APPENDIX 1

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

MICHAEL JAMES BARNES — PETITIONER

VS. — CRIMINAL NO. 3:13-cr-38(DCB)
CIVIL NO. 3:15-cv-682(DCB)

UNITED STATES OF AMERICA — RESPONDENT

ORDER GRANTING MOTIONS TO
DISMISS AND DISMISSING MOTION TO VACATE

Petitioner, Michael James Barnes ("Barnes") filed a pro se motion to vacate, set aside, or correct his federal sentence pursuant to 28 U.S.C. § 2255 **(docket entry 30)**. The Government moved to dismiss Barnes's motion **(docket entry 36)**, and Barnes, at this point represented by counsel, responded to the Government's motion (docket entry 37).

In its Motion to Dismiss, the Government asserted that Barnes had previously waived his right to collaterally attack his sentence in a § 2255 motion; that he had failed to demonstrate that he was entitled to proceed under the auspices and parameters of the Samuel Johnson decision[1] on which he relied; and that his argument under the Curtis Johnson decision[2] was both untimely and procedurally barred.

The Court found that additional briefing was required,

[1] Samuel Johnson v. United States, 135 S.Ct. 2551 (2015) (hereafter "Samuel Johnson").

[2] Curtis Johnson v. United States, 130 S.Ct. 1265 (2010) (hereafter "Curtis Johnson").

inasmuch as the Petitioner's Response (docket entry 37) to the Government's Motion to Dismiss advanced new arguments supplementing Barnes's original Petition, and was more in the nature of an Amended Motion to Vacate.

The Government's Amended Motion to Dismiss **(docket entry 39)**, the Petitioner's Response (docket entry 40), and the Government's Reply (docket entry 41) to the Petitioner's Response are now before the Court and fully briefed.

On July 9, 2013, pursuant to the terms of his plea agreement with the Government, Barnes entered a guilty plea before this Court to the charge of illegally possessing a firearm after having been convicted previously of a felony in violation of 18 U.S.C. § 922(g)(1). Barnes's Presentence Report ("PSR") detailed Barnes's criminal history and identified ten (10) prior felony convictions relevant to Barnes's present motion.[3]

The PSR determined that Barnes was an Armed Career Criminal and subject to an enhanced statutory minimum sentence of 15 years imprisonment pursuant to 18 U.S.C. § 924(e) because his offense of conviction was a violation of 18 U.S.C. § 922(g) and he had at least three prior convictions for a violent felony or serious drug offense as defined in 18 U.S.C. § 924(e)(1), or both, which were

[3] The relevant prior felony convictions are set forth in the Government's Amended Motion to Dismiss (docket entry 39, pp.2-3).

committed on different occasions.[4] The PSR did not address under which clause of the Armed Career Criminal Act (hereafter "ACCA") any particular prior felony conviction qualified as a predicate.

As noted in this Court's prior Memorandum Opinion and Order (docket entry 38), "Barnes's criminal history reflected in his PSR as adopted by the Court at sentencing is more extensive than alleged in his Indictment, demonstrating more violent felony convictions than appeared in his Indictment. Barnes's motion only attacks the prior convictions appearing in his Indictment."

Barnes chose to limit his collateral attack to three of the prior felony convictions listed in his Indictment.[5] Neither Barnes (in his original Motion to Vacate), nor his counsel (in response to the Government's Motion to Dismiss)[6] has argued that Barnes's ultimate sentencing exposure under the ACCA is limited to those prior convictions listed in his Indictment. The expanded list of convictions reflected in Barnes's PSR properly reflects his criminal history as it existed when this Court determined that Barnes's sentence was subject to enhancement under the ACCA.

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[4] PSR, ¶¶ 24, 43, 64.

[5] Florida convictions for Kidnapping on 4/12/1984, Burglary of a Dwelling on 10/15/1979, and Attempted Robbery on 10/03/1979. Barnes does not challenge that his Mississippi conviction for Possession of Precursors with Intent to Manufacture Methamphetamine on 9/11/2006 qualifies as a serious drug offense under 18 U.S.C. § 924(e)(2)(A).

