No.

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN FRANK DAVIS
Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Does an appeal waiver clause bar a criminal defendant from later appealing their conviction on the ground that the guilty plea was not knowing and voluntary?

Does the federal plea bargaining scheme deprive defendants of constitutional protections conferred by the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jonathan Frank Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

MEMORANDUM DECISION AND ORDER BELOW

The Ninth Circuit Court of Appeals denied Davis relief in his direct appeal in an unpublished decision,[1] on November 15, 2019. The decision is attached as Appendix A. The Ninth Circuit's order denying Davis' request for rehearing en banc is unpublished and attached as Appendix B.

JURISDICTIONAL STATEMENT

The Ninth Circuit Court of Appeals entered its final order in this case on January 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition was originally due before April 1, 2020, but is timely under Supreme Court Rule 13.3 and the COVID-19-related miscellaneous order of this Court issued on March 19, 2020. In the order, this Court extended the deadline to file any petition for a writ of certiorari due on or after March 19, 2020 to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Order List 589 U.S. ___.

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[1] *United States v. Davis*, No. 18-10236 (9th Cir. Nov. 15, 2019), available at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2019/11/15/18-10236.pdf

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the Fifth Amendment to the United States Constitution is set forth below:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The statutory right to appeal is codified at 28 U.S.C. § 1291 (1948), titled "Final Decisions of District Courts," and provides, in relevant part, as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States….

INTRODUCTION

The petition for certiorari presents claims that are important, recur frequently in the criminal justice system, and yet evade review because of the reflexive invocation and application of the appellate waiver clauses found in modern plea agreements. The claims also evade review due to fears of reinstatement of stacked charges carrying mandatory minimum sentences.

The reflexive assertion of foreclosure of judicial review is not a new phenomenon. Within five years of the Court's issuance of its landmark trilogy of cases legitimizing the practice of plea bargaining, the prosecution began to chip away at constitutional claims that survive a guilty plea. *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975). In recent years the prosecution has crafted an appeal waiver clause tailored to foreclose any right to appeal the conviction and sentence or otherwise challenge the judgment after its entry. During the COVID-19 pandemic, a federal prosecutor has amended the sentencing waiver clause to restrict the ability of a defendant to pursue—or the judiciary to grant—compassionate release as statutorily provided by 18 U.S.C. § 3582(c).

Plea bargaining is not countenanced by the Bill of Rights overall and the sentencing waiver clauses construed as appellate waiver clauses impermissibly infringe on unalienable rights and fundamental guarantees of due process. They also encroach on statutory rights to appeal, undermine congressional intent, and interfere with the function of the judiciary.

STATEMENT OF THE CASE

This Court has observed that no "procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Blackledge v. Allison*, 431 U.S. 63, 73 (1977) (citing *Fontaine v. United States*, 411 U.S. 213 (1973), *Machibroda v. United States*, 368 U.S. 487 (1962)). Preserved by repeated objections, this case squarely demonstrates that, in its current iteration, the federal plea bargaining scheme is coercive and surpasses constitutional limits, resulting in violations of basic constitutional protections due under the Fifth and Sixth Amendments to the United States Constitution. This Court should grant certiorari to ensure that plea bargaining comports with due process and courts retain jurisdiction over appeals from criminal judgments.

A. Historical Overview of Plea Bargaining

More than fifty years ago, on May 4, 1970, this Court legitimized a clandestine practice of disposing of criminal charges by agreement that it categorized as "plea bargaining." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Santobello v. New York*, 404 U.S. 257, 260 (1971). This Court accepted the reality that the guilty plea and the concomitant plea bargain were important components of the Nation's criminal justice system. *Allison*, 431 U.S. at 71; *see also Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978).

Before plea bargaining received the imprimatur of legitimacy from this Court, it was practiced in "unhealthy subterfuge":

> For decades it was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges.

Allison, 431 U.S. at 76. *See also*, *Hayes*, 434 U.S. at 365 ("Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.")

This Court rationalized that plea bargaining was a negotiation between prosecution and the defense, where the parties "arguably possess relatively equal bargaining power." *Hayes*, 434 U.S. at 362 (quoting, *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J)). This Court hoped that, "properly administered," the practice could "benefit all concerned." *Santobello*, 404 U.S. at 260; *accord Allison*, 431 U.S. at 71.

Plea bargaining has not been administered as anticipated and the benefit to all has not yet materialized. In 2018, 1,465,200 persons were imprisoned in the United States.[2] The number of persons imprisoned in 1970 was 196,429.[3] The federal prison

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[2] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2018*, NCJ 253516 (released Apr. 30, 2020), available at: https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6846

[3] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Bureau of Justice Statistics Bulletin, *Prisoners 1925 – 81* (released Dec. 1982), available at:

(continued ...)

population was comprised of 40,000 persons in 1985 and peaked to 220,000 persons in 2013.[4] In Fiscal Year 2019, 97.6 percent of federal convictions were resolved by guilty pleas.[5] In the District of Arizona, 99.3 percent of federal convictions were resolved by guilty pleas that same year. Id. Out of 5,610 prosecutions, forty cases proceeded to trial. Id.

In the 50 years since plea bargaining "came out of the shadows" as this Court categorized it in *Hayes*, 434 U.S. at 365 and *Allison*, 431 U.S. at 76 (1977), it has become "the criminal justice system." *Missouri v. Frye*, 566 U.S. 133, 144 (2012); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting that the American criminal justice system is "for the most part a system of pleas, not a system of trials"). This Court has recently noted that, under such a system, "determinative issues" motivating defendants to enter guilty pleas may have little to do with factual guilt. *Lee v. United States*, 137 S. Ct. 1958, 1967-68 (2017).

(... continued)

https://www.bjs.gov/content/pub/pdf/p2581.pdf

[4] U.S. Department of Justice, FY 2019 Agency Financial Report, Section III: Management Section, *Managing a Safe, Secure, and Humane Prison System*, § III-4-III-8, pp 146-150 (Nov. 2019), available at:
https://www.justice.gov/doj/page/file/1218576/download#page=20

[5] U.S. Sentencing Commission Annual Report, Sourcebook of Federal Sentencing Statistics, Sourcebook Figures And Tables, 2019 Sentencing Information, *Guilty Pleas and Trials in Each Circuit and District Table 11,* available at:
https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table11.pdf

B. Procedural History

In this case, Davis faced the indiscriminate use of plea bargaining and it resulted in plea coercion, induced a guilty plea when Davis had viable defenses to the charges, and denied him direct review where the appellate court held that the appeal waiver clause in the plea agreement barred Davis from contesting the voluntary nature of his plea.

The conviction sustained arose out of the use of interstate roads to travel from California to Arizona to engage in prostitution. ER 286-93.[6] In the modern era, women who work in the prostitution industry call themselves "sex workers." The preferred occupational title will be used throughout the petition. A man who facilitates sex work is a "pimp," while the women are known as "madams." The group that traveled to Phoenix in November 2014 was comprised of five women and two males. ER 63, 286-93.

