No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JULIO SOLORZANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May a person who is actually innocent of a firearms offense under 18 U.S.C. § 924(c) after *United States v. Davis*, 139 S. Ct. 2319 (2019), seek habeas relief if they previously waived their right to collateral attack?

IN THE SUPREME COURT OF THE UNITED STATES

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- v. -

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Petitioner Julio Solorzano respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 19, 2019. In this decision, the Ninth Circuit, like six other courts of appeals, held that a person who is actually innocent of a firearms offense under 18 U.S.C. § 924(c) after *United States v. Davis*, 139 S. Ct. 2319 (2019), is nevertheless barred from seeking habeas relief if they previously waived their right to bring a collateral challenge through a habeas proceeding. By contrast, judges in four other circuits have held that a person's previous collateral-attack waiver at a time when the Court's precedent foreclosed their actual innocence argument cannot serve as a procedural bar to habeas relief. The Court should grant certiorari to resolve this important split that will affect thousands of cases after *Davis*.

OPINION BELOW

The court of appeals affirmed the denial of Mr. Solorzano's petition for a writ of habeas corpus under 28 U.S.C. § 2255. *See United States v. Solorzano,* 778 F. App'x 480 (9th Cir. 2019) (attached here as Appendix A). Mr. Solorzano then petitioned for panel rehearing and rehearing en banc. On December 19, 2019, the panel denied Mr. Solorzano's petition for panel rehearing, and the full court declined to hear the matter en banc. *See* Appendix B.

JURISDICTION

On September 24, 2019, the court of appeals affirmed the denial of Mr. Solorzano's habeas petition. *See* Appendix A. On December 19, 2019, the court of appeals denied the petition for rehearing. *See* Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statute codifying habeas relief states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

The federal statute criminalizing use of a firearm during a crime of violence defines a "crime of violence" as a felony that:

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3).

STATEMENT OF FACTS

In 2012, a grand jury charged Mr. Solorzano with three counts: 1) Conspiracy to Conduct Enterprise Affairs Through a Pattern of Racketeering Activity in violation of 18 U.S.C § 1962(d) ("RICO conspiracy"); 2) Violent Crime in Aid of Racketeering in violation of 18 U.S.C. § 1959(a) ("VICAR"), and; 3) Possession, Brandishing, and Discharge of a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A). The case proceeded to trial, and a jury convicted Mr. Solorzano of the first two counts of RICO conspiracy and the firearms offense but acquitted him of the third VICAR count. Although the jury acquitted Mr. Solorzano of the VICAR charge, the verdict form nevertheless stated that Mr. Solorzano's § 924(c) conviction rested on both the RICO conspiracy and the VICAR counts.

After trial, Mr. Solorzano entered into a sentencing agreement with the prosecutor. As part of this agreement, Mr. Solorzano waived the right to file an appeal or collateral challenge to his conviction or sentence. The district court then sentenced Mr. Solorzano to ten years on the RICO conspiracy count and ten years on the § 924(c) firearm count, the latter of which was to run consecutively to the former.

On June 26, 2015, this Court struck down the "residual clause" of the Armed Career Criminal Act ("ACCA") as void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551 (2015). Within one year of *Johnson*, Mr. Solorzano timely filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, arguing that the residual clause of § 924(c), like the ACCA residual clause, was void for vagueness. He also maintained that because the jury acquitted him of the VICAR count, the § 924(c) count necessarily rested on the RICO conspiracy count. And because RICO conspiracy qualifies as a crime of violence *only* under the residual clause, Mr. Solorzano maintained that the court should vacate his consecutive ten-year § 924(c) sentence.

The district court denied Mr. Solorzano's petition. Rather than reaching the waiver issue, the district court held that Mr. Solorzano's § 924(c) conviction relied on both the RICO conspiracy *and* the VICAR counts. The district court also determined that the VICAR count satisfied an alternative definition of a "crime of violence" that requires the "use, attempted use, or threatened use of physical force" and thus did not implicate the residual clause. Nevertheless, the district court determined that reasonable jurists could find its assessment of the claims debatable and granted Mr. Solorzano a certificate of appealability.

