying criminal case. Dissatisfied with The Fifth Circuit's ruling, Mr. Burns filed the subject Petition for Writ of Certiorari.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on May 10, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be … deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V, Due Process Clause.

"No State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Equal Protection Clause.[1]

[1] "This Court repeatedly has held that the Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schweiker v. Wilson*, 450 U.S. 221, 227 n.6, 101 S. Ct. 1074, 1079 n.6 (1981) (citations omitted).

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Burns moved to vacate his conviction on one of three counts alleged against him and to remand the case for resentencing on two other counts. The underlying Judgment of Conviction that the § 2255 Petition is based on was filed in the United States District Court for the Southern District of Mississippi. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the conviction arose from the laws of the United States of America.

B. Statement of material facts.

At the plea hearing on November 18, 2002, Mr. Burns accepted responsibility for his actions by pleading guilty to three of the four charges asserted against him. The Plea Agreement executed by the parties had a Waiver of Appeal provision. The counts that he pled guilty to were:

- counts 1 and 3: two counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d); and
- count 2: one count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1).

The district court sentenced Mr. Burns on February 4, 2003. At sentencing, the district court deemed Mr. Burns a career offender under the provisions of

U.S.S.G. § 4B1.1. The career offender finding increased his adjusted offense level from 31 to 34 in regard to the two bank robbery convictions. It also increased his criminal history category from III to VI.

As to the two bank robbery convictions, Mr. Burns' total offense level was 34. At a criminal history category of VI and an offense level of 34, his Guidelines sentencing range was 262 to 327 months in prison. The court ordered him to serve 199 months in prison on each of these two counts, to run concurrently.

The two prior qualifying convictions that triggered the career offender enhancement under § 4B1.1 were:

- a Mississippi state court conviction for strong arm robbery; and
- a Mississippi state court conviction for armed robbery.

Post-*Johnson*, these two crimes are no longer "crimes of violence" under the Sentencing Guidelines, so Mr. Burns argued below that he no longer qualifies as a career offender under § 4B1.1.

Without the career offender enhancements, his offense level for the two bank robbery convictions would have been 31. His criminal history category would have been III. This combination yields a Guidelines sentencing range of 135 to 168 months in prison. See Guidelines Sentencing Table.

As to the brandishing a firearm during a crime of violence conviction, Mr. Burns' sentence was set by statute at seven years in prison, which equates to 84

months. The applicable statute required this sentence to be served consecutive to the sentence ordered for the bank robbery convictions. So the final prison sentence ordered by the court was 199 months for the two bank robbery convictions plus an additional 84 months for the brandishing conviction, for a total sentence of 283 months in prison. The court entered a Judgment reflecting that sentence on February 7, 2003.

After the district court filed the Final Judgment in Mr. Burns' case, this Court established new sentencing law in *Johnson*, in which the Court ruled that the ACCA's residual clause is unconstitutionally vague. Mr. Burns filed the subject Petition to Vacate based on the newly established law set forth in *Johnson*.

Through the Petition, Mr. Burns presented two arguments to the district court and the Fifth Circuit. The first issue was whether *Johnson* required him to be resentenced on the bank robbery convictions without application of the career offender provisions of the Sentencing Guidelines. The second issue was whether *Johnson* required the Court to vacate his conviction and sentence for brandishing a firearm during a crime of violence.

In regard to the issue focusing on the career offender provisions of the Sentencing Guidelines, in *Beckles v. United States*, 137 S.Ct. 886 (2017), this Court held that *Johnson* does not apply to the *advisory* Guidelines. However, the district court sentenced Mr. Burns before this Court handed down the rulings in

United States v. Booker, 543 U.S. 220 (2005). Prior to *Booker*, district courts were *required* to apply the Guidelines. Since Mr. Burns was sentenced when the Guidelines were mandatory, the holdings in *Beckles* do not bar his claim.

Because Mr. Burns' Sentencing Guidelines argument is not barred by *Beckles*, he analyzed the prior convictions on which district court based its career offender determination at sentencing. The convictions were for robbery under Mississippi law. Post-*Johnson*, robbery under Mississippi law is no longer a crime of violence. So Mr. Burns argued that he is entitled to resentencing on the bank robbery convictions, without application of the career offender provisions of the Guidelines.