Shortly before a bench trial was set to commence in 2018, the prosecution made Davis a fifth plea offer materially different from prior plea offers. Appendix C. The prosecution previously tendered four different plea offers for transportation of a minor for the purpose of prostitution—an offense punishable by imprisonment for a minimum of ten years up to life. ER 128, 141-44, 267-68. The first plea offer was a pre-indictment offer presented to Davis while he was incarcerated on unrelated charges

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[6] Citations to the appellate record shall be to the Excerpts of Record (ER) filed in the Ninth Circuit.

in California. Id. 41, 267-69. The plea offer tendered shortly before a trial was scheduled to commence was for the offense of transporting individuals for prostitution—an offense punishable by not more than ten years of imprisonment. Appendix C. On February 12, 2018, Davis pled guilty to Transporting Individuals to Engage in Prostitution, a violation of 18 U.S.C. § 2421(a). ER 97-113.

As it turned out, the sex worker who was a minor at the time the group traveled to Arizona had disavowed most of the allegations attributed to her four years earlier when she was interviewed after a disturbance at a motel. ER 71. Another sex worker—the prosecution's main witness—declined to testify against Davis. ER 62. Davis had pleaded with her not to testify against him in letters smuggled out of jail under the name of a different inmate. ER 68. Davis had also loudly professed his love to the main prosecution witness at the last hearing before the bench trial was scheduled to convene. ER 159.

Davis accepted the fifth plea offer tendered but had memorialized for the appellate record that the circumstances under which the prosecution made plea offers were unreasonable and coercive. Davis had also memorialized that the factual circumstances were not as the prosecution alleged.

At the final pretrial conference on January 31, 2018, Davis affirmed that three plea offers had been conveyed to him. ER 267-69. Davis also volunteered that his counter-offer to cap the sentencing range at ten years was not unreasonable where the underage sex worker had reportedly alleged that Davis had taken her to Paris. ER 269. The likelihood that Davis had taken an underage sex worker to Paris was

exceedingly low as documented in the discovery. The prosecution would note in its sentencing memorandum that Davis had been incarcerated off and on since he was 16 years old and was "no stranger to the criminal justice system, having 'engaged in a non-stop pattern of violence, coercion, and lawlessness since his early teens.'" ER 11-13.

At another pretrial hearing on February 8, 2018, Davis referred to the plea negotiations process as a "shot-clock prosecution."[7] ER 137. Davis objected that the circumstances under which the prosecution made plea offers were unreasonable because he was being asked to make "a life decision in this split second." ER 138. Davis also stated that he wanted to make a record that he did not want new counsel but he did not want a trial continuance either. ER 126, 139.

In an ex parte hearing, Davis explained that he had an issue with his attorneys' advice to accept a plea offer since the charges against him were defensible. ER 124. Davis also expounded that, given his knowledge of the events surrounding the charges, the discovery he reviewed did not support the offenses alleged. ER 124-25.

Davis reiterated that he did not want to change counsel but was concerned about his attorneys' view of the case:

> This is an incident that I didn't do. Why do you take a deal for something that you didn't do? Because you have lawyers that don't want to fight. I cannot win a fight if I

[7] "Shot clock" is a term of art used in basketball. It refers to the display clock marking the countdown within which shooting the ball is required.

> go - - they're going into it with a - - losing already. They're telling me, we're going to lose.
>
> That's what they're telling me. And I'm like, no, you're not. And I'm bombarded by this.
>
> Do I want to change my counsel? No. But I just want to put on the record of why I'm forced to -- I don't want to take a deal. I want to go to trial. But I don't want to just go in there and lose.

ER 125.

Defense counsel would later enter into the appellate record the prosecution's witness interview notes of the underage sex worker wherein she disavowed all of the statements attributed to her that had formed the framework of the most serious pimping charges against Davis. ER 71. After interviewing the witness on the eve of trial, the prosecution had transmitted its witness interview notes to the defense at 8:00 p.m. the Sunday night before the bench trial was scheduled to take place.

Expounding further on the allegations pertaining to the then underage sex worker, defense counsel objected that Davis not only denied the allegations related to those offenses, he specifically denied that he knew or had reason to know that the sex worker was a minor. ER 74. Additionally, defense counsel set forth in great detail the evidence garnered during the defense investigation that demonstrated that many of the allegations the underage sex worker made during the course of the investigation and prosecution were demonstrably false or wildly inconsistent from her other statements and those of the other sex workers. ER 74-76, 78.

With regards to one of the sex workers who were of age, defense counsel objected that her statements did not support allegations of use of force, threats of force, or coercion to commit the offense of transporting individuals to engage in prostitution. ER 77. Defense counsel also objected that another sex worker herself stated that the alleged instance of violence did not occur. ER 77.

Sentencing was preceded by a hearing in regards to Davis' pro-per motion to withdraw the guilty plea. ER 19. Davis first affirmed that he wanted to withdraw his guilty plea but opted to proceed to sentencing after consulting with defense counsel. ER 19-22. Thereafter, the district court memorialized for the appellate record that it had been prepared to consider the motion to withdraw but was not inclined to grant it. ER 23. The plea agreement had a Rule 11(c)(1)(C) clause stipulating to a sentencing range between 60 and 84 months (five to seven years). Appendix C-8a. Clause 3(f) provided that Davis would not be permitted to withdraw the guilty plea if the district court did not follow the agreements regarding sentencing. Id. The district judge sentenced Davis to a 78-month or 6-year term of imprisonment. ER 52.

REASONS FOR GRANTING THE PETITION

I

The decision of the appellate court is wrong and in conflict with the decisions of this Court. The right to contest the knowing and voluntary nature of a guilty plea is singularly exempt from sentencing appeal waiver clauses found in modern plea agreements.

On February 12, 2018, Davis pled guilty to Transporting Individuals to Engage in Prostitution, a violation of 18 U.S.C. § 2421(a). On direct review, Davis contended

that his guilty plea was not voluntary and was violative of the Fifth Amendment due to the coercive nature of the plea bargaining process and the severity of the sentence Davis would have faced had he proceeded to trial.

The panel held that the sentencing appeal waiver clause in Davis' plea agreement was enforceable, having found that the language of the waiver encompassed Davis' right to appeal on the grounds at issue on direct review. Appendix A-3a. The panel also held that the record revealed that Davis waived his appellate rights to review knowingly and voluntarily, and that his guilty plea was knowing and voluntary. Id.

The panel decision is in conflict with the decisions of this Court. From the beginning, this Court has required that guilty pleas be voluntary and intelligent to pass constitutional muster:

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice.

Brady, 397 U.S. at 748 (citing *Machibroda v. United States*, 368 U.S. 487 (1962); *Waley v. Johnston*, 316 U.S. 101 (1942); *Walker v. Johnston*, 312 U.S. 275 (1941); *Chambers v. Florida*, 309 U.S. 227 (1940); *Kercheval v. United States*, 274 U.S. 220 (1927)). This Court

also noted that prosecutorial pressure that amounts to mental coercion violates due process:

> Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.

Brady, 397 U.S. at 750.

In *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court observed that fear that deters a defendant from exercising his right to appeal may rise to a constitutional violation:

> [W]e emphasized [in *Pearce*] that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his, first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

417 U.S. at 28 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969)).

The panel decision is also in conflict with Circuit precedent. In *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992), the Ninth Circuit held that an unconditional guilty plea must be knowing and voluntary. The Circuit case underlying dismissal of Davis' claim for relief expressly states, "[i]f the agreement is involuntary or otherwise unenforceable, then the defendant is entitled to appeal." *United States v. Jeronimo*, 398 F.3d 1149, 1154 (9th Cir. 2005).

