

APPENDIX 1

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Jackson Division

UNITED STATES OF AMERICA

V.

TIMOTHY JAMARAS BURNS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:02cr86BN-001

Defendant's Attorney: Thomas Powell
P. O. Box 621
Ridgeland, MS 39158

THE DEFENDANT:

pleaded guilty to Count(s) one, two and three

pleaded nolo contendere to Count(s) _____ which was accepted by the Court.

was found guilty on Count(s) _____ after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s)

SOUTHERN DISTRICT OF MISSISSIPPI
FILED

FEB - 7 2003

BY J.T. NOBLIN, CLERK DEPUTY

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2113(a)&(d)	Armed Bank Robbery	8/28/00	1
18 U.S.C. § 924(c)(1)	Brandishing a Firearm During Crime of Violence	8/28/00	2
18 U.S.C. § 2113(a)&(d)	Armed Bank Robbery	1/17/01	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on Count(s) _____

Count(s) 4 is are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 427-33-8628

Defendant's Date of Birth: March 30, 1978

Defendant's USM No.: 06750-043

Defendant's Residence Address:

223 Forrest Avenue

Jackson, MS 39206

COPY, I HEREBY CERTIFY.

J.T. NOBLIN, CLERK

DEPUTY CLERK

Defendant's Mailing Address:

Same as above

CJB # 37 pp - 38 - 43

February 3, 2003

Date of Imposition of Judgment

Signature of Judicial Officer

William H. Barbour, Jr., U.S. District Court Judge

Name and Title of Judicial Officer

2/7/03

Date

11

DEFENDANT: BURNS, Timothy Jamaras
CASE NUMBER: 3:02cr86BN-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred ninety-nine (199) months for Counts 1 and 3, to run concurrently and eighty-four (84) months as to Count 2 to run consecutive to Counts 1 and 3. The cost of incarceration is waived.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated as close to Austin, Texas as his security classification will allow.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

by _____ a.m. p.m. on _____
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BURNS, Timothy Jamaras
CASE NUMBER: 3:02cr86BN-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years as to Counts 1 and 3 and three (3) years for Count 2, all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

- The above drug testing condition is suspended, based on the Court's determination that the defendant poses a low risk of future substance abuse.
- The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: BURNS, Timothy Jamaras
CASE NUMBER: 3:02cr86BN-001

SPECIAL CONDITIONS OF SUPERVISION

- a. The defendant is to provide any financial information, business or personal, to the U.S. Probation Officer upon request and is prohibited from incurring new charges or opening additional lines of credit without the approval of the U.S. Probation Officer.
- b. The defendant shall submit to random urinalysis testing and complete any substance abuse treatment program deemed necessary by the supervising U.S. Probation Officer.

DEFENDANT: BURNS, Timothy Jamaras
CASE NUMBER: 3:02cr86BN-001**CRIMINAL MONETARY PENALTIES**

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$ 4,663.00

The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

<u>Name of Payee</u>	<u>*Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
Members Exchange Credit Union Attn: Mitz Tate, CSO, President P. O. Box 31049 Jackson, MS 39286		\$4,663.00	100%

TOTALS \$ _____ \$ 4,663.00

If applicable, restitution amount ordered pursuant to plea agreement _____

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The Court determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for fine and/or restitution.

the interest requirement for the fine and/or restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: BURNS, Timothy Jamaras
CASE NUMBER: 3:02cr86BN-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, or E below; or

B Payment to begin immediately (may be combined with C, D, or E below); or

C Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of not less than \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal (e.g., equal, weekly, monthly, quarterly) installments of not less than \$ 100.00 over a period of 50 months (e.g., months or years), to commence 60 days (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

vs.

CRIMINAL NO. 3:02-cr-86-WHB-ALL
CIVIL ACTION NO. 3:16-cv-445-WHB-ALL

TIMOTHY JAMARAS BURNS

OPINION AND ORDER

This cause is before the Court on Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody ("Motion to Vacate").¹ Having considered the pleadings, the record in the underlying criminal case, as well as supporting and opposing authorities, the Court finds the Motion is not well taken and should be denied.