The second issue presented to the district court and the Fifth Circuit focused on Mr. Burns' conviction and sentence for brandishing a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). He argued that *Johnson* applies to § 924(c). He continued by arguing that under *Johnson*, his conviction and sentence for brandishing a firearm during a crime of violence should be vacated. This is true because the bank robbery convictions on which the brandishing conviction is based are no longer crimes of violence post-*Johnson*.

Rather than address the merits of Mr. Burns' arguments, the Fifth Circuit affirmed the district court's rulings because the Plea Agreement executed by the parties had a Waiver of Appeal provision. Because the Fifth Circuit never reached

the merits of his § 2255 Petition, the issue in this Petition for Writ of Certiorari is limited to whether the Fifth Circuit erred by ruling that Waiver of Appeal provision bars his *Johnson*-related arguments.

V. ARGUMENT

A. Introduction.

As described in detail in the previous subsection of this Petition, the Fifth Circuit never reached the merits of Mr. Burns' § 2255 claims because it ruled that the they are barred from consideration by the Waiver of Appeal provision in the Plea Agreement. The waiver of appeal provision stated that "Burns 'expressly waive[d] the right to appeal the conviction and sentence imposed … or the manner in which the sentence was imposed in any post-conviction proceeding … including … a motion brought under' 28 U.S.C. § 2255" Fifth Circuit Opinion, p. 2. Because the Fifth Circuit never addressed the merits of Mr. Burns' arguments, the only issue presented in this Petition is whether the Fifth Circuit erred in its analyses and conclusions regarding the waiver of appeal issue.

B. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." One "compelling reason" to grant certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" S.Ct. R. 10(a). Rule 10(a) is met in this case.

In Mr. Burns' case, the Fifth Circuit made two separate but related rulings. First, it ruled that a waiver of appeal provision bars an appeal even if the sentence is illegal or unconstitutional. Fifth Circuit Opinion, p. 4. Second, it ruled that a waiver of appeal provision is enforceable even if the law that an appellant relies on arose after he or she entered into a plea agreement containing a waiver of appeal provision.[2] *Id.* at p. 5. Specifically, the Fifth Circuit held, "[w]e decline to reach the merits of Burns' motion because we find he has waived his right to bring it." *Id.* at p. 3.

The Ninth Circuit takes a contrary position. In *United States v. Torres*, 828 F.3d 1113, 1116 & 1124 (9th Cir. 2016), the court found that the waiver of appeal provision was unenforceable because a defendant cannot waive the right to appeal an illegal or unconstitutional sentence.

As presented in the following subsection of this Petition, this Court should grant certiorari and rule that the Waiver of Appeal provision in Mr. Burns' Plea agreement did not bar his argument that his sentence was illegal and unconstitutional under *Johnson*. Granting certiorari will provide consistency among the circuits on this important issue. *See* S.Ct. R. 10(a).

[2] As presented below, Fifth Circuit law is inconsistent on this issue.

C. Relevant law.

Before delving into the Ninth Circuit's decision in *Torres*, we consider the inconsistency among Fifth Circuit decisions on the subject waiver of appeal issue. Even though the Fifth Circuit rejected Mr. Burns' arguments, that court's holdings in *Smith v. Blackburn*, 632 F.2d 1194 (5th Cir. 1980) support Mr. Burns' argument that the waiver of post-conviction relief provision is legally unenforceable under the facts of his case. In *Blackburn*, a Louisiana state court convicted the defendant of receiving stolen property. *Blackburn*, 632 F.2d at 1195. He was tried and convicted by a five-person jury. *Id.* It is important to note that to be tried by a five-person jury, Blackburn had to waive his right to a six-person jury. *Id.* The court sentenced him to 20 years in prison as a habitual offender. *Id.* The conviction was returned on May 5, 1975. *Id.*