Plea bargains are presumptively constitutional *if* they are entered into (1) voluntarily and intelligently, *and* (2) with the assistance of counsel. *Parker*, 397 U.S.

at 796; *McMann v. Richardson*, 397 U.S. 759, 772 (1970); *Brady*, 397 U.S. at 757-58. See also Fed. R. Crim. P. 11.

Express reservation of the right to contest voluntariness was not required to permit Davis to litigate voluntariness and plea coercion claims on direct review. Compare, Fed. R. Crim. P. 11(a)(2) (providing for reservation of appellate review of an adverse determination of a specified pretrial motion).

In *Broce*, this Court held that once a judgment of conviction is final, the post-judgment inquiry is limited to determining whether the underlying plea was both counseled and voluntary. *United States v. Broce*, 488 U.S. 563, 569 (1989). In *Class*, this Court held that a guilty plea does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal. *Class v. United States*, 138 S. Ct. 798, 803 (2018). The court of appeals had held that Class had waived his constitutional claims by pleading guilty. *Id*. at 802-03. Class issued on February 21, 2018, nine days after Davis entered a guilty plea on February 12, 2018.

On direct review, the Ninth Circuit has held that an appellant has not waived his claims that his plea was not knowing and voluntary. *Cortez*, 973 F.2d at 768-69. In *Cortez*, the appellant had appealed from a denial to dismiss the indictment for selective prosecution. *Id*. at 766. In *Jeronimo*, the Ninth Circuit concluded that it lacked jurisdiction over the appeal because of the appeal waiver clause in the plea agreement. *Jeronimo*, 398 F.3d at 1157. But the Ninth Circuit also noted that the appellate record before it was not sufficiently constituted for it to make a voluntariness determination. Id.

The appeal waiver clause at issue provides as follows:

> 6. **WAIVER OF DEFENSES AND APPEAL RIGHTS**
> The defendant waives (1) any and all motions, defenses, probable cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under 18 U.S.C. § 3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. This waiver shall not be construed to bar an otherwise-preserved claim of ineffective assistance of counsel or of "prosecutorial misconduct" (as that term is defined by Section II.B of Ariz. Ethics Op. 15-01 (2015)).

Appendix C-11a.

To the extent that the waiver clause is enforceable, it is more appropriately titled a "Sentencing Appeal Waiver," rather than a "Waiver of Defenses and Appeal Rights." In accordance with Department of Justice (DOJ) policy, appeal waiver clauses principally require petitioners to waive appeal on issues related to sentencing. In fact, DOJ's *Criminal Resource Manual* expressly instructs that a sentencing appeal waiver provision does not waive all claims on appeal and that a

number of constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement.[8]

DOJ's resource manual comports with the advisory committee's amendment of Rule 11. In 1999, Rule 11 was amended to reflect the practice of adding a sentencing appeal waiver provision to plea offers. Fed. R. Crim. P. 11(b)(1)(N) Advisory Committee Notes (1999). The advisory committee noted that the use of an appellate waiver clause was being adopted due, in part, to the "increasing number of direct appeals and collateral reviews challenging sentencing decisions." Id.

The power of the prosecution to foreclose the right to appeal is constitutionally limited. First, the Fifth Amendment guarantees to every person that he shall not be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. In the *Brady* trilogy, this Court interpreted this amendment as a constitutional protection that requires guilty pleas to be voluntary and intelligent. *Brady*, 397 U.S. at 748.

Second, this Court has noted that constitutional rights conferred by the Sixth Amendment "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*,

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[8] See U.S. Department of Justice, *Criminal Resource Manual* 601-699, § 626, Plea Agreements and Sentencing Appeal Waivers – Discussion of the Law, available at, https://www.justice.gov/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law (first visited July 2, 2019). Petitioner notes that the webpage has now been annotated to state that § 626 is archived content and the information may be outdated (visited May 15, 2020): https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law

566 U.S. at 170; *accord*, *Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010). A defendant who enters a guilty plea nominally gives up the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. U.S. Const. amend. VI; *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

Third, the exercise of prosecutorial power is circumscribed by due process and both individual and institutional abuses are prohibited. *Hayes*, 434 U.S. at 365;[9] *Perry*, 417 U.S. at 27-28.

Last, the statutory right to appeal exists to ensure that constitutional rights and guarantees are protected. 28 U.S.C. § 1291; James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 SEATTLE U. L. REV. 375, 378-384 (1985); Quin M. Sorenson, *Appeal Rights Waivers: A Constitutionally Dubious Bargain*, The Federal Lawyer, 33, 33 (October/November 2018).

The innovative use of appeal waiver clauses does not strip petitioners of the right to vindicate the denial of basic constitutional rights or other infirmities such as the constitutionality of the statute of conviction. *Class*, 138 S. Ct. at 803-05 (examining *United States v. Broce*, 488 U.S. 563 (1989), *Menna v. New York*, 423 U.S. 61 (1975), *Blackledge v. Perry*, 417 U.S. 21 (1974), *Tollett v. Henderson*, 411 U.S. 258 (1973), *Haynes v. United States*, 390 U.S. 85 (1968)). *See also, Garza v. Idaho*, 139 S. Ct. 738, 742 (2019)

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[9] Hayes had alleged prosecutorial vindictiveness. This Court concluded that the prosecution's decision to indict Hayes as a habitual offender after he refused to plead guilty to the original charge was a legitimate use of available leverage in the plea-bargaining process. *Hayes*, 434 U.S. at 365.

(claims of ineffective assistance of counsel in relation to the negotiation of the plea agreement survive appeal waiver clauses in plea agreements).

The constitutional protections Davis is vindicating on direct review do not fall within any of the categories of claims that the plea agreement's sentencing appeal waiver clause forbids Davis from raising on direct review. Nor could it. *Brady*, 397 U.S. at 748; *Class*, 138 S. Ct. at 805; *Garza*, 139 S. Ct. at 745 ("[A]ll jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary."). Claims of prosecutorial misconduct (or vindictiveness) likewise survive the entry of a guilty plea due to the requirements of due process and fundamental fairness. *Hayes*, 434 U.S. at 365; *Perry*, 417 U.S. at 27-29; *Santobello*, 404 U.S. at 262.[10] Double jeopardy claims also survive entry of a guilty plea. *Pearce*, 395 U. S. at 725.

The sentencing appeal waiver clause in Davis' plea agreement does not categorically foreclose review of Davis' claim of infringement on Fifth Amendment protections. Davis' guilty plea was not voluntary and it was secured in violation of the Fifth Amendment as it resulted from a coercive plea bargaining process.

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[10] See generally, *Town of Newton v. Rumery*, 480 U.S. 386, 401-03 (1987) (O'Connor, J., concurring) (Justice O'Connor's concurrence premised on a requirement that the government would bear the burden of proving that release agreements, wherein petitioners releases the right to file a § 1983 action in return for a prosecutor's dismissal of pending criminal charges, were voluntarily made, not the product of an abuse of the criminal process, not the product of prosecutorial overreaching, and in the public interest.).

Foreclosing appellate review denies Davis fundamental constitutional protections due to defendants after criminal conviction.

II

The petition should be granted because issues related to appeal waiver clauses are important and recur frequently in the criminal legal system.