[6] Barnes's response to the Government's Motion to Dismiss is hereafter referred to as his "Amended Motion to Vacate."

Indeed, at the time Barnes was sentenced, the law was well-settled that a defendant's sentence may be enhanced under the ACCA based upon prior convictions for violent felonies, even though the prior convictions were not identified in his Indictment. United States v. Stapleton, 440 F.3d 700, n.1 (5th Cir. 2006)(The Supreme Court has held recidivist provisions like those in the Armed Career Criminal Act are neither substantive offenses nor elements thereof, and thus the fact of a prior conviction need not be alleged in an indictment nor proven beyond a reasonable doubt, citing Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)).

BARNES'S SENTENCING HEARING

After receipt and review of the PSR prepared by the U.S. Probation Office, Barnes appeared before this Court for sentencing on September 30, 2013. The sentencing hearing transcript reflects that the Court granted Barnes's objection to the four-level enhancement to the offense level that was based on Barnes's possession of a firearm in connection with a felony offense of possession of a controlled substance with intent to distribute. As a result, the Defendant's criminal history category was reduced by one point. The Court confirmed with defense counsel that Barnes nonetheless remained subject to the Armed Career Criminal statutory and guideline provisions. Having confirmed that there were no other objections to the PSR, the Court then adopted the PSR as

modified to reflect those two changes. The Court found that Barnes was subject to an enhanced sentence under the ACCA, which required a minimum sentence of 15 years imprisonment, stating as follows:

> Then we go to the three prior convictions. He has at least three prior convictions of a violent felony or serious drug offense as defined in 18 United States Code 924(e)(1) or both which were committed on different occasions and therefore he is an armed career criminal and is subject to an enhanced sentence under the provisions of 18 United States Code 924(e).

The Court followed the Government's recommendation contained in Barnes's plea agreement and sentenced Barnes to serve 180 months, equivalent to the ACCA statutory minimum of 15 years imprisonment, which was below the advisory guideline range.

BARNES'S POST-SENTENCING REVIEW

The Court has noted that "[t]he docket in this case indicates that Barnes did not seek an appeal to the Fifth Circuit; therefore, the one year statute of limitation under Section 2255(f)(1) expired on or about November 8, 2014." After this deadline, on September 21, 2015, Barnes filed his Motion to Vacate under 28 U.S.C. § 2255, claiming that his sentence was rendered unconstitutional by the Supreme Court's decision in Samuel Johnson, and retroactively subject to collateral review under Welch v. United States, 136 S.Ct. 1257 (2016) (hereafter "Welch").

On February 9, 2017, the Court entered its Order requiring the United States to respond to Barnes's motion. On March 13, 2017,

the United States filed a Motion to Dismiss, followed by Barnes's Response in Opposition on March 27, 2017, filed through his counsel. Construing this Response by counsel to advance new arguments supplementing Barnes's original Petition, on April 10, 2018, the Court entered its Memorandum Opinion and Order treating the Response as an Amended Motion to Vacate, requested additional briefing, and required the United States to file an Amended Motion to Dismiss addressing these newly raised arguments.

PROCEDURAL REQUIREMENTS UNDER 28 U.S.C. § 2255

The key question before the Court is whether Barnes has demonstrated that his sentence is unconstitutional because of erroneous reliance on the ACCA residual clause in light of the holdings of Samuel Johnson and Welch and, consequently, whether he has suffered a constitutional error or injury that permits his petition for relief to move forward. A Section 2255 motion premised on the holdings of Samuel Johnson and Welch must meet the same statutory threshold requirements as any other motion for collateral relief filed pursuant to 28 U.S.C. §2255. In this Circuit, the law is well-established that in any Section 2255 proceeding, the movant bears the burden to demonstrate facts that establish a constitutional violation. United States v. Woods, 870 F.2d 285, 287 (5th Cir. 1989). Speculative or mere conclusory allegations on a critical matter are insufficient to raise a

constitutional issue. United States v. Hall, 455 F.3d 508 (5th Cir. 2006); United States v. Pineda, 988 F.2d 22, 23 (5th Cir. 1993). Thus, when a petitioner bases his Section 2255 motion on Samuel Johnson, the petitioner continues to bear the burden of any Section 2255 movant: that is, to make a threshold showing that the holding of the case on which he relies in fact applies to his particular sentence and renders it erroneous.