I. Factual Background and Procedural History

Timothy Jamaras Burns ("Burns") pleaded guilty to two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d), and one count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). Prior to sentencing, a Presentence Investigation Report ("PSI") was prepared to determine the applicable sentencing range under the United States Sentencing Guidelines ("U.S.S.G."). As to the armed robbery counts, i.e.

¹ The Fifth Circuit authorized the filing of this successive Motion to Vacate. See In re Anderson Alexander, No. 15-60352, slip Op. (5th Cir. Aug. 30, 2016).

Counts 1 and 3, Burns's initial Combined Adjusted Offense Level was calculated to be 31. Burns, however, was deemed to be an armed career criminal that required that his sentence be calculated from an Adjusted Offense Level of 34 pursuant to U.S.S.G. § 4B1.1. The prior felony convictions used to support the armed career criminal designation included a state court conviction for strong armed robbery, and a state court conviction for armed robbery. The Adjusted Offense Level, which, when considered in conjunction with his Criminal History Level of VI, resulted in a Sentencing Guideline Range of 262 to 327 months as to Counts 1 and 3. With respect to the brandishing a firearm count, i.e. Count 2, Burns was subject to a mandatory 7-year term of imprisonment pursuant to 18 U.S.C. § 924(c)(1)(A)(ii). In February of 2003, Burns was sentenced to concurrent 199-month terms of imprisonment on Counts 1 and 3, and a consecutive 84-month term of imprisonment on Count 2.

Relying on Johnson v. United States, 576 U.S. ---, 135 S.Ct. 2552 (2015), Burns filed the subject Motion to Vacate. In his Motion, Burns argues that his Section 924(c) conviction for brandishing a firearm during a crime of violence must be vacated because the crime used as the basis for that conviction, i.e. bank robbery, can no longer be considered a crime of violence. Burns also argues that his state court convictions for armed robbery and strong arm robbery should not have been considered for the purpose of applying the enhancements under U.S.S.G. § 4B1.1 when his

sentence was calculated. The Court considers Burns's Motion to Vacate.

II. Discussion

In Johnson v. United States, 576 U.S. ---, 135 S.Ct. 2552 (2015), the United States Supreme Court considered a due process challenge to the Armed Career Criminal Act ("ACCA"), codified at 18 U.S.C. § 924(e). This statute provides, in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years ...

(2) As used in this subsection -

...

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that -

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

18 U.S.C. § 924(e). The specific issue raised to the Court was whether the residual clause in Section 924(e)(2)(B)(ii), which reads "or otherwise involves conduct that presents a serious

potential risk of physical injury to another" was unconstitutionally vague. In deciding the issue, the Johnson Court held that an "increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." Johnson, 133 S. Ct. at 2563. The Court also held that its decision did not "call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Id.

In his Motion to Vacate, Burns first challenges his conviction for brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). Specifically, Burns argues that the bank robbery during which he brandished a firearm can no longer be considered a "crime of violence" following Johnson and, therefore, his conviction under Section 924(c) must be vacated. The Court finds this argument fails for at least two reasons. First, as conceded by Burns², the United States Court of Appeals for the Fifth Circuit has held that Section 924(c) is not "unconstitutionally vague under Johnson". United States v. Jones, --- F.3d ---, 2017 WL 1406491, at *3 (5th Cir. Apr. 20, 2017). Second, the Fifth Circuit has found that a violation of the bank

² In his pleadings, "[i]n candor", Burns "notes that his argument is contrary to Fifth Circuit law", and that the Fifth Circuit has previously "found that the 'by force and violence, or by intimidation' language of § 2119(a) qualifies bank robbery as a crime of violence under § 924(c)(3)(A)." See Supp. Mem. [Docket No. 29], 12 and 17. Burns indicates that the purpose of raising this argument is to preserve it for further appellate review. Id. at 17.

robbery statute, i.e. 18 U.S.C. § 2113(a), because it requires taking property "by force and violence, or by intimidation", is a crime of violence for the purposes of the Sentencing Guidelines and 18 U.S.C. § 924(c)(3)(A). Id. at *3 (citing United States v. Brewer, 848 F.3d 711, 715-16 (5th Cir. 2017) (holding that because bank robbery requires a taking "by force and violence or by intimidation," it is a crime of violence under § 924(c)(3)(A)).³ For these reasons, the Court finds Burns's Motion to Vacate, to the extent it seeks to have his conviction/sentence under 18 U.S.C. § 924(c) vacated, must be denied.