In an ecosystem where 97.6 percent of federal convictions are resolved by guilty pleas, the questions presented are important and recur frequently. *Class*, *Garza*, *Lee*, *Frye*, *Lafler,* and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), readily demonstrate that the judiciary, the prosecution, and the defense bar reflexively assume that guilty pleas and appeal waiver clauses foreclose review of all claims except select claims of ineffective assistance of counsel and prosecutorial misconduct.

The reflexive assertion of foreclosure of review is not a new phenomenon. Within five years of the Court's issuance of the *Brady* guilty plea trilogy, the prosecution began to chip away at constitutional claims that survive a guilty plea. In *Lefkowitz v. Newsome*, 420 U.S. 283, 288 (1975), the prosecution contended that Newsome was precluded from raising constitutional claims in federal habeas corpus proceedings even though state law permitted a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues. More recently, on May 12, 2020, United States District Judge Charles R. Breyer rejected a plea agreement after taking issue with provisions that attempted to restrict the ability of a

defendant to pursue—or the judiciary to grant—compassionate release as statutorily provided by 18 U.S.C. § 3582(c).[11]

As originally envisioned, defendants, the judiciary, the prosecution, and the public would benefit from plea bargaining:

> The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

Allison, 431 U.S. at 71. *See also Santobello*, 404 U.S. at 261; *Brady*, 397 U.S. at 751-52.

The benefit to all has not materialized where 1,465,200 persons were imprisoned in 2018.[12] The number of persons imprisoned nationally in 1970 was 196,429.[13] DOJ's Fiscal Year 2019 budget was $38,961,259[14] and the agency employed

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[11] *United States v. Funez Osorto*, No. 19-cr-00381-CRB-4 (ND Cal. May 12, 2020), available at: https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/Funez-Osorto/US_v_Funez_Osorto_Order_Rejecting_Plea_Agreement_5-11-2020.pdf

[12] *Prisoners in 2018*, available at: https://www.bjs.gov/content/pub/pdf/p18.pdf
Cf, Vera Institute of Justice, *People in Prison in 2019* (May 2020) (estimating that there were an estimated 1,435,500 people in state and federal prisons at the end of 2019), available at: https://www.vera.org/publications/people-in-prison-in-2019

[13] *Prisoners 1925 – 81*, available at: https://www.bjs.gov/content/pub/pdf/p2581.pdf

[14] U.S. Department of Justice, FY 2019 Agency Financial Report, Section I: Management's Discussion and Analysis, *Table 1. Sources of DOJ Resources*, § I-7 (Nov. 2019), available at: https://www.justice.gov/doj/page/file/1218576/download

10,496 attorneys,[15] and 35,000 staff at the Bureau of Prisons (BOP)[16] to imprison approximately 180,000 people. From Fiscal Year 2015 through July 2019, BOP has experienced 46 inmate deaths by homicide and 107 inmate deaths by suicide, including the deaths of high-profile inmates, James "Whitey" Bulger and Jeffrey Epstein.[17] The number of inmates who have contracted and died from the respiratory illness occasioned by COVID-19 while in BOP custody stands at 64 on May 26, 2020.[18] The first person to die from COVID-19 in federal custody was Patrick Estell Jones. The prosecution opposed Jones' application for a sentence reduction under the

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[15] U.S. Department of Justice, *Discretionary Budget Authority, FY 2019 Budget Request at a Glance*, available at:
https://www.justice.gov/jmd/page/file/1033086/download;
U.S. Department of Justice, *Discretionary Budget Authority, FY 2018 Budget Request at a Glance*, available at:
https://www.justice.gov/jmd/page/file/968216/download;
U.S. Department of Justice, General Legal Activities, *Criminal Division* (*CRM*) *FY 2018 Budget Request at a Glance*, available at:
https://www.justice.gov/jmd/page/file/968361/download; and
U.S. Department of Justice, *U.S. Attorneys (USA) FY 2018 Budget Request At A Glance*, available at:
https://www.justice.gov/jmd/page/file/968226/download

[16] *Managing a Safe, Secure, and Humane Prison System*, at § III-5, Page 148.

[17] Id. at § III-6, Page 148.

[18] U.S. Department of Justice, Federal Bureau of Prisons, *COVID-19 Resource Page*, available at:
https://www.bop.gov/coronavirus/

First Step Act and it was later denied by the judge.[19] Jones, 49, died on March 28, 2020.[20]

In addition to imprisonment, the jail population is comprised of 738,400 persons nationally.[21] Tabulations compiled by civil society, Prison Policy Initiative, places the number of persons under confinement at closer to 2.3 million people. Those numbers take into consideration people confined in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, 80 Indian Country jails, as well as those confined in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.[22]

In addition to confinement, DOJ statisticians estimated that 6,613,500 persons are under correctional supervision in the United States as of December 31, 2016.[23]

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[19] *United States v. Jones*, No. 6:07-cr-00022-ADA (W.D. Tex. Nov. 1, 2019), ECF No. 182.

[20] U.S. Department of Justice, Federal Bureau of Prisons, Press Release, *Inmate Death at FCI Oakdale I* (March 28, 2020), available at: https://www.bop.gov/resources/news/pdfs/20200328_press_release_oak_death.pdf

[21] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Jail Inmates in 2018*, NCJ 253044 (March 2020), available at: https://www.bjs.gov/content/pub/pdf/ji18.pdf

[22] Prison Policy Initiative Reports, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020* (HTML publication, March 24, 2020), available at: https://www.prisonpolicy.org/reports/pie2020.html

[23] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Correctional Populations in the United States, 2016*, NCJ 251211 (released Apr. 2018), available at: https://www.bjs.gov/content/pub/pdf/cpus16.pdf

When this Court legitimized plea bargaining, it noted that the criminal justice system did not operate in an ideal world. *Allison*, 431 U.S. at 71. This Court observed that the prosecution was under-resourced:

> If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello, 404 U.S. at 260.

The operating budget of DOJ is now 38 billion dollars. In *Greenlaw v. United States*, 554 U.S. 237, 244 (2008), this Court remarked that counsel for the United States constituted "the richest, most powerful, and best represented litigant" to appear before the Court.

Despite the vast resources at the disposal of the prosecution, the benefit to all has not materialized. The number of individuals DOJ imprisons has skyrocketed since the 1970s. During the COVID-19 crisis, DOJ did not have a coordinated response to combat contagious disease and, to date, 64 individuals have died of the respiratory disease while in BOP custody.[24] This is a 42 percent increase in the number of people who died from both homicide and suicide in the previous four years. Yet, the prosecution has steadfastly opposed the release of persons at risk of death from the respiratory disease. Incongruously, a federal prosecutor revised the waiver clause during the COVID-19 pandemic to restrict the ability of a defendant to

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[24] Commencing with a March 26, 2020, directive from Attorney General William P. Barr, BOP began releasing individuals to home confinement. As of May 26, 2020, BOP has transferred 3,183 inmates to home confinement including high profile inmates Paul Manafort, Michael Cohen, and Michael Avenatti.

pursue—or the judiciary to grant—compassionate release as the pathogen ravaged the Nation.