If Barnes has truly stated a constitutional claim under the Samuel Johnson decision, then his sentence may be unconstitutional and the merits of his Section 2255 motion may be considered by the Court to determine whether his prior felony convictions properly qualified under the elements/force or enumerated crimes clause or whether resentencing is required. However, if Barnes's sentence was not impacted by the residual clause of the ACCA, then Barnes has failed to state a constitutional claim and he is not entitled to relief under Samuel Johnson, his sentence remains constitutionally imposed, and his Section 2255 motion must be dismissed.

In an April 2018 opinion, the Tenth Circuit concisely outlined the following approach for assessing a movant's Section 2255 motion premised on Samuel Johnson in United States v. Wilfong, 2018 WL 1617654, at *3-4 (10th Cir. 2018)(unpublished). In Wilfong, the Tenth Circuit stated:

> Even now, courts continue to grapple with the ever-evolving legal and practical difficulties of

> distinguishing between movants who are entitled to habeas relief under Johnson and movants who are not. ... [I]t is the movant's burden to make a threshold showing that his sentence is erroneous under Johnson. Because Johnson only invalidated the residual clause of the ACCA, the movant's sentence is erroneous only if it relied on or was authorized by the residual clause. If a movant can make this showing, the burden shifts to the government to prove that reliance on the residual clause was harmless. In the Johnson context, erroneous reliance on the residual clause is only harmless if the government can prove that, even without relying on the invalidated residual clause, the movant has three qualifying ACCA predicate offenses ....
>
> [W]hether the movant's sentence relied on the residual clause is a question of historical fact that asks whether the sentencing court imposed the ACCA sentence based upon the residual clause at the time of sentencing, not whether the challenged offense would qualify as an ACCA predicate offense under current law ....
>
> [W]hen the record is unclear as to which clause the sentencing court relied upon (the court's clausal basis or classification), we look to the "relevant background legal environment at the time of sentencing," i.e., "what the controlling law was at the time of sentencing," to determine the clausal basis of the sentencing court's decision. This test is applicable, however, only when the record is silent, and the sole question before the reviewing court at this stage is whether the sentencing court relied on the residual clause.

United States v. Wilfong, 2018 WL 1617654, at *3-4 (10th Cir. 2018) (internal citations omitted)(unpublished)(emphasis added).

To identify the historical facts that either support or contradict Barnes's motion, it is necessary to turn to the sentencing record in this case. Barnes's sentencing transcript is silent as to which particular prior felony convictions the Court selected to establish the requisite number for ACCA application. Nor does the sentencing record specify under which particular

clause they qualified. As previously noted, the PSR makes no such delineation. See PSR ¶¶ 24, 43, 64. At sentencing, the parties agreed that the ACCA applied to Barnes's ultimate sentence. Thus, it was unnecessary for the Court to make a more specific finding.

Section 2255 motions relying on Samuel Johnson create unique procedural questions much akin to the age-old question "which comes first - the chicken or the egg?" For in such cases, in order for a party to demonstrate the presence (or lack thereof) of procedural defenses – such as the presence of a cognizable constitutional claim, untimeliness of the claim, or plea agreement collateral review waiver - it frequently becomes necessary to discuss to some degree the merits of the claim. Ultimately, that discussion often demonstrates that the Section 2255 motion is procedurally barred, as demonstrated in Barnes's case. For that reason, the United States, without waiving any procedural defenses, has chosen to address Barnes's relevant prior felony convictions and the qualification of several predicate offenses under the elements/force clause at the time the Court sentenced Barnes on September 30, 2013.