On appeal to the Ninth Circuit, Mr. Solorzano disputed that his § 924(c) conviction could have rested on the VICAR count of which he was acquitted. Even assuming it did, Mr. Solorzano also explained why the predicate offenses underlying the VICAR count did not require the "use, attempted use, or threatened use of

physical force" and thus rested on the residual clause. And while the Government contended that Mr. Solorzano's sentencing agreement waived his right to bring this collateral challenge, Mr. Solorzano pointed to the Ninth Circuit's decision in *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016), which permitted a *Johnson* challenge in spite of a similar waiver "if a defendant's sentence is illegal, which includes a sentence that violates the Constitution." Because Mr. Solorzano's sentence also violated the Constitution by resting on the void-for-vagueness residual clause, he argued that the sentencing agreement did not foreclose his collateral challenge.

While Mr. Solorzano's case was pending on appeal, this Court issued its decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). In this decision, the Court agreed with Mr. Solorzano that the residual clause of § 924(c) was void for vagueness. *See id.* at 2336. Although the Solicitor General had argued that the Court could avoid any constitutional concerns by taking a "case-specific approach" to the residual clause, the Court rejected this invitation as violating the statute's text, context, and history. *See id.* at 2327-32. The Solicitor General also conceded that the holding in *Davis* would apply retroactively to cases on collateral review. *See* Brief for the United States, United States v. Davis, Sup. Ct. No. 18-431 (Feb. 12, 2019), at 52 ("A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review.").

Nevertheless, the Ninth Circuit dismissed Mr. Solorzano's appeal. *See United States v. Solorzano,* 778 F. App'x 480 (9th Cir. 2019). Unlike the district court, the court of appeals relied exclusively on the waiver in Mr. Solorzano's sentencing agreement to hold that he could not collaterally challenge his § 924(c) conviction. *See id.* at 482. The court rejected Mr. Solorzano's reliance on *Torres*, finding that *Torres* only covered "illegal *sentences*," while Mr. Solorzano was actually challenging his § 924(c) *conviction. See id.* Having distinguished *Torres*, the court of appeals then enforced the collateral-attack waiver in Mr. Solorzano's sentencing agreement and dismissed his appeal. *See id.*

Mr. Solorzano filed a petition for panel and en banc rehearing. On December 19, 2020, the panel denied his petition for panel rehearing, and the full court declined to hear the matter en banc. This petition for a writ of certiorari follows.

SUMMARY OF THE ARGUMENT

The courts of appeals are currently locked in a 7-4 split over the question of whether defendants convicted of § 924(c) who previously signed a collateral-attack waiver may seek to vacate their sentences after *Davis*. In such cases, judges in seven circuits enforce the collateral-attack waiver, while judges in four circuits permit the petitioner to seek habeas relief. This inconsistency leads to dramatic disparities in the sentences of one of the most commonly-charged federal crimes and severely erodes confidence in the fairness and equity of the criminal justice system.

Mr. Solorzano's case provides a direct opportunity to resolve this issue. Because his § 924(c) conviction rested on a count that the government does not

dispute falls solely under the residual clause, Mr. Solorzano is actually innocent of the offense. This actual innocence means that he falls within the "miscarriage of justice" exception to procedural bars—an exception that serves to balance a prosecutor's interest in finality with an innocent person's interest in avoiding incarceration. Because enforcing the collateral-attack waiver in such circumstances would constitute a miscarriage of justice, the Court should grant Mr. Solorzano's petition for certiorari and resolve the circuit split in his favor.

REASONS FOR GRANTING THE PETITION

I.

The Courts of Appeals Are Locked in a 7-4 Split Over Whether Defendants Who Previously Waived Collateral Attack May Seek Relief Under *Davis*.

After this Court issued its watershed decision in *Johnson* striking down the residual clause of the Armed Career Criminal Act ("ACCA"), prisoners across the country began filing habeas petitions under 28 U.S.C. § 2255 based on similar void-for-vagueness clauses. Some of these petitions directly challenged identical sentencing enhancements under ACCA. But others challenged similarly-worded residual clauses found elsewhere in the federal criminal code, such as 18 U.S.C. § 16(b) and 18 U.S.C. § 924(c)(3)(B).

Because many federal criminal cases resolve through a guilty plea, a sizable number of these habeas petitions were brought by petitioners who had signed plea agreements years before *Johnson*, at a time when this Court had repeatedly upheld the residual clause. Most of these plea agreements contained a standard clause waiving the right to appeal or collaterally attack the conviction or sentence. The

question that now divides the courts of appeals is whether a person who is actually innocent of a § 924(c) firearms offense after *Davis* may challenge their conviction and sentence despite such a waiver.