Judge Breyer reviewed DOJ statistics that documented that for two and a half decades, BOP hardly granted compassionate release and, when it did, compassionate release was granted to an average of twenty-four individuals a year during the fiscal years spanning from 2006 to 2011. *Funez Osorto*, No. 19-cr-00381-CRB-4, Doc. 210 at 6. Furthermore, "[b]etween 2006 and 2011, twenty-eight defendants whose compassionate release requests had been approved by the Warden and Regional Director died waiting for the BOP Director to act." *Id*. at 7.

It is clear from the five opinions of the Court in *Ramos v. Louisiana*, No. 18–5924, slip op. (U.S. Apr. 20, 2020), that this Court does not overturn precedent lightly. However, enforcing constitutional limits to prevent the institutional abuse of prosecutorial power would not constitute renunciation of doctrines previously announced in this Court's opinions. *Compare Ramos*, slip op. at 19. Plea bargaining does not fall in the "isolated relic of an abandoned doctrine" as Professor Jeffrey Fisher argued on behalf of Evangelisto Ramos. Davis' petition should be granted because plea agreements drive the criminal legal system and mandatory minimum sentencing provisions are institutionally abused. When the Court legitimized plea bargaining, it eroded the legitimacy of the criminal justice system and created a draconian world. Foreclosing judicial oversight through an appellate waiver clause infringes on fundamental guarantees of due process, undermines congressional intent, and interferes with the function of the judiciary.

III

The federal plea bargaining scheme violates constitutional limits because the tactics the prosecution employs to secure guilty pleas are impermissibly coercive.

This Court introduced the term "plea bargaining" to the legal lexicon in 1971. *Santobello*, 404 U.S. at 260. In recent years, civil society and stakeholders have coined the term "plea coercion" to encapsulate prosecutorial conduct that coerces defendants into waiving constitutional and statutory rights. However, from the very beginning, prosecutorial conduct rising to plea coercion was of concern to this Court:

> Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.

Brady, 397 U.S. at 750. Concurring in *Santobello*, Justice Douglas noted that plea bargaining is not per se unconstitutional but a guilty plea is rendered voidable by threatening physical harm, threatening to use false testimony, threatening to bring additional prosecutions, or by failing to inform a defendant of his right of counsel. *Santobello*, 404 U.S. at 265-66 (Douglas, J, concurring).

The Innocence Project filed a brief in support of the appellant in *Class* in 2017, and submitted empirical research that demonstrated that defendants plead guilty to receive shorter sentences even when they may not be guilty. *See, Brief of the Innocence Project as Amicus Curiae in Support of Petitioner*, No. 16-424 at 6 (May 19, 2017) *Class v. United States*, 138 S. Ct. 798 (2018) ("*Innocence Project Brief*"). Prosecutors induce pleas by offerings defendants opportunities to plead guilty to reduced charges and accept the certainty of some—but less—time in prison or risk a trial on more serious charges

and receive a longer sentence, often significantly longer sentences if convicted. *Innocence Project Brief,* at 7.

Federal prosecutors use the practice of "stacking" charges which results in sentencing disparities so large that defendants cannot accurately weigh their options and do not exercise their right to trial—even with a strong defense. *Innocence Project Brief,* at 8 (citing Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 109 (2005)). Excessive charging plays a role in convincing defendants to give up the right to a trial and the possibility of acquittal even when the state's evidence is weak. *Innocence Project Brief,* at 8. The charging memorandum issued by Attorney General Jeff Sessions on May 10, 2017 directs prosecutors to charge and pursue the most serious, readily provable offense. *Innocence Project Brief*, at 7 (citing *Memorandum from Att'y Gen. Jefferson B. Sessions to All Federal Prosecutors* (May 10, 2017) https://www.justice.gov/opa/press-release/file/965896/download); see also, Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010). The Innocence Project substantiated its assertions by citing government-generated statistics documenting that 97.3 percent of federal convictions in Fiscal Year 2016 were resolved by guilty pleas. *Innocence Project Brief*, at 4 (citing U.S. Sentencing Comm'n, 2016, Sourcebook of Federal Sentencing Statistics).

In the amici curiae brief filed by the National Association of Criminal Defense Lawyers (NACDL) and the American Civil Liberties Union (ACLU) in support of Appellant Class, the parties likewise demonstrated that plea bargaining does not take

place on a level playing field and defendants plead guilty at high rates because of broad criminal statutes and severe mandatory sentences that give prosecutors enormous leverage. *Brief of the National Association of Criminal Defense Lawyers and the American Civil Liberties Union as Amici Curiae in Support of Petitioner*, No. 16-424 at 7-8 (May 19, 2017) *Class v. United States*, 138 S. Ct. 798 (2018).

To bring attention to what it referred to as an "assembly line system of justice," the NACDL collaborated with numerous members of civil society to examine the forces driving mass incarceration. The title *Trial Penalty Report*,[25] encapsulates the substantial difference between the sentence offered prior to trial and the sentence a defendant receives after trial. Some of the barriers to exercising the right to trial included prosecutors with unbridled discretion, the formulaic calculations of Federal Sentencing Guidelines, sentencing discretion constrained by mandatory minimum statutory penalties, and the judiciary's reticence to deviate from Guidelines calculations.[26]

Interest in the *Trial Penalty Report* led to a special double issue of the *Federal Sentencing Reporter* on the trial penalty. In the publication, the exonerated provided first-hand accounts of how the threat of the trial penalty coerces the innocent to plead

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[25] National Association of Criminal Defense Attorneys Report, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 2018), available at: https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf

[26] *Trial Penalty Report*, at 24-57.

guilty.[27] Other authors explored the historical and international perspective on plea bargaining. Id. Causation, impact, and potential cures of the problem were also considered along with how the trial penalty perpetuates racial disparity in the criminal justice system. Id.

This case offers a classic example of the prosecution's charging and plea offer scheme: in a second superseding indictment, the prosecution charged Davis with six counts relating to facilitating prostitution across state lines: (1) Conspiracy to Commit Sex Trafficking by Force, Fraud, or Coercion, a violation of 18 U.S.C. § 1594(c), Class A Felony, punishable by any term of years up to life and $250,000 fine; (2) Sex Trafficking of Minor Sex Worker Jane Doe, a violation of 18 U.S.C. § 1591(a), (b)(1) - (2), Class A Felony, punishable by imprisonment for a minimum of 10 years up to life and $250,000 fine; (3) Sex Trafficking of Sex Worker One, by Force, Fraud or Coercion, a violation of 18 U.S.C. § 1591(a), Class A Felony, imprisonment for a minimum of 10 years up to life and $250,000 fine; (4) Sex Trafficking of Sex Worker Two, by Force, Fraud or Coercion, a violation of 18 U.S.C. § 1591(a), Class A Felony, punishable by imprisonment for a minimum of 10 years up to life and $250,000 fine; (5) Transporting Minor Sex Worker Jane Doe. to Engage in Prostitution, a violation of 18 U.S.C. § 2423(a) and (e), a Class A Felony, punishable by imprisonment by not less than 10 years or for life and $250,000 fine; and (6) Transporting Individuals (Sex Worker One and Sex Worker Two) to Engage in Prostitution, a violation of 18 U.S.C.

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[27] *Federal Sentencing Reporter*, Vol. 31, Issue No. 4-5, pp. 215–368, 221, ISSN 1053-9867, electronic ISSN 1533-8363 (April / June 2019).

§ 2421(a), Class C Felony, punishable by not more than 10 years imprisonment and $250,000 fine. ER 286-93.