Three years later in 1978, this Court decided *Ballew v. Georgia*, 435 U.S. 223 (1978). The *Ballew* Court held that a conviction returned by a five-person jury is unconstitutional under the Sixth Amendment. *Blackburn*, 632 F.2d at 1195 (citing *Ballew*). Blackburn filed a petition for habeas corpus relief in federal court, in which he invoked the holdings in *Ballew*. *Blackburn*, 632 F.2d at 1195. In response to Blackburn's petition, the government argued, "federal habeas corpus relief is barred because petitioner elected to be tried by a five-member jury rather than a six-member jury after being informed of his right to so choose." *Id.*

The Fifth Circuit disagreed with the government's waiver argument. The court held "[w]e find no waiver in this case." *Blackburn*, 632 F.2d at 1195. "A waiver is 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Fifth Circuit went on to hold, '[d]espite the respondent's insistence that petitioner should have been able to anticipate the Supreme Court's holding in *Ballew* three years down the road, petitioner clearly did not waive a 'known right or privilege.'" *Blackburn*, 632 F.2d at 1195.

Just as in *Blackburn*, Mr. Burns could not anticipate that *Johnson* could affect his sentence because *Johnson* was decided by the Supreme Court over 12 years after he was sentenced in February of 2003. Consistent with the holdings of the Fifth Circuit's holdings in *Blackburn*, Mr. Burns could not have waived a right that did not exist when the waiver was executed.

Another Fifth Circuit case supporting Mr. Burns' argument is *United States v. Wright*, 681 Fed. App'x 418 (5th Cir. 2017). Wright pled guilty to felon in possession of a firearm. *Wright*, 681 Fed. App'x at 419. The plea was "[u]nder a plea agreement in which he waived his right to appeal[.]" *Id.* At sentencing, the district court increased the offense level under the Sentencing Guidelines because "Wright's Texas conviction for 'delivery' of a controlled substance was a 'controlled substance offense' within the meaning of U.S.S.G. § 4B1.2." *Id.*

After the Fifth Circuit affirmed Wright's conviction and sentence but before he filed a petition for writ of certiorari, this Court handed down its decision in *Mathis v. United States*, 136 S.Ct. 2243 (2016). *Wright*, 681 Fed. App'x at 419. The *Mathis* Court held that when "determining whether an offense qualifies as an Armed Career Criminal Act predicate, a sentencing court may subdivide a defendant's prior statute of conviction, and thus apply the modified categorical approach, only if that statute contains multiple 'elements' constituting separate crimes—not simply multiple 'means' of committing the same offense." *Id.* at 419 (citing *Mathis*, 136 S.Ct. at 2251-56).

In his appeal before this Court, Wright invoked *Mathis* by arguing that the district court erred by "applying the modified categorical approach in classifying his prior drug offense as a 'controlled substance offense' because the statute under which he was convicted does not set forth alternative elements for committing the statutory offense of conviction and thus is not divisible into separate offenses." *Wright*, 681 Fed. App'x at 419. This Court sided with Wright, and remanded the case to the Fifth Circuit for further consideration of the issue in light of *Mathis*. *Id.* at 420.

On remand, the first issue considered by the Fifth Circuit was "whether the appellate-rights waiver in Wright's plea agreement is enforceable as to his *Mathis*-based claim." *Wright*, 681 Fed. App'x at 420. Wright argued that the waiver was

unenforceable because "a defendant can only waive 'known' rights and he could not have intentionally relinquished a claim based on *Mathis*" because *Mathis* was "decided after he was sentenced." *Id.*

Agreeing with Wright, the Fifth Circuit held: "Wright has not waived his *Mathis*-based argument" because "[w]aiver occurs when a party intentionally abandons a right that is known."[3] *Wright*, 681 Fed. App'x at 420 (citations omitted). "Where, as 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." *Id.* (citations omitted).

Just as in *Wright*, Mr. Burns' waiver of post-conviction relief should not be enforced because he could not waive an unknown right. That is, his rights under *Johnson* could not be waived because that decision was not handed down until about 12 years after Mr. Burns was sentenced.