Many judges say yes. For instance, in *In re Hammoud*, the Eleventh Circuit dismissed the petitioner's pre-*Johnson* direct appeal "based on the sentence appeal waiver provision in his plea agreement." 931 F.3d 1032, 1036 (11th Cir. 2019). But twelve years later—*after Davis* struck down the residual clause of § 924(c)—the Eleventh Circuit granted his request for a certificate of appealability, holding that *Davis* was "retroactive to cases on collateral review." *Id.* at 1039. Relying on this Eleventh Circuit decision, multiple district courts in the Second Circuit have since concluded that a prior collateral review waiver does not "bar a petitioner's claim that a newly announced constitutional rule warrants vacating his criminal conviction." *Leyones v. United States*, 2018 WL 1033245, at *3 (E.D.N.Y. Feb. 22, 2018). *See also Bonilla v. United States*, 2020 WL 489573, at *2 (E.D.N.Y. Jan. 29, 2020) ("This Court now finds that Bonilla's waiver of appealability is not enforceable in his specific circumstances."). And in the context of the ACCA residual clause, the Fourth Circuit has declined to enforce similar waivers because "all sentences rendered under the residual clause became unconstitutional" under *Johnson* and its progeny. *United States v. Cornette*, 932 F.3d 204, 209 (4th Cir. 2019).

Other circuits have reached the opposite conclusion. In *United States v. Worthen*, for instance, the Seventh Circuit enforced the collateral-attack waiver,

finding that it did not fall within the "few narrow exceptions" (such as ineffective assistance of counsel or sentences that exceed the statutory maximum) that would have excused it. 842 F.3d 552, 554 (7th Cir. 2016). Likewise, the First Circuit determined that a collateral-review waiver applied in spite of the unconstitutionality of the residual clause, declining to find that it fell under the "clear and gross injustice" exception to the waiver. *Remington v. United States*, 872 F.3d 72, 78 (1st Cir. 2017). Similarly, the Fifth Circuit determined that a collateral-attack waiver barred all claims "except those concerning prosecutorial misconduct or IAC." *United States v. Kelly*, 915 F.3d 344, 350 (5th Cir. 2019). Three other circuits have reached the same conclusion in unpublished decisions. *See United States v. White*, __ F. App'x __, 2019 WL 5677912, at *3 (3d Cir. Oct. 31, 2019) ("[W]e agree with the District Court's finding that subsequent changes in the law do not make a plea agreement 'involuntary or unknowing.'"); *United States v. Ford*, 641 F. App'x 650, 651 (8th Cir. 2016) (stating that it would "enforce the appeal waiver" because no exception applied); *United States v. Hurtado*, 667 F. App'x 291, 292 (10th Cir. 2016) (same).

The Sixth Circuit has repeatedly flip-flopped on this issue, demonstrating the difficulty of this question and the need for the Court's guidance. First, it held that because "a defendant can abandon only '*known* rights,'" the petitioner "could not have intentionally relinquished a claim based on *Johnson*, which was decided after his sentencing." *United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)) (alterations omitted)

(emphasis in McBride). But a later panel distinguished this case on the basis that it involved only a concession as to the Guidelines range, rather than a written waiver of collateral review, which "could and did intentionally relinquish his right to appeal." *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017).

But two years later, the Sixth Circuit disavowed *Morrison* and other cases that "say nothing of whether an appellate waiver encapsulates a subsequent change of the law which would otherwise render a defendant or petitioner's sentence statutorily excessive, i.e., *illegal*." *Vowell v. United States*, 938 F.3d 260, 268 (6th Cir. 2019) (emphasis in original). As one district court noted, *Vowell*'s about-face on this issue was "confounding" because "no effort was made to explain or harmonize" *Morrison*'s prior holding that an appellate waiver bars a subsequent habeas challenge—even though the same judge who authored *Morrison* also sat on the *Vowell* panel. *Webster v. Streeval,* 2019 WL 5848060, at *2 (E.D. Ky. Nov. 7, 2019). And while the district court acknowledged that exceptions exist to the rule that a later panel cannot overrule an earlier panel, it observed that "merely disagreeing with the reasoning of the prior panel decision is not one of them." *Id.*

As these cases show, judges across the country are taking widely inconsistent approaches to the enforcement of collateral-attack waivers in § 924(c) cases. The Court's guidance is desperately needed to bring consistency to this haphazard patchwork of rulings.

