

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

MICHAEL JAMES BARNES
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60497

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the district court and the Fifth Circuit Court of Appeals erred by finding that the post-conviction waiver in Mr. Barnes' Plea Agreement bars him from the relief sought in his *Johnson*-related § 2255 Petition.

PARTIES TO THE PROCEEDING

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

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I. OPINIONS BELOW

The United States District Court for the Southern District of Mississippi entered a Judgment of Conviction against Petitioner Michael Barnes on October 9, 2013. The conviction was for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The court enhanced his sentence under the provisions of 18 U.S.C. § 924(e), the Armed Career Criminal Act (hereinafter “ACCA”). The district court case number is 3:13cr38-DCB. The subject § 2255 Petition arose out of the sentence ordered for the felon in possession conviction.

In 2015, after Mr. Barnes’ conviction and sentence, this Court ruled that the “residual clause” portion of the “violent felony” definition in the ACCA is unconstitutional. *See Johnson v. United States*, 135 S.Ct. 2551 (2015). Invoking the holdings in *Johnson*, Mr. Barnes filed the subject § 2255 Petition to Vacate Sentence on September 21, 2015. In the Petition, Mr. Barnes argued that he should be resentenced without applying the ACCA’s sentence enhancement provisions.

The district court entered an Order denying the relief sought in the § 2255 Petition on July 6, 2018.¹ Mr. Barnes appealed the case to the United States Court of Appeals for the Fifth Circuit on July 9, 2018. The Fifth Circuit case number is 18-60497. The Fifth Circuit entered an Opinion affirming the district court’s

¹ The district court’s Order is attached hereto as Appendix 1.

rulings on March 23, 2020. It entered a Final Judgment on the same day.² The Opinion is reported at 953 F.3d 383.³

² The Fifth Circuit's Order and its Judgment are attached hereto as composite Appendix 2.

³ The reported rendition of the Opinion is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on March 23, 2020. This Petition for Writ of Certiorari is filed within 150 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules, which was amended by this Court's Covid-19 related Order dated March 19, 2020. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

While no provisions of the Constitution are directly associated with the subject issue, the issue is nevertheless very important. Binding a defendant to a plea agreement that waives rights that do not exist at the time the agreement is signed is patently unfair and unjust.

IV. STATEMENT OF THE CASE

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

This case arises out of a Petition filed under 28 U.S.C. § 2255, in which Mr. Barnes sought to be resentenced without applying the ACCA's sentencing provisions. The § 2255 Petition concerns an underlying conviction and sentence filed in the United States District Court for the Southern District of Mississippi for a felon in possession of a firearm. The Southern District of Mississippi had jurisdiction over the case under 18 U.S.C. § 3231 because the felon in possession conviction arose from the laws of the United States of America.

B. Statement of material facts.

A Federal Grand Jury for the Southern District of Mississippi indicted Mr. Barnes for felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The Grand Jury returned the Indictment on April 16, 2013.

Mr. Barnes accepted responsibility for his actions by pleading guilty to the charge on July 9, 2013. The plea was under a Plea Agreement containing a "Waivers" paragraph that stated in part:

16. Waivers. Defendant ... hereby expressly waives the following rights:
 - a. the right to appeal the conviction and sentence imposed in this case, or the manner in which the sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any grounds whatsoever, and
 - b. the right to contest the conviction and sentence or the manner in which that sentence was imposed in any post-conviction proceeding,

including but not limited to a motion brought under Title 28, United States Code, Section 2255[.]

The district court conducted a sentencing hearing on September 30, 2013.

The Court deemed Mr. Barnes an “armed career criminal” under the combined provisions of 18 U.S.C. § 924(e) of the ACCA and Guidelines § 4B1.4 because he had prior convictions for possession of precursors under Mississippi state law, kidnapping under Florida state law, burglary of a dwelling under Florida state law and attempted robbery under Florida state law.

Mr. Barnes’ status as an armed career criminal raised his adjusted offense level from 18 to 34. After deducting three points for acceptance of responsibility, his total offense level was 31. Armed career offender status raised his criminal history category under the Guidelines from V to VI. Finally, armed career criminal status required a 15-year mandatory minimum sentence.