Next, relying on Johnson, Burns challenges the armed career criminal enhancement under U.S.S.G. § 4B1.4 that was applied when his Sentencing Guideline Range was calculated. Specifically, Burns

³ As explained by the Jones Court:

In Brewer, the defendants, who were convicted of bank robbery, argued that a person can commit bank robbery by intimidation without threatened, attempted, or actual use of force. Brewer, 848 F.3d at 715. We concluded that bank robbery necessarily requires at least an implicit threat to use violent force. Id. ("The kind of 'intimidation' that suffices to put a victim in fear of bodily injury during the course of a bank robbery, and which would in turn allow a defendant to complete such a robbery, is the very sort of threat of immediate, destructive, and violent force required to satisfy the 'crime of violence' definition. It is hard to imagine any successful robbery accomplished by threatening some far removed reprisal that does not involve physical force."). Because bank robbery ... requires a taking "by force and violence or by intimidation," [it is] a crime of violence under § 924(c)(3)(A).

Jones, 2017 WL 1406491, at *3, n.2.

argues that his prior Mississippi state law convictions for armed robbery and strong armed robbery should not have been considered "crimes of violence" for the purpose of applying that enhancement. The Court finds that even if Burns's argument survives Beckles v. United States, --- U.S. ---, 137 S. Ct. 886 (2017), which held that the provisions of the Sentencing Guidelines are not subject to due process vagueness challenges, Burns's argument does not have merit because the Fifth Circuit has already held that convictions for robbery and armed robbery under Mississippi law are considered violent felonies for sentencing purposes. See In re Collins, No. 16-60437, slip op. (5th Cir. Jul. 29, 2016) (finding that convictions of robbery and armed robbery under Mississippi law qualify as violent felonies for sentencing purposes).

In sum, the Court finds Burns is not entitled to relief on either his Section 924(c) challenge or his Guidelines challenge. Accordingly, the Court finds his Motion to Vacate is not well taken, and should be denied.

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that Defendant's Motion to Vacate Conviction and Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. § 2255 [Docket No. 20], as supplemented by [Docket No. 29], is hereby denied. A Final Judgment dismissing this case with

prejudice shall be entered this day.

IT IS FURTHER ORDERED that a Certificate of Appealability should not issue. Defendant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED this the 9th day of May, 2017.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

vs.

CRIMINAL NO. 3:02-cr-86-WHB-ALL
CIVIL ACTION NO. 3:16-cv-445-WHB-ALL

TIMOTHY JAMARAS BURNS

FINAL JUDGMENT

In accordance with Rule 58 of the Federal Rules of Civil Procedure, and with the Opinion and Order that denied Defendant Timothy Jamaras Burns's Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, this case is hereby dismissed with prejudice.

SO ORDERED this the 9th day of May, 2017.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

May 10, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TIMOTHY JAMARAS BURNS,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Mississippi

Before CLEMENT, DUNCAN, and OLDHAM, Circuit Judges.

PER CURIAM:*

Timothy Burns pleaded guilty to two counts of armed bank robbery and one count of brandishing a firearm during a crime of violence. He waived his rights to appellate and collateral review and was sentenced as a career offender under the then-mandatory federal Sentencing Guidelines. Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Burns filed a § 2255 motion asserting that his prior convictions no longer qualified him for the career offender enhancement and that his brandishing

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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conviction should be vacated. The district court denied the motion on the merits. We affirm because Burns waived his right to bring this motion.