Having chronicled the Fifth Circuit's inconsistency on the subject issue, we move to the Ninth Circuit's holdings in *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016). In *Torres*, the Ninth Circuit analyzed the exact same issue that is before this Court. Pursuant to a plea of guilty, Torres was convicted of felon in

[3] As a separate basis for finding that the appeal waiver should not be enforced, the court noted that "the Government has waived the right to assert waiver by failing to object to Wright's appeal based on the waiver clause in his plea agreement." *Wright*, 681 Fed. App'x at 420. This alternative holding, however, does nothing to diminish the effect of the independent ruling that a party cannot knowingly waive an unknown right.

possession of a firearm. *Id.* at 1116. He entered a plea agreement in which he waived the right to appeal all issues other than denial of a motion to suppress evidence. *Id.* He appealed both his sentence and denial of the motion to suppress to the Ninth Circuit. *Id.*

The *Torres* court upheld the district court's denial of the motion to suppress. *Torres*, 828 F.3d at 1116. As to the sentencing issue, the court found that the waiver of appeal provision was unenforceable because a defendant cannot waive the right to appeal an illegal or unconstitutional sentence. *Id.* at 1116, 1124. In regard to the sentencing issue on appeal, Torres challenged

> his sentence on the grounds that the district court incorrectly enhanced his offense level under section 2K2.1 of the U.S. Sentencing Guidelines, in light of the Supreme Court's June 2015 decision in *Johnson v. United States*, 135 S.Ct. at 2557–60. *Johnson* held that the ACCA's catch-all "residual clause," *see* 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague because it failed to specify the crimes that fell within its scope sufficiently clearly to satisfy the dictates of due process. *Johnson*, 135 S.Ct. at 2557–58, 2563. Torres argues that section 2K2.1(a)(2)'s identically worded residual clause is likewise unconstitutional.

Torres, 828 F.3d at 1123.

Before addressing the merits of the sentencing issue, the court had to decide whether the argument was barred by the waiver of appeal provision in the plea agreement. *Torres*, 828 F.3d at 1124. The waiver of appeal provision stated that Torres

> knowingly and expressly waive[d]: (a) the right to appeal any sentence imposed within or below the applicable guidelines range as determined by

> the Court, with the exception of preserving the right to appeal a determination that the [he] qualifies as an Armed Career Criminal; (b) the right to appeal the manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to appeal any other aspect of the conviction or sentence.

Id. (internal footnotes omitted).

The government sought dismissal of the sentencing issue based on the waiver of appeal provision. The court held that standard contract principles applied to interpretation of an appeal waiver, and that it would "enforce an appeal waiver contained in a plea agreement if 'the language of the waiver encompasses [the defendant's] right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made.'" *Torres*, 828 F.3d at 1124. The court went on to hold:

> The analogy between plea agreements and private contracts is imperfect, however, because the Constitution imposes a floor below which a defendant's plea, conviction, and sentencing may not fall. For example, an appeal waiver does not deprive a defendant of a constitutional ineffective assistance of counsel claim. A waiver of appellate rights will also not apply if a defendant's sentence is "*illegal*," which includes a sentence that "*violates the Constitution*."

Id. (emphasis added; internal and end citations omitted).

The government in *Torres* conceded that *Johnson* applies to the Sentencing Guidelines.[4] *Torres*, 828 F.3d at 1125. The court held, "[w]e therefore accept the

[4] Mr. Burns recognizes that in *Beckles v. United States*, 137 S.Ct. 886 (2017), this Court ruled that *Johnson* is inapplicable to the Sentencing Guidelines. *Beckles* does not affect Mr. Burns' case because he was sentenced under the armed career criminal provisions of the Armed Career

Government's concession that the district court sentenced Torres pursuant to a provision in the Guidelines that is unconstitutionally vague. This renders Torres's sentence "illegal," and therefore the waiver in his plea agreement does not bar this appeal." *Id.* (citation omitted).[5] The Ninth Circuit then remanded the case to district court for resentencing in light of the holdings in *Johnson*. *Id.*

It is hard to imagine a case with more comparable legal issues than Mr. Burns' case and *Torres*. Both involve waiver issues that relate to filing § 2255 petitions pursuant to the holdings in *Johnson*. As in *Torres*, this Court should find that the waiver of post-conviction relief provision in Mr. Burns' plea agreement is unenforceable because he cannot waive the right to challenge an illegal and/or unconstitutional sentence.