Combining the total offense level of 31 with the criminal history category of VI resulted in a Guidelines sentencing range of 188 to 235 months in prison. The court ordered a 180-month prison sentence. Without the “armed career criminal” enhancement, Mr. Barnes’ offense level would have been 15 (pre-Chapter 4 enhancement offense level of 18 less 3 points for acceptance of responsibility). His criminal history category would have been V. At a total offense level of 15 and a criminal history category of V, his Guidelines sentence range would have

been 37 to 46 months in prison. *See* Guidelines Sentencing Table. No statutory minimum sentence would be required.

After the district court filed the Final Judgment in Mr. Barnes' case, this Court established new sentencing law in *Johnson v. United States*, 135 S.Ct. 2551 (2015). The Court filed *Johnson* on June 26, 2015. *Johnson* rendered the "residual clause" of the ACCA unconstitutionally vague.

Based on the newly established law set forth in *Johnson*, Mr. Barnes filed a Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody on September 21, 2015. The district court denied the § 2255 Petition on July 6, 2018.

The district court based denying the § 2255 Petition on two grounds. First, the court found that that the waiver of post-conviction relief provision in Mr. Barnes' Plea Agreement barred relief. Second, the district court ruled that Mr. Barnes' arguments fail on the merits.

Dissatisfied with the district court's denial of the relief requested in Mr. Barnes' Petition, he filed a Notice of Appeal on July 9, 2018. On March 23, 2020, over one and one half years later, the United States Court of Appeals for the Fifth Circuit entered an Order affirming the district court's dismissal of the § 2255 Petition. The Fifth Circuit did not address the merits of Mr. Barnes' *Johnson*-related arguments. Instead, it ruled that dismissal of the Petition was proper

because the “Waivers” provision of Mr. Barnes Plea Agreement barred him from seeking relief under *Johnson*. Aggrieved by the Fifth Circuit’s ruling, Mr. Barnes filed this Petition for Writ of Certiorari.

V. ARGUMENT

A. Introduction.

Through the subject § 2255 Petition, Mr. Barnes sought a sentence reduction under this Court's rulings in *Johnson v. United States*, 135 S.Ct. 2551 (2015).

However, the merits of that argument are not at issue in this Petition. That is true because the Fifth Circuit did not decide the case based on the merits of Mr. Barnes' *Johnson*-related arguments. Instead, it affirmed the district court's dismissal of the § 2255 Petition because Mr. Barnes purportedly waived the right to file the Petition when he entered a Plea Agreement containing a waiver of appeal provision. Under this fact scenario, the only issue before this Court is whether Mr. Barnes waived his right to seek a sentence reduction under *Johnson*.

We note that on or about the same day that this Petition for Writ of Certiorari is filed, the undersigned will also file a Petition for Writ of Certiorari in *United States v. Wendell Taylor*, Fifth Circuit case number 18-60425. The Petition in *Taylor* addresses the same issue addressed in this Petition.

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

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” Rule 10(a) goes on to state that a reason to grant certiorari is when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on

the same important matter[.]” Mr. Barnes’ case presents a scenario in which the Fifth Circuit’s decision in this case conflicts with the Ninth Circuit’s holdings in *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) and the Sixth Circuit’s holdings in *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016).

Mr. Barnes’ Plea Agreement contained a “Waivers” paragraph that stated in part:

16. Waivers. Defendant ... hereby expressly waives the following rights:
 - a. the right to appeal the conviction and sentence imposed in this case, or the manner in which the sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any grounds whatsoever, and
 - b. the right to contest the conviction and sentence or the manner in which that sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255[.]

Based on this provision, the Fifth Circuit found, “Barnes’s § 2255 motion is barred by his collateral review waiver.” *United States v. Barnes*, 953 F.3d 383, 390 (5th Cir. 2020). As stated above, this ruling conflicts with rulings from the Ninth and Sixth Circuits.