II.

Determining Whether Collateral-Attack Waivers Foreclose Relief Is a Widespread and Important Issue.

As the Solicitor General himself acknowledged in *Davis*, thousands of individuals are charged with § 924(c) every year—in 2017 alone, prosecutors brought 2,700 cases.[1] Given that § 924(c) sentences run consecutively to any other sentence, and given that multiple § 924(c) convictions may result in a draconian "stacking" effect that carries a mandatory minimum of 30 years or more, it is not surprising that tens of thousands of individuals remain incarcerated under § 924(c). In the wake of *Davis*, then, untold numbers of § 924(c) habeas petitions are currently wending their way through the courts. And because 98% of all federal criminal cases resolve through a guilty plea,[2] the vast majority of these cases will involve plea agreements with a waiver of the right to collateral attack that may change the outcome of the petition.

Nothing about the outcome of these cases should hinge on geography. Yet that is precisely what happens when courts in Boston, Philadelphia, Dallas, Chicago, Des Moines, Pasadena, and Denver enforce § 924(c) collateral-attack waivers while courts in New York, Richmond, Cincinnati, and Atlanta do not.

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[1] *See* Petition for a Writ of Certiorari, United States v. Davis, 18-431, p. 24.

[2] *See* Gramlich, John, "Only 2% of federal criminal defendants go to trial, and most who do are found guilty," Pew Research Center, June 11, 2019, *available at*: https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

Transparency suffers, and confidence in the judiciary erodes, when a lawyer must explain to a defendant sentenced to 120 years in prison why he will be spending the rest of his life in prison while a person convicted of precisely the same crimes who signed precisely the same plea deal in a nearby state will soon walk free. As Justice Breyer has noted, "[a] just legal system seeks not only to treat different cases differently but also to treat like cases alike." *Pepper v. United States*, 562 U.S. 476, 510 (2011) (Breyer, J., concurring).

Inconsistencies also arise within the circuits because some prosecutors who actually seek to do justice (rather than impose the maximum amount of time possible) have declined to enforce collateral-attack waivers in light of § 924(c)'s draconian penalties. *See, e.g.*, *United States v. Goodson*, 700 F. App'x 417, 419 n.2 (6th Cir. 2017) ("The government has elected not to enforce the waiver."); *Frazier v. United States*, No. 17-5585 (6th Cir. Aug. 1, 2018) (Eastern District of Tennessee) ("[T]he United States, in the interests of justice, expressly waives reliance on [§ 2255] waiver in this case."). In other cases, however (such as Mr. Solorzano's), prosecutors have sought to enforce the waiver and foreclose any chance of relief from an unconstitutional sentence. *See, e.g.*, *Gilmer v. United States*, No. 3:16-cv-01563, 2018 U.S. Dist. LEXIS 121706, at *5 (M.D. Tenn. July 20, 2018) (arguing that the court "must enforce waivers" even after a change in law). While prosecutorial discretion plays an important role in criminal justice, such discretion must be tied to guiding principles, rather than the consciences of individual prosecutors.

Finally, the Ninth Circuit's illogical reasoning in Mr. Solorzano's case has no basis in precedent and would throw decades of longstanding habeas jurisprudence out the window. In Mr. Solorzano's decision, the Ninth Circuit declined to follow its binding precedent in *Torres*, 828 F.3d at 1125 (which did not enforce a waiver in the Johnson context), on the basis that the defendant in *Torres* was challenging an "illegal sentence," while Mr. Solorzano was challenging his § 924(c) *conviction.* 778 F. App'x at 482. Not only was this factually incorrect (as Mr. Solorzano stated throughout his briefing that he was challenging his sentence), but the statute itself clarifies that a petitioner who brings an action under § 2255 is "claiming the right to be released upon the ground that the *sentence* was imposed in violation of the Constitution" and thus "may move the court which imposed the *sentence* to vacate, set aside or correct the *sentence*." 28 U.S.C. § 2255(a) (emphases added). *See also Hill v. United States*, 368 U.S. 424, 426 (1962) (noting that § 2255 "states four grounds upon which such relief may be claimed"—all of which refer to a "sentence"). So in one fell swoop, the Ninth Circuit unilaterally rewrote the statute and decades of precedent holding that § 2255 challenges a sentence, rather than a conviction. Such far-reaching but ungrounded jurisprudence should not be allowed to stand.