In the context of abandonment of an unknown right through a waiver, we must consider how the Fifth Circuit construes plea agreements. In *United States v. Escobedo*, 757 F.3d 229, 233 (5th Cir. 2014),[6] the Fifth Circuit held:

> We construe a plea "agreement like a contract, seeking to determine the defendant's '*reasonable understanding*' of the agreement and construing ambiguity against the Government." *United States v. Farias*, 469 F.3d 393, 397 (5th Cir.2006); *accord United States v. Elashyi*, 554 F.3d 480, 501 (5th

Criminal Act. So the analysis in *Torres* in regard to enforcing the waiver provision continues to apply in Mr. Burns' case because his sentence is "illegal" under *Johnson*.

[5] The Eighth Circuit also holds that appeal rights cannot be waived in regard to attacking a sentence that is "constitutionally invalid[.]" *United States v. Andis*, 333 F.3d 886, 942 (8th Cir. 2003).

[6] In *Escobedo*, the Fifth Circuit found that the government's interpretation of the appeal waiver provision of the plea agreement did not comport with Escobedo's reasonable interpretation of the agreement. 757 F.3d at 234.

> Cir.2008) ("[A] plea agreement is construed strictly against the Government as the drafter."); *United States v. Azure*, 571 F.3d 769, 772 (8th Cir.2009) ("The government bears the burden of establishing that the plea agreement clearly and unambiguously waives the defendant's right[s][.]").

(Emphasis added).

An important aspect of this holding is that construction of a plea agreement must be based on the defendant's "reasonable understanding" of the agreement. The undeniable inference is that the "reasonable understanding" must be judged at the time the defendant executes the plea agreement.

Under *Escobedo*, this Court should find that Mr. Burns did not waive his right to pursue the *Johnson*-related argument in his § 2255 Motion. How could he have "reasonably understood" that he was waiving a right that he did not know existed? The answer to this question is simple – he could not have. This requires a finding that the waiver of post-conviction relief provision is unenforceable in this case.

Such a finding will be consistent with at least three other *Johnson*-related cases in the Southern District of Mississippi. In all three cases, the petitioner-defendant executed plea agreements containing waiver of post-conviction relief provisions. In all three cases, the prosecution filed motions to dismiss based on the waiver provisions. Notwithstanding the motions to dismiss, the Court considered the *Johnson*-related petitions on the merits, rather than dismissing the cases pursuant to the waiver of post-conviction relief provisions. The cases are:

- *United States v. Nagascus Terrell Culpepper*, case no. 3:12cr118-CRW-FKB, the Motion to Dismiss is at docket entry number 420 and the district court's order is at docket entry number 423;
- *United States v. Christopher Lamont Tarrio*, case no. 3:08cr1-TSL-LRA, the Motion to Dismiss is at docket entry number 38 and the district court's order is at docket entry number 40; and
- *United States v. Curtis Craven*, case no. 2:08cr5-KS-MTP, the Motion to Dismiss is at docket entry number 38 and the district court's order is at docket entry number 40.

We also note that many circuit courts have adopted a "miscarriage of justice" exception to enforcement of appeal waiver provisions. *United States v. Powell*, 574 Fed. App'x 390, 394 (5th Cir. 2014). The Fifth Circuit has neither accepted nor rejected the miscarriage of justice exception to enforcing appeal waivers or post-conviction relief provisions.[7] *Id.* at 394.

Mr. Burns' fact pattern gives this Court a prime opportunity to address miscarriage of justice in the context of appeal waivers and post-conviction relief waivers. Many defendants have received sentence reductions under the retroactively applicable holdings in *Johnson*. To deny Mr. Burns and other

[7] The Fifth Circuit decided *Powell* in 2014. The undersigned searched for Fifth Circuit cases decided after 2014 addressing the miscarriage of justice issue. No published decisions addressing the issue were uncovered. In one unpublished and nonbinding case, *United States v. Fairley*, 735 Fed. App'x 153 (5th Cir. 2018), a panel of the Fifth Circuit held "[w]e decline to adopt the miscarriage of justice exception to appellate waivers." *Id.* at 154. It is important to note, however, that *Fairley* did not involve whether a defendant can waive a right that is unknown at the time the waiver is executed. *See id.* at 1153-54.

defendants that executed waivers of post-conviction relief would be patently unjust and unfair. Adopting a miscarriage of justice rule of law in this context will cure that unjust result.