FACTS AND PROCEEDINGS

In 2002, Burns was charged with two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and two counts of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). In a memorandum of understanding, the Government agreed to dismiss one of the firearm counts, recommend a sentence on the low end of the Guidelines range, and grant a reduction for acceptance of responsibility if Burns pleaded guilty. Burns “expressly waive[d] the right to appeal the conviction and sentence imposed . . . or the manner in which that sentence was imposed, on the grounds set forth in [18 U.S.C. §] 3742, or on any ground whatsoever, and expressly waive[d] the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding . . . including . . . a motion brought under” 28 U.S.C. § 2255.

In the presentence investigation report (“PSR”), the probation officer applied the 2000 edition of the Sentencing Guidelines to determine Burns’s sentencing range. The PSR stated that Burns qualified as a career offender under U.S.S.G. § 4B1.1 because the charged bank robberies and at least two of his prior offenses were “crimes of violence.” Burns was sentenced to concurrent 199-month prison terms for the bank robberies and a consecutive 84-month term for the firearm offense. He did not appeal.

In 2016, Burns moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 based on *Johnson*. He asserted that, because *Johnson* invalidated the residual clause in the “violent felony” definition of the Armed Career Criminal Act, he no longer had two qualifying prior convictions for the career offender designation and his conviction under § 924(c) should be vacated. The district court denied the motion on the merits before the

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Government responded. Burns appealed, and this court granted a certificate of appealability on his claims that the residual clauses in the career-offender-enhancement provision of the mandatory Guidelines and § 924(c) are unconstitutionally vague.

STANDARDS OF REVIEW

“This court reviews *de novo* whether an appeal waiver bars an appeal.” *United States v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019) (quotation omitted); *see United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (per curiam) (finding “no principled means of distinguishing . . . a [collateral review] waiver from the waiver of a right to appeal”). “When considering challenges to a district court’s decisions under 28 U.S.C. § 2255, this court reviews questions of law *de novo*.” *United States v. Taylor*, 873 F.3d 476, 479 (5th Cir. 2017). The court “may affirm for any reason supported by the record, even if not relied on by the district court.” *United States v. Batamula*, 823 F.3d 237, 240 (5th Cir. 2016) (en banc) (quotation omitted).

DISCUSSION

We decline to reach the merits of Burns’s motion because we find he has waived his right to bring it. An informed and voluntary waiver of post-conviction relief generally bars such relief. *Wilkes*, 20 F.3d at 653. A waiver is enforceable if (1) it was knowing and voluntary, and (2) it “applies to the circumstances at hand, based on the plain language of the agreement.” *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). A waiver is knowing and voluntary if the defendant knows that he has the right to collateral review and that he is waiving it in the plea agreement. *See United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994).

Burns does not dispute that he was aware of his right to collateral review and that he was waiving it. Nor does he dispute that the waiver’s broad language applies to his *Johnson* claims. Instead, he first argues that the

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Government waived its right to enforce the plea agreement by failing to assert the waiver in the district court. The Government, however, did not intentionally relinquish its right to enforce the plea agreement; the district court dismissed Burns's motion on the merits before the Government responded. *See United States v. Olano*, 507 U.S. 725, 733 (1993); *cf. Wood v. Milyard*, 566 U.S. 463, 474 (2012) (finding the State waived a timeliness argument because it "chose, in no uncertain terms, to refrain from interposing a timeliness 'challenge' to Wood's petition").

Alternatively, Burns relies on two out-of-circuit cases to argue that his waiver is unenforceable. First, relying on *United States v. Torres*, 828 F.3d 1113, 1124–25 (9th Cir. 2016), Burns contends that his right to challenge an illegal or unconstitutional sentence cannot be waived. This argument is foreclosed by our precedent. This court has held that a defendant can waive his right to challenge an illegal sentence. *See United States v. Hemler*, 169 F. App'x 897, 898 (5th Cir. 2006) (per curiam) (rejecting the argument that "a waiver of appeal does not bar an appeal of an illegal sentence"); *United States v. Baty*, 980 F.2d 977, 979 (5th Cir. 1992) (noting that a defendant who has waived her right to appeal cannot appeal an illegal sentence); *see also* 18 U.S.C. § 3742(a)(1)–(2) (the waivable right to appeal includes the right to appeal sentences "imposed in violation of law" or "imposed as a result of an incorrect application of the sentencing guidelines"). This court has also held that a defendant can waive his right to challenge an unconstitutional sentence. *See United States v. Keele*, 755 F.3d 752, 756–57 (5th Cir. 2014); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011).