IN THE FIFTH CIRCUIT, WHEN A SENTENCING RECORD IS SILENT AS TO WHICH ACCA CLAUSE INFORMED THE PETITIONER'S SENTENCE, WHAT SHOWING MUST A PETITIONER MAKE TO RAISE A COGNIZABLE CONSTITUTIONALLY-BASED CLAIM PURSUANT TO SAMUEL JOHNSON ?

Approximately six months after the parties addressed Barnes's initial motion, on October 12, 2017, the Fifth Circuit Court of Appeals published United States v. Taylor, 873 F.3d 476, 481 (5th Cir. 2017). In Taylor, the Fifth Circuit had the opportunity to adopt a standard to define the degree of proof petitioners must demonstrate when claiming that their sentences were enhanced under the now-unconstitutional ACCA residual clause – but where the sentencing record is silent as to (1) which particular convictions qualified as predicates for ACCA exposure and (2) under which ACCA clause those particular convictions qualified.

Taylor based his Section 2255 motion on Samuel Johnson and challenged a prior Texas conviction for injury to a child. (Taylor also had two prior convictions for burglary of a building). The district court found Taylor had not contested the injury-to-a-child conviction as qualifying under the ACCA as a "crime of violence" at his sentencing hearing. Stating that Taylor should have challenged that classification at sentencing and noting Taylor's concession that the injury-to-a-child offense counted as a "violent felony," the district court denied Taylor's Section 2255 motion as untimely, finding that the ACCA's residual clause did not play any role in Taylor's sentencing. Taylor, 873 F.3d at 477-78. The Fifth Circuit granted a Certificate of Appealability. Id. at 478-79.

On appeal, the Government conceded that after Samuel Johnson, the Texas injury-to-a-child conviction at issue would no longer

qualify as an ACCA predicate in light of the Fifth Circuit's intervening opinion in United States v. Martinez-Rodriguez, 857 F.3d 282, 286 (5th Cir. 2017)(holding, as a matter of statutory construction, that Texas's injury-to-a-child offense is broader than the ACCA's elements clause). Consequently, the Government conceded that if Taylor's claim was constitutionally based, then Taylor's sentence exceeded the statutory maximum. Id. at 479. However, the Government pointed to the district court's conclusion that the residual clause played no role at Taylor's sentencing and thus argued that Taylor's sentence was not constitutionally based. The Government posited that Taylor bore the burden of proof to show that at his sentencing hearing the district court construed his injury-to-a-child conviction to qualify as an ACCA predicate under the residual clause, rather than the still-valid elements clause. Id.

When this Court sentenced Barnes, precedential authority recognized several of his prior felony crimes described in his PSR also as qualifying "violent felony" convictions under the elements/ force clause of the ACCA. Thus, even assuming that Barnes's argument (on the merits) is accurate regarding his prior convictions for Kidnapping (id.) and Burglary of a Dwelling (id.), neither are necessary to sustain his enhanced sentence under the ACCA. As demonstrated hereafter, removing those two prior convictions from Barnes's sentencing calculation could not have

reduced his sentencing exposure – Barnes's sentence nonetheless remained subject to enhancement under the elements/force clause of the ACCA.

PRECEDENTIAL AUTHORITY AT THE TIME BARNES WAS SENTENCED GOVERNING QUALIFICATION OF BARNES'S PRIOR CONVICTIONS AS PREDICATE VIOLENT FELONIES UNDER THE ACCA ELEMENTS/ FORCE CLAUSE