III.

Mr. Solorzano's Case Is an Ideal Vehicle to Resolve This Question.

Mr. Solarzano's case squarely presents the issue at the heart of this circuit split. The Ninth Circuit relied solely on the collateral-attack waiver of his sentencing agreement to deny his claim for relief. Had it not done so, Mr. Solorzano

was eligible for habeas relief because his ten-year § 924(c) sentence rested on the RICO conspiracy count, which the government did not deny fell solely under the residual clause. Were it not for the collateral-attack waiver, Mr. Solorzano would benefit from the Court's on-point decision in *Davis*, which the Solicitor General admits applies retroactively. What's more, no procedural issues would distract from the resolution of this claim—Mr. Solorzano preserved the issues at every stage of litigation, and all of his petitions and appeals were timely filed. His case thus presents the ideal opportunity for this Court to avoid a new and divisive line of waiver law—one that remains disconnected from principles of consistency, history, and fairness.

IV.

A Defendant's § 924(c) Challenge Falls Within the "Actual Innocence" Exception to a Collateral-Attack Waiver.

The Court should also grant certiorari because its own precedent resolves this issue in favor of Mr. Solorzano and the circuits that do not enforce a collateral-attack waiver. In *McQuiggin v. Perkins*, this Court held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass" when a claim would otherwise be procedurally barred. 569 U.S. 383, 386 (2013). In *McQuiggin*, the Court relied on its longstanding "miscarriage of justice" exception to explain that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *Id.* at 392. The Court explained that this exception is "grounded in the equitable discretion of habeas courts to see that federal

constitutional errors do not result in the incarceration of innocent persons." *Id.* (quotations omitted). Although it applies to a "severely confined category" of cases in which the petitioner must show it is "more likely than not that no reasonable juror would have convicted," such an exception "balance[s] the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Id.* at 393, 395.

This "actual innocence" exception to procedural bars applies here. Where a defendant's § 924(c) conviction rests solely on the residual clause, the holding in *Davis* striking down this clause confirms that the defendant is actually innocent of a firearms offense under § 924(c). As one district court explained, if the petitioner is correct on the merits, he thus "stands convicted under a statute that is unconstitutionally vague as ruled by the Supreme Court in an opinion with retroactive application," and his collateral-attack waiver "cannot justify his incarceration." *Bonilla*, 2020 WL 489573, at *3. In such cases, "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* (quotations omitted). And while the Government's interest in the finality of criminal cases is not insignificant, blocking such claims on "purely procedural grounds" would "irreparably discredit the federal courts." *Id.*

Given that Mr. Solorzano is actually innocent of § 924(c) after *Davis*, a miscarriage of justice would result if the collateral-attack waiver foreclosed his opportunity to seek § 2255 relief. As *McQuiggin* confirms, such a procedural bar

should "not result in the incarceration of innocent persons." 569 U.S. at 392. Accordingly, the Court should grant certiorari to resolve this circuit split by holding that a collateral-attack waiver does not bar petitioners like Mr. Solorzano from having a fair opportunity to challenge their sentences on the basis that they are actually innocent.

CONCLUSION

For these reasons, Mr. Solorzano respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

Date: March 17, 2020

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APPENDIX A

NOT FOR PUBLICATION

FILED

SEP 24 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO SOLORZANO, AKA Mowgli, Defendant-Appellant.	No. 17-55713 D.C. Nos. 3:16-cv-01455-GPC 3:12-cr-00236-GPC-12 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE CORNEJO, AKA Rabbit, Defendant-Appellant.	No. 17-55725 D.C. Nos. 3:16-cv-01410-GPC 3:12-cr-00236-GPC-16

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Argued and Submitted May 15, 2019
Pasadena, California

Before: WARDLAW and HURWITZ, Circuit Judges, and KORMAN,** District

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

Judge.