Next, citing to *United States v. McBride*, 826 F.3d 293, 294–95 (6th Cir. 2016), Burns argues that he cannot waive a right that did not exist at the time he agreed to the waiver. But the Sixth Circuit has distinguished *McBride* because the plea agreement at issue in that case did not include an appeal

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waiver. The court continues to enforce waivers despite changes in law. *See, e.g.*, *United States v. Morrison*, 852 F.3d 488, 491–92 (6th Cir. 2017). Burns’s argument is also foreclosed by our precedent. In *United States v. Burns*, this court held that “an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise” a newly recognized constitutional error “merely because the waiver was made before” the error was recognized. 433 F.3d 442, 450–51 (5th Cir. 2005).¹

Finally, Burns contends that we could find his waiver unenforceable under a miscarriage of justice exception. This circuit has declined to explicitly adopt or reject this exception. *See United States v. Ford*, 688 F. App’x 309, 309 (5th Cir. 2017) (per curiam); *United States v. Powell*, 574 F. App’x 390, 394 (5th Cir. 2014) (per curiam). Regardless, Burns does not explain the contours of this exception or why it should apply to him. So, he has waived the argument that it applies. *See, e.g.*, *Willis v. Cleco Corp.*, 749 F.3d 314, 319 (5th Cir. 2014) (“A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it.” (quotation omitted)).

CONCLUSION

Because Burns waived his right to bring this collateral challenge, we AFFIRM the district court’s denial of his § 2255 motion.

¹ *United States v. Wright*, 681 F. App’x 418 (5th Cir. 2017) (per curiam), finding that a waiver was unenforceable as to a right established by precedent that did not exist at the time of the waiver, did not overturn *Burns*. *See Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60358

D.C. Docket No. 3:16-CV-445

United States Court of Appeals
Fifth Circuit

FILED

May 10, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TIMOTHY JAMARAS BURNS,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Mississippi

Before CLEMENT, DUNCAN, and OLDHAM, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

APPENDIX 4

770 Fed.Appx. 187

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Timothy Jamaras BURNS, Defendant - Appellant

No.

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|

Filed May 10, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Mississippi, upon guilty plea, of armed bank robbery and brandishing a firearm during a crime of violence, and was sentenced as a career offender under the then-mandatory federal Sentencing Guidelines. Later, defendant filed motion for postconviction relief asserting, *inter alia*, that his prior convictions no longer qualified him for the career offender enhancement. The district court denied the motion, and defendant appealed. The Court of Appeals granted a certificate of appealability (COA).

Holdings: The Court of Appeals held that:

[1] defendant effectively waived right to postconviction relief as part of plea bargain;

[2] government did not waive its right to enforce plea waiver of postconviction relief by failing to assert the waiver in the district court;

[3] waivable right to appeal included the right to appeal sentence imposed in violation of law or imposed as a result of an incorrect application of the Sentencing Guidelines; and

[4] defendant's otherwise valid appeal waiver was not rendered invalid or inapplicable to an appeal seeking to raise a newly recognized constitutional error.

Affirmed.

West Headnotes (4)

[1] Criminal Law

Effect of guilty or nolo contendere plea

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(A) In General

110k1434 Effect of guilty or nolo contendere plea
Defendant effectively waived right to postconviction relief as part of plea bargain; defendant did not dispute that he was aware of his right to collateral review and that he was waiving it, nor did he dispute that the waiver's broad language applied to his claims. 28 U.S.C.A. § 2255.

Cases that cite this headnote

[2] Criminal Law

Post-conviction relief

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E) In General

110k1042.7 Proceedings After Judgment

110k1042.7(2) Post-conviction relief

Government did not waive its right to enforce plea waiver of postconviction relief by failing to assert the waiver in the district court, as the district court had dismissed defendant's postconviction relief motion on the merits before the government responded. 28 U.S.C.A. § 2255.