Barnes's prior Florida Attempted Robbery conviction (PSR ¶ 29) qualified as a "violent felony" under the elements/force clause of the ACCA when this Court sentenced Barnes in 2013 and the same is true post-Samuel Johnson. United States v. Lockley, 632 F.3d 1238 (11th Cir. 2011)(Florida attempted robbery conviction categorically qualified as a crime of violence under the elements clause of the career offender provision of the guidelines since the Florida statute is generic, rejecting defendant's argument under Curtis Johnson (2010)); See United States v. Fritts, 841 F.3d 937, 940 n.4, 941-42 (11th Cir. 2016), cert. denied __ U.S. __, 137 S.Ct. 2264 (2017) (precedent addressing whether an offense was a crime of violence under the Guidelines' elements clause was dispositive in deciding whether the offense also qualified under the ACCA's elements clause with the same language); United States v. Joyner, 882 F.3d 1369 (11th Cir. 2018)(Florida attempted strong arm robbery categorically qualified as a "violent felony" under the elements clause of the ACCA). In contrast to the law cited above, Barnes's

motions cite no legal authority that agrees with his argument.[7]

Barnes agrees that his Mississippi conviction for Possession of Precursors with the Intent to Manufacture Methamphetamine falls under the category of a serious drug offense. Docket entry 30, pp. 15-17. Thus, if one or more of Barnes's prior felony convictions qualified under the elements/force clause of the ACCA as a "violent felony," Barnes's sentence was properly subject to enhancement under the ACCA when this Court sentenced him in September of 2013.

In lieu of Barnes's Kidnapping conviction (PSR ¶ 31, Count 4), this Court had available Barnes's prior Florida Armed Robbery conviction (PSR ¶ 31, Count 3) as it categorically qualified in 2013 as a "violent felony" under the elements clause of the ACCA. United States v. Dowd, 451 F.3d 1244, 1255 (11th Cir. 2006)(holding, "without difficulty," that a Florida conviction for armed robbery was "undeniably a conviction for a violent felony" under the ACCA's elements clause). The same is true post-Samuel Johnson. See United States v. Fritts, 841 F.3d 937, 942-944 (11th Cir. 2016), cert. denied 137 S.Ct. 2264 (2017)(defendant's Florida armed robbery conviction categorically qualifies as a violent felony under the ACCA's elements clause rejecting physical force arguments under Curtis Johnson (2010), discussing Florida Supreme Court

[7] See docket entry 30, pp. 15-17; docket entry 37, p. 4: "Mr. Barnes [sic] arguments regarding why the sentence enhancements are not applicable under the ACCA in the post-Johnson (2015) era are presented on pages 14-21 of his Petition."

decisions as well as Eleventh Circuit precedent in support of that holding); see also United States v. Garcia, 2017 WL 1375214 (N.D. Fl. Feb. 24, 2017)(discussing and applying Fritts as controlling precedent in analyzing Florida armed robbery convictions under the ACCA). Barnes's motions raise no challenge to his Florida armed robbery conviction. See PSR ¶ 31, Count 3.

In lieu of either the Florida Kidnapping conviction or the Florida Armed Robbery conviction, the Court also had available Barnes's Florida Aggravated Battery conviction. See PSR ¶ 31, Count 6. In 1984, when Barnes was convicted of this crime, the Florida aggravated battery statute read as follows:

> A person commits aggravated battery who, in committing battery, (a)Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or (b) Uses a deadly weapon.

See Florida Stat. 784.045.

When this Court sentenced Barnes in September of 2013, the law was clear that his prior conviction for Florida Aggravated Battery qualified under the elements/force clause of the ACCA as a "violent felony" and thus properly could be considered to enhance Barnes's sentence. See Guthrie v. State, 407 So.2d 357, 358 n.3 (Fla. 5th DCA 1981)(a conviction for aggravated battery requires proof of great bodily harm, permanent disability, or permanent disfigurement); Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, 1341 (11th Cir. Feb. 23, 2013), abrogated on other grounds by Samuel Johnson, 135 S.Ct. 2551, cert. denied, 570 U.S. 925

(2013)(conviction under Florida's aggravated battery statute categorically qualifies under the elements clause of the ACCA). Accord United States v. Tarver, 712 Fed.App'x. 885 (11th Cir. 2017)(unpublished)(Turner still controls). Barnes's motions raise no challenge concerning his Florida aggravated battery convictions. See PSR ¶ 31, Counts 5,6.