Finally, we direct the Court's attention to Judge Parker's concurring opinion in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992). *Melancon* involved whether provisions barring the appeal of sentences are unenforceable in general. *Id.* at 567. In Mr. Burns' case, the defense is not arguing that waiver of the right to attack a sentence on direct appeal or via post-conviction relief is unenforceable in all circumstances. He specifically argues that they are unenforceable as to rights that are unknown at the time the waiver is executed. Nevertheless, Judge Parker's concurring opinion provides a good explanation of constitutional concerns surrounding waiver of appeal rights and waiver of post-conviction relief rights.

On the prosecution's motion to dismiss the appeal, the *Melancon* Court held "that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *Id.* at 568. Accordingly, the Fifth Circuit granted the prosecution's motion to dismiss Melancon's appeal. *Id.*

Judge Parker authored a lengthy and well-reasoned concurring opinion in *Melancon*. 972 F.2d at 570-80. He began by stating, "I concur specially because I cannot dissent. This panel is bound by the unpublished, *per curiam* opinion, *United States v. Sierra*, No. 91-4342 (5th Cir. Dec. 6, 1991) [951 F.2d 345 (Table)]." *Id.*

at 570. He went on to state "I write separately to express why I think the rule embraced by this Circuit in *Sierra* is illogical and mischievous – and to urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.*

Judge Parker reasoned that "[t]he rule articulated in *Sierra* is clearly unacceptable, even unconstitutional policy: the '*Sierra* rule' manipulates the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *Melancon*, 972 F.2d at 571. "I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent." *Id.*

Judge Parker acknowledged that waivers can be valid in a number of scenarios in criminal cases. However,

> [i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (citations omitted). But "[t]he situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the

Guidelines or an otherwise illegal sentence." *Id.* at 572. "This right cannot come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors the district court has made – i.e., what errors exist to be appealed, or waived." *Id.* (citation omitted).

Judge Parker's attack on the majority's opinion addresses constitutional concerns. He opines that the rule adopted by the majority "reflects the imposition of an unconstitutional condition upon a defendant's decision to plead guilty." *Melancon*, 972 F.2d at 577.

> Unconstitutional conditions occur "when the government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from governmental interference. The 'exchange' thus has two components: the conditioned government benefit on the one hand and the affected constitutional right on the other."

Id. (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv.L.R. 1415, 1421-1422 (1989) (emphasis in original)). "With a '*Sierra* Waiver,' the government grants to the criminal defendant the ***benefit*** of a plea agreement only on the ***condition*** that the defendant accept the boot-strapped abdication of his or her right to appeal." *Melancon*, 972 F.2d at 578 (emphasis in original). "This is at least unacceptable, even if the government may withhold the benefit (i.e., the plea agreement) altogether." *Id.* (citation omitted).

Judge Parker recognized that in order to create the constitutional issue described in the previous paragraph of this Brief, there must be a constitutional

right. "The right to appeal is a statutory right, not a constitutional right." *Melancon*, 972 F.2d at 577 (citation omitted). However,

> [e]ven if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.

Id. (citing *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that government has a due process duty not to limit the opportunity of a statutorily created direct appeal in a criminal case)). In other words, once the statutory right to appeal is established, due process and equal protection bar the government from infringing on the right in an improper manner.

Judge Parker's concurring opinion in *Melancon*'s provides further justification for Mr. Burns' argument. Based on the holdings presented and analyzed above in *Blackburn*, *Wright*, *Torres*, *Escobedo* and *Melancon*, this Court should grant certiorari to address whether Mr. Burns § 2255 arguments are waived by the Waiver of Appeal Provision in his Plea Agreement.

VI. CONCLUSION

Based on the arguments presented above, Mr. Burns asks the Court to grant his Petition for Writ of Certiorari in this case.

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