Cases that cite this headnote

[3] Criminal Law

Issues considered

110 Criminal Law

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026.10 Waiver or Loss of Right

110k1026.10(2) Plea of Guilty or Nolo Contendere

110k1026.10(4) Issues considered

Waivable right to appeal included the right to appeal sentence imposed in violation of law or imposed as a result of an incorrect application of the Sentencing Guidelines.

Cases that cite this headnote

[4] Criminal Law

 **Plea of Guilty or Nolo Contendere**

Criminal Law

 **Issues considered**

110 Criminal Law

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026.10 Waiver or Loss of Right

110k1026.10(2) Plea of Guilty or Nolo Contendere

110k1026.10(2.1) In general

110 Criminal Law

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026.10 Waiver or Loss of Right

110k1026.10(2) Plea of Guilty or Nolo Contendere

110k1026.10(4) Issues considered

Defendant's otherwise valid appeal waiver was not rendered invalid or inapplicable to an appeal seeking to raise a newly recognized constitutional error merely because the waiver was made before the error was recognized.

Cases that cite this headnote

***188 Appeal from the United States District Court for the Southern District of Mississippi**

Attorneys and Law Firms

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Before **CLEMENT**, **DUNCAN**, and **OLDHAM**, Circuit Judges.

Opinion

PER CURIAM: *

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

***189** Timothy Burns pleaded guilty to two counts of armed bank robbery and one count of brandishing a firearm during a crime of violence. He waived his rights to appellate and collateral review and was sentenced as a career offender under the then-mandatory federal Sentencing Guidelines. Following the Supreme Court's decision in *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), Burns filed a § 2255 motion asserting that his prior convictions no longer qualified him for the career offender enhancement and that his brandishing conviction should be vacated. The district court denied the motion on the merits. We affirm because Burns waived his right to bring this motion.

FACTS AND PROCEEDINGS

In 2002, Burns was charged with two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and two counts of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). In a memorandum of understanding, the Government agreed to dismiss one of the firearm counts, recommend a sentence on the low end of the Guidelines range, and grant a reduction for acceptance of responsibility if Burns pleaded guilty. Burns "expressly waive[d] the right to appeal the conviction and sentence imposed ... or the manner in which that sentence was imposed, on the grounds set forth in [18 U.S.C. §] 3742, or on any ground whatsoever, and expressly waive[d] the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction

proceeding ... including ... a motion brought under" 28 U.S.C. § 2255.

In the presentence investigation report ("PSR"), the probation officer applied the 2000 edition of the Sentencing Guidelines to determine Burns's sentencing range. The PSR stated that Burns qualified as a career offender under U.S.S.G. § 4B1.1 because the charged bank robberies and at least two of his prior offenses were "crimes of violence." Burns was sentenced to concurrent 199-month prison terms for the bank robberies and a consecutive 84-month term for the firearm offense. He did not appeal.

In 2016, Burns moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 based on *Johnson*. He asserted that, because *Johnson* invalidated the residual clause in the "violent felony" definition of the Armed Career Criminal Act, he no longer had two qualifying prior convictions for the career offender designation and his conviction under § 924(c) should be vacated. The district court denied the motion on the merits before the Government responded. Burns appealed, and this court granted a certificate of appealability on his claims that the residual clauses in the career-offender-enhancement provision of the mandatory Guidelines and § 924(c) are unconstitutionally vague.

STANDARDS OF REVIEW

"This court reviews *de novo* whether an appeal waiver bars an appeal." *United States v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019) (quotation omitted); *see United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (per curiam) (finding "no principled means of distinguishing ... a [collateral review] waiver from the waiver of a right to appeal"). "When considering challenges *190 to a district court's decisions under 28 U.S.C. § 2255, this court reviews questions of law *de novo*." *United States v. Taylor*, 873 F.3d 476, 479 (5th Cir. 2017). The court "may affirm for any reason supported by the record, even if not relied on by the district court." *United States v. Batamula*, 823 F.3d 237, 240 (5th Cir. 2016) (en banc) (quotation omitted).