STANDARDS OR TESTS TO DISCERN WHETHER THE ACCA RESIDUAL CLAUSE INFORMED A PETITIONER'S SENTENCE TO SUPPORT A CLAIM UNDER SAMUEL JOHNSON

In Taylor, supra, the Fifth Circuit considered several standards or tests applied by other Circuits when a sentencing record is unclear as to whether a sentencing court relied on the ACCA residual clause to enhance a petitioner's sentence. See Taylor, 873 F.3d at 480-81. The standard applied by the Ninth[8] and Tenth[9] Circuits was noteworthy to the Fifth Circuit in Taylor. Those Circuits look to a "snapshot of the legal background at the

[8] See United States v. Geozos, 870 F.3d 890, 893-95 (9th Cir. 2017)(looking to the relevant legal background environment at the time of sentencing to decide whether a sentencing court relied on the ACCA residual clause, even when the sentencing record alone is unclear).

[9] See United States v. Snyder, 871 F.3d 1122, 1124, 1129 (10th Cir. 2017)(relevant background legal environment made apparent that petitioner was not sentenced based on the ACCA's residual clause that was invalidated by Samuel Johnson; this demonstrates a "snapshot" of what the controlling law was at the time of sentencing and does not take into account post-sentencing decisions that may have clarified or corrected pre-sentencing decisions); United States v. Wilfong, 2018 WL 1617654, at *4 (10th Cir. 2018)(unpublished).

time of sentencing" to demonstrate whether the prior conviction at issue qualified as a predicate only under the residual clause of the ACCA. Applying this standard, if a particular prior felony conviction could only qualify as a predicate "violent felony" by using the residual clause of the ACCA, in the face of a silent sentencing record the appellate court can conclude that the defendant's sentence was enhanced in reliance upon the residual clause.

Another standard considered in Taylor is described as the "more likely than not" standard currently used in the First[10] and Eleventh[11] Circuits, which requires the petitioner to demonstrate

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[10] Dimott v. United States, 881 F.3d 232, 240, 242 (1st Cir. 2018)(distinguished the Fifth Circuit's Taylor opinion, relying on precedential authority in the First Circuit that placed the prior conviction at issue within the parameters of the enumerated crimes clause). The First Circuit refused to adopt a rule that, when faced with a silent sentencing record, the appellate court must assume that the defendant was sentenced under the residual clause of 18 U.S.C. § 924(e). The First Circuit refused to break with its time-honored precedent that federal post-conviction petitioners bear the burden of proof and production under § 2255, and must establish by a preponderance of the evidence that they are entitled to relief.

[11] Beeman v. United States, 871 F.3d 1215, 1218-24 (11th Cir. 2017)("To prove a Johnson claim, the movant must show that - more likely than not - it was the residual clause" that resulted in the ACCA sentencing enhancement.) The Beeman decision resolved prior dueling dicta in the Eleventh Circuit decisions of In Re Moore, 830 F.3d 1268, 1271-72 (11th Cir. 2016)(suggesting that a movant has the burden of showing that he is entitled to relief even when it is unclear whether the district court relied on the residual clause or other ACCA clauses) and In re Chance, 831 F.3d 1335, 1339-40 (11th Cir. 2016) which Barnes cites in his motion(s). The Chance panel suggested that the sentencing court must ignore precedent unless the sentencing judge uttered the magic words "residual clause" but the panel acknowledged that its own opinion was merely dicta; however, in Beeman, the Eleventh Circuit chose not to adopt the Chance standard.

that the ACCA residual clause "more likely than not" affected the challenged sentence. However, even applying this standard, the Fifth Circuit in Taylor took notice that "if the law was clear at the time of sentencing that only the residual clause would authorize a finding that the prior conviction was a violent felony, that circumstance would strongly point to a sentencing per the residual clause." Taylor at 481. Taylor further noted the Eleventh Circuit's emphasis that "it is the state of the law at the time of sentencing that matters, and subsequent legal decisions ... 'cast[ ]very little light, if any' on the question of whether the defendant was sentenced under the residual clause." Id.