Julio Solorzano and Jose Cornejo were charged with RICO conspiracy, in violation of 18 U.S.C. § 1962(d), violent crimes in aid of racketeering ("VIAR"), in violation of 18 U.S.C. § 1959(a), and discharging a firearm during a crime of violence, in violation 18 U.S.C. § 924(c). The indictment alleged two predicate crimes of violence for the § 924(c) charge: (1) the RICO conspiracy and (2) VICAR. The jury found the defendants guilty of the RICO conspiracy and acquitted the defendants of the VICAR charge, but nonetheless found they violated § 924(c), returning a verdict finding them "guilty of discharge of a firearm . . . in relation to a crime of violence, that is the violent crime in aid of racketeering." The jury verdict also found the defendants "guilty of brandishing a firearm . . . in relation to a crime of violence, that is the RICO conspiracy" and "guilty of discharge of a firearm . . . in relation to a crime of violence, that is the RICO conspiracy."

The defendants subsequently filed motions under 28 U.S.C. § 2255 collaterally attacking their convictions, arguing that (1) the residual clause in § 924(c) was unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); (2) RICO conspiracy is not a crime of violence; and (3) "the violent crime in aid of racketeering" jury finding could not serve as the predicate for their

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** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

§ 924(c) convictions, given their acquittal on the VICAR charges. The district court denied the motions, finding that the jury's verdicts established that the defendants had committed the "violent crime in aid of racketeering" despite the acquittals on the VICAR charges, and that the § 924(c) convictions were therefore supported by the § 924(c) "force clause." The defendants timely appealed. We dismiss the appeals.

1. After the jury returned its verdicts, the defendants entered into sentencing agreements with the government that "waive[], to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence." The defendants did not argue below that the waivers were not knowing and voluntary. Nor do they now assert any breach of the sentencing agreement. Indeed, the district court made clear that but for the sentencing agreement, it might well have imposed longer sentences than it did. Rather, the defendants argue that because an appeal waiver generally does not extend to an "illegal sentence," *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016), they can collaterally attack their § 924(c) convictions despite the sentencing agreement because if their convictions are improper, the sentences imposed are illegal. We reject that argument.

2. "[T]he phrase 'illegal sentence' has a precise legal meaning. An illegal sentence is one 'not authorized by the judgment of conviction' or 'in excess of the permissible statutory penalty for the crime.'" *United States v. Vences*, 169 F.3d 611,

613 (9th Cir. 1999) (quoting *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986)). It also includes a sentence that "violates the Constitution." *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). The definition of "illegal sentence" is imported from this Court's case law interpreting Federal Rule of Criminal Procedure 35(a), which allows a court to "correct an illegal sentence at any time." *See Fowler*, 794 F.2d at 1448-49. Rule 35, however, does not authorize challenges to an underlying conviction. *See United States v. Johnson*, 988 F.2d 941, 943 (9th Cir. 1993).

The defendants do not contend that their sentences are unauthorized under the judgment of conviction or that the Constitution prohibits the sentences imposed. Rather, they simply contend that the evidence adduced at trial does not support their § 924(c) convictions in light of subsequent Supreme Court law, and that the resulting sentences are therefore illegal. But, if the "illegal sentence" exception were so broadly construed, it would vitiate virtually all appeal and collateral attack waivers, as any defendant who signed the waiver would be able to argue that his sentence was illegal because he was incorrectly convicted. Enforcing the defendants' knowing and voluntary waivers of their right to collaterally attack their convictions, we **DISMISS** their appeals.

APPENDIX B

FILED

DEC 19 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO SOLORZANO, AKA Mowgli, Defendant-Appellant.	No. 17-55713 D.C. Nos. 3:16-cv-01455-GPC 3:12-cr-00236-GPC-12 Southern District of California, San Diego ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSE CORNEJO, AKA Rabbit, Defendant-Appellant.	No. 17-55725 D.C. Nos. 3:16-cv-01410-GPC 3:12-cr-00236-GPC-16

Before: WARDLAW and HURWITZ, Circuit Judges, and KORMAN,* District Judge.

The panel has voted to deny the petitions for panel rehearing. Judge Wardlaw and Judge Hurwitz vote to deny the petitions for rehearing en banc, and Judge Korman has so recommended.

The full court has been advised of the petitions for rehearing en banc and no

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35. The petitions for panel rehearing and rehearing en banc, Dkts. 54, are **DENIED**.