Pre-indictment, the prosecution had offered Davis a plea to one count of transporting a minor to engage in prostitution. ER 267-68. The stipulations were that Davis' sentence would be capped at the low end of the advisory Guidelines range and he would agree to enhancements for undue influence under Section 2G1.3(b)(2)(B), use of a computer under Section 2G1.3(b)(3)(B), and commercial sexual activity under Section 2G1.3(b)(4)(B). Id. The plea offer tendered shortly before a trial was scheduled to commence was for the offense of transporting individuals for prostitution—an offense punishable by not more than ten years of imprisonment. Appendix C.

The prosecution did not dead forthrightly with Davis. The prosecution charged Davis with multiple stackable offenses subject to numerous enhancements. The prosecution tendered five plea offers to Davis: one pre-indictment and tendered while Davis was incarcerated in California, the last shortly before the bench trial was scheduled to begin and the prosecution's case compromised. The indictment set forth conduct occurring in other jurisdictions yet the plea agreement did not bind any other United States Attorney's Office from bringing additional charges. ER 289-90; Clause 4(a)(b) Appendix C-10a.

This is not a case where a defendant made a voluntary and intelligent choice amongst the alternatives available to him. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970). This case reflects the tremendous pressures placed on defendants to accept

plea offers despite innocence or assessment of viable defenses to the charges. The inequality between prosecutors and defense attorneys is demonstrated here as well: defense attorneys often pressure their clients to accept plea offers to spare them from unnecessarily long prison terms, despite the weakness of the prosecution's case.

The determinative issue here did not turn on factual guilt or the strength of the evidence but on considerations of receiving a less severe sentence and mitigating collateral consequences. Davis' guilty plea was extracted by a coercive, and as he categorized it, a "shot-clock," plea bargaining process violative of the constitutional protections and the procedural safeguards due Davis under the statutory right to appeal from a judgment. U.S. Const. amend. V; 28 U.S.C. § 1291.

The Court's precedent on this issue has proven unworkable for society at large and there has been a changed understanding of relevant facts—key factors this Court considers when reconsidering precedent. The tactics the prosecution employs to secure guilty pleas are impermissibly coercive and the federal plea bargaining scheme violates constitutional limits.

CONCLUSION

The prosecution has used a procedural vehicle with a murky provenance to reshape the criminal justice system, undermine congressional intent, foreclose judicial review, and suborn waivers of constitutional rights from 97.6 percent of the people it has prosecuted. However, the Fifth Amendment was enshrined in the Bill of Rights in 1791 to constrain prosecutorial powers. In relevant part, the prosecution

may not compel a person to be a witness against himself nor may the prosecution deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. V. These proscriptions restraining the prosecution are bolstered by constitutional protections due to the people in toto under the Bill of Rights. Life and Liberty are two of three unalienable rights enshrined in the Declaration of Independence. In this Court's 230-year history, it has never expressly invalidated a constitutional protection conferred by the Bill of Rights. Nor has this Court countenanced deprival of life, liberty, or property without due process of law. For the above reasons, Davis requests that this Court grant the Petition for a Writ of Certiorari. The federal plea bargaining scheme is impermissible coercive, and the sentencing appeal waiver clause in Davis' plea agreement does not bar Davis from contending that his guilty plea was coerced and was not intelligent and voluntary.

Respectfully submitted,
for Jonathan Frank Davis
Petitioner

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May 26, 2020

APPENDICES

APPENDIX A

[FILED]
[NOV 15 2019]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 18-10236
Plaintiff-Appellee,	D.C. No.
v.	2:17-cr-00841-DGC-1
JONATHAN FRANK DAVIS, AKA Johnny Stax,	MEMORANDUM*
Defendant-Appellant.	

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Submitted November 12, 2019**
San Francisco, California

Before: BEA and LEE, Circuit Judges, and PIERSOL,*** District Judge

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

***The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

Appellant Jonathan Davis appeals from the district court's judgment and challenges conditions of supervised release imposed following his guilty plea conviction for transporting individuals to engage in prostitution in violation of 18 U.S.C. § 2421. We dismiss.

Davis argues that the "coercive plea bargaining process" and possibility of receiving a severe sentence if he proceeded to trial rendered his guilty plea involuntary. Davis also contends that the district court erred in imposing conditions of supervised release requiring him to participate in substance abuse treatment and a domestic violence program, prohibiting him from using or possessing alcohol or controlled substances, including marijuana, and allowing a probation officer to require that Davis contact a person if the probation officer determines that Davis poses a risk to that person. The government contends that this appeal is barred by a valid appeal waiver.

We review de novo whether a guilty plea was voluntary, *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010), and whether a defendant has waived his appellate rights pursuant to a plea agreement, *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010). Because Davis did not object to the challenged supervised release conditions in the district court, this court reviews the district court's sentence, including the supervised release conditions, for plain error. *United States v. Cope*, 527 F.3d 944, 957 (9th Cir. 2008).

"A defendant's waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made." *United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011) (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005)). The terms of the appeal waiver in Davis's plea agreement unambiguously encompass this appeal. The record also reflects that Davis waived his appellate rights knowingly and voluntarily, *see United States v. Watson*, 582 F.3d 974, 986-87 (9th Cir. 2009), and that his guilty plea was knowing and voluntary, *United States v. Kaczynski*, 239 F.3d 1108, 1114-15 (9th Cir. 2001). Thus, the appeal waiver in Davis's plea agreement is enforceable.

Ordinarily, the appeal waiver would also bar Davis's challenge to conditions of his supervised release. Davis, however, invokes the exception that "[a]n appeal waiver will not apply if . . . the sentence violates the law." *United States v. Bibler*, 495 F.3d 621, 624(9th Cir. 2007). "A sentence is illegal if it exceeds the

permissible statutory penalty for the crime or violates the Constitution." *Id*. The court reviews de novo "[w]hether a supervised release condition illegally exceeds the permissible statutory penalty or violates the Constitution." *Watson*, 582 F.3d at 981. The court looks to the substantive requirements of the statute governing supervised release conditions—here, 18 U.S.C. § 3583(d)—to determine whether a condition exceeds the permissible statutory penalty. *See United States v. Mendez-Gonzalez*, 697 F.3d 1101, 1103-04 (9th Cir. 2012); *Watson*, 582 F.3d at 982-84, 987.

We reject Davis's argument that Mandatory Conditions 2 and 3, which prohibit the use and possession of controlled substances including marijuana, are illegal because a sentencing court is statutorily mandated to impose these conditions, *see* 18 U.S.C. § 3583(d), and these conditions are not unconstitutional. Special Condition 1, requiring Davis to attend substance abuse treatment, Special Condition 6, requiring Davis to participate in a domestic violence program, and Special Condition 9, prohibiting Davis from using or possessing alcohol, are also constitutional because they are reasonably related to Davis's criminal history, the goals of deterrence, protecting the public, rehabilitation, and involve no greater deprivation of liberty than reasonably necessary. *See* 18 U.S.C. § 3583(d)(1), (2); *see also Watson*, 582 F.3d at 983.