DISCUSSION

[1] We decline to reach the merits of Burns's motion because we find he has waived his right to bring it. An informed and voluntary waiver of post-conviction relief generally bars

such relief. *Wilkes*, 20 F.3d at 653. A waiver is enforceable if (1) it was knowing and voluntary, and (2) it "applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). A waiver is knowing and voluntary if the defendant knows that he has the right to collateral review and that he is waiving it in the plea agreement. *See United States v. Portillo*, 18 F.3d 290, 292 (5th Cir. 1994).

[2] Burns does not dispute that he was aware of his right to collateral review and that he was waiving it. Nor does he dispute that the waiver's broad language applies to his *Johnson* claims. Instead, he first argues that the Government waived its right to enforce the plea agreement by failing to assert the waiver in the district court. The Government, however, did not intentionally relinquish its right to enforce the plea agreement; the district court dismissed Burns's motion on the merits before the Government responded. *See United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *cf. Wood v. Milyard*, 566 U.S. 463, 474, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012) (finding the State waived a timeliness argument because it "chose, in no uncertain terms, to refrain from interposing a timeliness 'challenge' to Wood's petition").

[3] Alternatively, Burns relies on two out-of-circuit cases to argue that his waiver is unenforceable. First, relying on *United States v. Torres*, 828 F.3d 1113, 1124–25 (9th Cir. 2016), Burns contends that his right to challenge an illegal or unconstitutional sentence cannot be waived. This argument is foreclosed by our precedent. This court has held that a defendant can waive his right to challenge an illegal sentence. *See United States v. Hemler*, 169 F. App'x 897, 898 (5th Cir. 2006) (per curiam) (rejecting the argument that "a waiver of appeal does not bar an appeal of an illegal sentence"); *United States v. Baty*, 980 F.2d 977, 979 (5th Cir. 1992) (noting that a defendant who has waived her right to appeal cannot appeal an illegal sentence); *see also* 18 U.S.C. § 3742(a)(1)–(2) (the waivable right to appeal includes the right to appeal sentences "imposed in violation of law" or "imposed as a result of an incorrect application of the sentencing guidelines"). This court has also held that a defendant can waive his right to challenge an unconstitutional sentence. *See United States v. Keele*, 755 F.3d 752, 756–57 (5th Cir. 2014); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011).

Next, citing to *United States v. McBride*, 826 F.3d 293, 294–95 (6th Cir. 2016), Burns argues that he cannot waive a right that did not exist at the time he agreed to the waiver. But

the Sixth Circuit has distinguished *McBride* because the plea agreement at issue in that case did not include an appeal

[4] waiver. The court continues to enforce waivers despite changes in law. *See, e.g.*, *United States v. Morrison*, 852 F.3d 488, 491–92 (6th Cir. 2017). Burns’s argument is also foreclosed by our precedent. *191 In *United States v. Burns*, this court held that “an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise” a newly recognized constitutional error “merely because the waiver was made before” the error was recognized. 433 F.3d 442, 450–51 (5th Cir. 2005).¹

¹ *United States v. Wright*, 681 F. App’x 418 (5th Cir. 2017) (per curiam), finding that a waiver was unenforceable as to a right established by precedent that did not exist at the time of the waiver, did not overturn *Burns*. *See Jacobs v. Nat’l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”).

Finally, Burns contends that we could find his waiver unenforceable under a miscarriage of justice exception. This circuit has declined to explicitly adopt or reject this exception. *See United States v. Ford*, 688 F. App’x 309, 309 (5th Cir. 2017) (per curiam); *United States v. Powell*, 574 F. App’x 390, 394 (5th Cir. 2014) (per curiam). Regardless, Burns does not explain the contours of this exception or why it should apply to him. So, he has waived the argument that it applies. *See, e.g., Willis v. Cleco Corp.*, 749 F.3d 314, 319 (5th Cir. 2014) (“A party that asserts an argument on appeal, but fails to adequately brief it, is deemed to have waived it.” (quotation omitted)).

CONCLUSION

Because Burns waived his right to bring this collateral challenge, we AFFIRM the district court’s denial of his § 2255 motion.

All Citations

770 Fed.Appx. 187