In *Torres*, the Ninth Circuit analyzed the exact same issue that is before this Court. Pursuant to a plea of guilty, Torres was convicted of felon in possession of a firearm. 828 F.3d at 1116. He entered into a plea agreement in which he waived the right to appeal all issues other than denial of a motion to suppress evidence. *Id.* He

appealed both his sentence and denial of the motion to suppress to the Ninth Circuit. *Id.*

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

Concerning the sentencing issue on appeal, Torres challenged

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

Torres, 828 F.3d at 1123.

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

knowingly and expressly waive[d]: (a) the right to appeal any sentence imposed within or below the applicable guidelines range as determined by the Court, with the exception of preserving the right to appeal a determination that the [he] qualifies as an Armed Career Criminal; (b) the right to appeal the manner in which the Court determined that sentence on

the grounds set forth in 18 U.S.C. § 3742; and (c) the right to appeal any other aspect of the conviction or sentence.

Id. (internal footnotes omitted).

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

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

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

The government in *Torres* conceded that *Johnson* applies to the Sentencing Guidelines.⁴ *Torres*, 828 F.3d at 1125. The court held, “[w]e therefore accept the Government’s concession that the district court sentenced Torres pursuant to a

⁴ Mr. Barnes recognizes that in the subsequent decision of *Beckles v. United States*, 137 S.Ct. 886 (2017), this Court ruled that *Johnson* is inapplicable to the Sentencing Guidelines. Nevertheless, it is the *Torres* Court’s analysis of the then-illegal sentence that is relevant to Mr. Barnes’ argument.

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

McBride is the Sixth Circuit case that conflicts with the Fifth Circuit's decision in Mr. Barnes' case. The facts and procedural posture of *McBride* follow:

William McBride signed a plea agreement after being charged in five jurisdictions with six counts of bank robbery in violation of 18 U.S.C. § 2113(a), (d). The agreement included an "understand[ing]" that McBride would be sentenced as a career offender because "he ha[d] at least two prior crime of violence convictions." *See* USSG § 4B1.1(a). The presentence report recommended designating McBride a career offender based on two prior convictions for bank robbery, also in violation of § 2113. McBride's sentencing memorandum asked the court to depart downward from the Sentencing Guidelines advisory range of 188 to 235 months of imprisonment, but agreed that "[t]here is no dispute that McBride is a 'career offender.'" His counsel also conceded the career-offender point at sentencing. Had he not been labeled a career offender, the Guidelines sentencing range would have been 100 to 125 months of imprisonment. The district court sentenced McBride to 216 months of imprisonment. McBride now contests his career-offender designation, arguing that in light of *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), § 2113 is not a predicate offense under the career-offender guideline.

McBride, 826 F.3d 294.

The court held, "McBride waived this argument, except insofar as it could not have been made before *Johnson*. A defendant waives the argument that a sentencing enhancement does not apply by 'explicitly agreeing' that it does, such

as through ‘plain, positive concurrence.’” *McBride*, 826 F.3d at 294-95 (emphasis added; citations omitted). The court went on to hold:

However, a defendant can abandon only “known right[s].” *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (emphasis added). McBride could not have intentionally relinquished a claim based on *Johnson*, which was decided after his sentencing. Although McBride otherwise waived the right to appeal his career-offender status, to the extent that his claim relies on *Johnson*, we review for plain error.

Id. at 295 (bracketed footnote added; end citation and some internal citations omitted). Based on this holding, the court considered the merits of McBride’s *Johnson*-related sentencing argument.

Under *McBride*, a defendant can waive only rights that are known to him at the time of the waiver. **Rights unknown at the time of the waiver cannot be waived.** This conflicts with Fifth Circuit precedent stated in Mr. Barnes’ case.

To summarize, the holdings in Mr. Barnes’ case directly conflict with Ninth Circuit precedent in *Torres* and Sixth Circuit precedent in *McBride*. This inconsistency in circuit court decisions provides a reason to grant certiorari in this case under Supreme Court Rule 10(a).

VI. CONCLUSION

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

Submitted August 17, 2020, by:



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