Finally, we reject Davis's argument that Standard Condition 12, which allows a probation officer to require that Davis contact a person if the probation officer determines that Davis poses a risk to that person, is unconstitutionally vague. We previously discussed Standard Condition 12 with implicit approval. *See United States v. Evans*, 883 F.3d 1154, 1164 (9th Cir. 2018). Any error in imposing this condition therefore was not plain error because what error is now claimed was not clear or obvious. *United States v. De La Fuente*, 353 F.3d 766, 769 (9th Cir. 2003).

Because the challenged conditions of supervised release are not "illegal," the appeal waiver in his plea agreement applies.

DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed January 2, 2020]

UNITED STATES OF AMERICA	No. 18-10236
Plaintiff-Appellee,	D.C. No. 2:17-cr-00841-DGC-1
v.	District of Arizona, Phoenix
JONATHAN FRANK DAVIS, AKA Johnny Stax,	ORDER
Defendant-Appellant.	

Before: BEA and LEE, Circuit Judges, and PIERSOL,* District Judge.

Judge Lee voted to deny the petition for rehearing en banc, and Judge Bea and Judge Piersol so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

* The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jonathan Frank Davis, Defendant.	CR17-841-01-PHX-DGC **PLEA AGREEMENT**

Plaintiff, United States of America, and the defendant, Jonathan Frank Davis, hereby agree to dispose of this matter on the following terms and conditions:

1. **PLEA**

The defendant will plead guilty to Count Six of the second superseding indictment charging the defendant with a violation of Title 18, United States Code (U.S.C.) § 2421, Transporting Individuals to Engage in Prostitution, a Class C felony offense.

2. **MAXIMUM PENALTIES**

a A violation of 18 U.S.C. § 2421 is punishable by a maximum fine of $250,000, a maximum term of imprisonment of 10 years, or both, and a term of supervised release of five years up to life. A maximum term of probation is five years.

b. According to the Sentencing Guidelines issued pursuant to the Sentencing Reform Act of 1984, the Court shall order the defendant to:

(1) make restitution to any victim of the offense pursuant to 18 U.S.C.§ 3663 and/or 3663A, unless the Court determines that restitution would not be appropriate;

(2) pay a fine pursuant to 18 U.S.C. § 3572, unless the Court finds that a fine is not appropriate;

(3) serve a term of supervised release when required by statute or when a sentence of imprisonment of more than one year is imposed (with the understanding that the Court may impose a term of supervised release in all other cases); and

(4) pay upon conviction a $100 special assessment for each count to which the defendant pleads guilty pursuant to 18 U.S.C. § 3013; and

(5) pay upon conviction an additional $5,000 special assessment pursuant to 18 U.S.C. § 3014(a), unless the Court determines that the defendant is indigent.

c. The Court is required to consider the Sentencing Guidelines in determining the defendant's sentence. However, the Sentencing Guidelines are advisory, and the Court is free to exercise its discretion to impose any reasonable sentence up to the maximum set by statute for the crime(s) of conviction, unless there are stipulations to the contrary that the Court accepts.

3. **AGREEMENTS REGARDING SENTENCING**

a. Recommendation: Acceptance of Responsibility. If the defendant makes full and complete disclosure to the U.S. Probation Office of the circumstances surrounding the defendant's commission of the offense, and if the defendant demonstrates an acceptance of responsibility for this offense up to and including the time of sentencing, the United States will recommend a two-level reduction in the applicable Sentencing Guidelines offense level pursuant to U.S.S.G. § 3E1.1(a). If the defendant has an offense level of 16 or more, the United States will move an additional one-level reduction in the applicable Sentencing Guidelines offense level pursuant to U.S.S.G. § 3E1.1(b).

b. Non-Binding Recommendations. The defendant understands that recommendations are not binding on the Court. The defendant further understands that the

defendant will not be permitted to withdraw the guilty plea if the Court does not follow a recommendation.

c. Stipulation: Sentencing Cap. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant stipulate that the defendant shall be sentenced to a term of imprisonment between 60 and 84 months (five to seven years).

d. Stipulation: Supervised Release. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant stipulate that the defendant shall be placed on supervised release for a period of five years.

e. Assets and Financial Responsibility. The defendant shall make a full accounting of all assets in which the defendant has any legal or equitable interest.

The defendant shall not (and shall not aid or abet any other party to) sell, hide, waste, spend, or transfer any such assets or property before sentencing, without the prior approval of the United States (provided, however, that no prior approval will be required for routine, day-to-day expenditures). The defendant also expressly authorizes the United States Attorney's Office to immediately obtain a credit report as to the defendant in order to evaluate the defendant's ability to satisfy any financial obligation imposed by the Court. The defendant also shall make full disclosure of all current and projected assets to the U.S. Probation Office immediately and prior to the termination of the defendant's supervised release or probation, such disclosures to be shared with the U.S. Attorney's Office, including the Financial Litigation Unit, for any purpose. Finally, the defendant shall pa1iicipate in the Inmate Financial Responsibility Program to fulfill all financial obligations due and owing under this agreement and the law.

f. Non-Binding Recommendations. The defendant understands that recommendations are not binding on the Court. The defendant further understands that the defendant will not be permitted to withdraw the guilty plea if the Court does not follow a recommendation.

g. Restitution. Pursuant to 18 U.S.C. § 3663 and/or 3663A, the defendant specifically agrees to pay full restitution, regardless of the resulting loss amount but in no event

more than $100,000, per victim. "Victims" include persons or entities directly or proximately harmed by defendant's "relevant conduct" including conduct pertaining to any dismissed counts or uncharged conduct, as defined by U.S.S.G. §lBl.3, regardless of whether such conduct constitutes an "offense" under 18 U.S.C. §§ 2259, 3663, 3663(A) or 2248. Even if the victims did not suffer physical injury, the defendant expressly agrees to pay restitution for expenditures and future expenses related to treatment for mental or emotional trauma suffered by the victims. Such expenditures shall include, but are not limited to: mental health treatment and

counseling. The defendant understands that such restitution will be included in the Court's Order of Judgment and that an unanticipated restitution amount will not serve as grounds to withdraw the defendant's guilty plea or to withdraw from this plea agreement.

4 **AGREEMENT TO DISMISS OR NOT TO PROSECUTE**

a. Pursuant to Fed. R. Crim. P. 11(c)(1)(A), the United States, at the time of sentencing, shall dismiss the following charges: The remaining counts in the second superseding indictment. The United States also agrees not to prosecute the defendant for any other offenses committed by the defendant, and known by the United States, as contained in the discovery in this matter.

b. This agreement does not, in any manner, restrict the actions of the United States in any other district or bind any other United States Attorney's Office.

5. **COURT APPROVAL REQUIRED; REINSTITUTION OF PROSECUTION**

a. If the Court, after reviewing this plea agreement, concludes that any provision contained herein is inappropriate, it may reject the plea agreement and give the defendant the opportunity to withdraw the guilty plea in accordance with Fed. R. Crim. P.1 1(c)(5).

b. If the defendant's guilty plea or plea agreement is rejected, withdrawn, vacated, or reversed at any time, this agreement shall be null and void, the United States shall be free to prosecute the defendant for all crimes of which it then has knowledge and any charges that have been dismissed because of this plea agreement shall automatically

be reinstated. In such event, the defendant waives any and all objections, motions, and defenses based upon the Statute of Limitations, the Speedy Trial Act, or constitutional restrictions in bringing later charges or proceedings. The defendant understands that any statements made at the time of the defendant's change of plea or sentencing may be used against the defendant in any subsequent hearing, trial, or proceeding subject to the limitations of Fed. R. Evid. 410.

6. **WAIVER OF DEFENSES AND APPEAL RIGHTS**

The defendant waives (1) any and all motions, defenses, probable cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under 18 U.S.C. § 3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. This waiver shall not be construed to bar an otherwise-preserved claim of ineffective assistance of counsel or of "prosecutorial misconduct" (as that term is defined by Section 11.B of Ariz. Ethics Op. 15-01 (2015)).

7. **DISCLOSURE OF INFORMATION**

a. The United States retains the unrestricted right to provide information and make any and all statements it deems appropriate to the U.S. Probation Office and to the Court in connection with the case.

b. Any information, statements, documents, and evidence that the defendant provides to the United States pursuant to this agreement may be used against the defendant at any time.

c. The defendant shall cooperate fully with the U.S. Probation Office. Such cooperation shall include providing complete and truthful responses to questions posed by the U.S. Probation Office including, but not limited to, questions relating to:

(1) criminal convictions, history of drug abuse, and mental illness; and

(2) financial information, including present financial assets or liabilities that relate to the ability of the defendant to pay a fine or restitution.

8. **FORFEITURE, CIVIL, AND ADMINISTRATIVE PROCEEDINGS**

a. Nothing in this agreement shall be construed to protect the defendant from administrative or civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Pursuant to 18 U.S.C. § 3613, all monetary penalties, including restitution imposed by the Court, shall be due immediately upon judgment, shall be subject to immediate enforcement by the United States, and shall be submitted to the Treasury Offset Program so that any federal payment or transfer of returned property the defendant receives may be offset and applied to federal debts (which offset will not affect the periodic payment schedule). If the Court imposes a schedule of payments, the schedule of payments shall be merely a schedule of minimum payments and shall not be a limitation on the methods available to the United States to enforce the judgment.

9. **ELEMENTS**

Transporting Individuals to Engage in Prostitution

18 U.S.C. § 2421

On or between November 20, 2014, and November 23, 2014, in the District of Arizona and elsewhere:

1. The defendant knowingly transport [added: ed plus attorney initials] individuals in interstate commerce;

2. The defendant transported these people with the intent that such individuals engage in prostitution; and

3. The defendant did something that was a substantial step toward committing the crime.

10. **FACTUAL BASIS**

a. The defendant admits that the following facts are true and that if this matter were to proceed to trial the United States could prove the following facts beyond a reasonable doubt:

On or between November 20, 2014, and November 23, 2014, I, Jonathan Frank Davis, knowingly transported B.H. and R.W., in interstate commerce. Specifically, I transported B.H. and R.W. by vehicle from California to Arizona, with the intent that B.H. and R.W. engage in prostitution.

b. The defendant shall swear under oath to the accuracy of this statement and, if the defendant should be called upon to testify about this matter in the future, any intentional material inconsistencies in the defendant's testimony may subject the defendant to additional penalties for perjury or false swearing, which may be enforced by the United States under this agreement.

APPROVAL AND ACCEPTANCE OF THE DEFENDANT

I have read the entire plea agreement with the assistance of my attorney. I understand each of its provisions and I voluntarily agree to it.

I have discussed the case and my constitutional and other rights with my attorney. I understand that by entering my plea of guilty I shall waive my rights to plead not guilty, to trial by jury, to confront, cross-examine, and compel the attendance of witnesses, to present evidence in my defense, to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination, all with the assistance of counsel, and to be presumed innocent until proven guilty beyond a reasonable doubt.

I agree to enter my guilty plea as indicated above on the terms and conditions set forth in this agreement.

I have been advised by my attorney of the nature of the charges to which I am entering my guilty plea. I have further been advised by my attorney of the nature and range of the possible sentence and that my ultimate sentence shall be determined by the Court after consideration of the advisory Sentencing Guidelines.

[Original document initialed by attorneys and paragraph stricken] ~~I have been advised, and understand, that under the Sex Offender Registration and Notification Act, as a federal law, I must register and keep the registration current in each of the following jurisdictions: where I reside; where I am an employee; and where I am a student. I understand that the requirements for registration include providing my name, my residence address, and the names and addresses of any places where I am or will be an employee or a student, among other information. I further understand that the requirement to keep the registration current includes informing at least one jurisdiction in which I reside, am an employee, or am a student not later than three business days after any change of my name, residence, employment, or student status. I have been advised, and understand, that failure to comply with these obligations subjects me to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment or both~~.

My guilty plea is not the result of force, threats, assurances, or promises, other than the promises contained in this agreement. I voluntarily agree to the provisions of this agreement and I agree to be bound according to its provisions.

I understand that if I am granted probation or placed on supervised release by the Court, the terms and conditions of such probation/supervised release are subject to modification at any time. I further understand that if I violate any of the conditions of my probation/supervised release, my probation/supervised release may be revoked and upon such revocation, notwithstanding any other provision of this agreement, I may be required to serve a term of imprisonment or my sentence otherwise may be altered.

This written plea agreement, and any written addenda filed as attachments to this plea agreement, contain all the terms and conditions of the plea. Any additional agreements, if any such agreements exist, shall be recorded in a separate

document and may be filed with the Court under seal; accordingly, additional agreements, if any, may not be in the public record.

I further agree that promises, including any predictions as to the Sentencing Guideline range or to any Sentencing Guideline factors that will apply, made by anyone

(including my attorney) that are not contained within this written plea agreement, are null and void and have no force and effect.

I am satisfied that my defense attorney has represented me in a competent manner.

I fully understand the terms and conditions of this plea agreement. I am not now using or under the influence of any drug, medication, liquor, or other intoxicant or depressant that would impair my ability to fully understand the terms and conditions of this plea agreement.

2/12/18	/s/Jonathan Frank Davis
Date	JONATHAN FRANK DAVIS
	Defendant

APPROVAL OF DEFENSE COUNSEL

I have discussed this case and the plea agreement with my client in detail and have advised the defendant of all matters within the scope of Fed. R. Crim. P. 11, the constitutional and other rights of an accused, the factual basis for and the nature of the offense to which the guilty plea will be entered, possible defenses, and the consequences of the guilty plea including the maximum statutory sentence possible. I have further discussed the concept of the advisory Sentencing Guidelines with the defendant. No assurances, promises, or representations have been given to me or to the defendant by the United States or any of its representatives that are not contained in this written agreement. I concur in the entry of the plea as indicated

above and that the terms and conditions set forth in this agreement are in the best interests of my client. I agree to make a bona fide effort to ensure that the guilty plea is entered in accordance with all the requirements of Fed. R. Crim. P. 11.

2/12/18
Date

/s/Susan Anderson
SUSAN ANDERSON
MARIA WEIDNER
Attorneys for Defendant

APPROVAL OF THE UNITED STATES

I have reviewed this matter and the plea agreement. I agree on behalf of the United States that the terms and conditions set forth herein are appropriate and are in the best interests of justice.

ELIZABETH A. STRANGE
First Assistant United States Attorney
District of Arizona

2/12/18
Date

/s/Margaret Perlmeter
MARGARET PERLMETER
ROBERT BROOKS
Assistant U.S. Attorneys

ACCEPTANCE BY THE COURT

_____
Date

_____
Honorable David G. Campbell
United States District Judge