Another standard considered in Taylor is described as the "may have been used" standard, applied in the Fourth[12] and the D.C.[13] Circuits, which requires petitioners to demonstrate that the residual clause "may have been used" to result in the ACCA enhanced sentence. Ultimately, the Fifth Circuit found it unnecessary to adopt any particular standard, because under the facts before it, Taylor's claims merited relief under all the tests articulated by the various Circuits. Taylor's Texas conviction for injury-to-a-child obviously did not fall within the enumerated crimes clause of the ACCA, nor did it fall within the elements clause of the ACCA

[12] United States v. Winston, 850 F.3d 677, 682 (4th Cir. 2017).

[13] United States v. Wilson, 249 F.Supp.3d 305, 310-11 (D.C. Cir. 2017).

given intervening Fifth Circuit precedent. As that conviction was necessary to sustain Taylor's ACCA sentence enhancement as one of his three required predicate offenses, it could only have qualified under the residual clause of the ACCA. Similarly, there was legal precedent in the Fifth Circuit from 2002 suggesting that Taylor's prior Texas conviction for injury-to-a-child could have applied only under the residual clause.[14] Thus, the Fifth Circuit concluded that Taylor's claim would merit relief under each Circuit's standard, demonstrating a constitutional injury and satisfying the showing required under 28 U.S.C. § 2255(h)(2).[15]

BARNES'S MOTIONS TO VACATE SENTENCE FAIL TO STATE A COGNIZABLE CLAIM UNDER SAMUEL JOHNSON AND THUS ARE BARRED BY THE STATUTE OF LIMITATIONS

Barnes argues that Samuel Johnson and Welch resurrect his right through a Section 2255 motion to challenge the constitutionality of the Court's application of the ACCA to his sentence – a right that arguably expired on or about November 8, 2014,[16] unless the Samuel Johnson and Welch decisions specifically revive it.[17] Barnes seems to contend that these decisions tolled the statute of limitations as to any ACCA sentences as long as

[14] Taylor was sentenced in 2006. Taylor, 873 F.3d at 477.

[15] Taylor at 482.

[16] 28 U.S.C. § 2255(f)(1).

[17] 28 U.S.C. § 2255(f)(3).

claims of injury are alleged to relate to these decisions.

However, it is unquestioned that the Samuel Johnson and Welch decisions impact only the residual clause of the ACCA. Thus, to state a cognizable claim and avoid the statute of limitations, Barnes must demonstrate in his motions that the residual clause guided his sentence, which he has failed to do. He is unable to do so because when he was sentenced on September 30, 2013, he had other prior felony convictions reflected in his PSR - part of his sentencing record - that qualified as "violent felony" predicates under the elements/force clause of the ACCA and supported the enhanced sentence imposed by the Court. Thus, Barnes cannot state a cognizable constitutional claim under Samuel Johnson, and any other claims are barred by the statute of limitations. The claims that do appear in his motions are conclusory on a critical matter and thus are insufficient to raise a constitutional issue. United States v. Hall, 455 F.3d 508 (5th Cir. 2006); United States v. Pineda, 988 F.2d 22, 23 (5th Cir. 1993).

BARNES'S INITIAL MOTION FAILS TO STATE A COGNIZABLE CLAIM OF CONSTITUTIONAL INJURY

Barnes's initial motion articulates three claims in an attempt to assert constitutional error in his ACCA sentence, none of which provide an adequate foundation for his conclusion that his sentence is unconstitutional.

First, Barnes notes that he "faced a mandatory minimum

sentence under the residual clause of the ACCA."[18] Of course, he likewise faced a mandatory minimum sentence under the elements/force clause of the ACCA as previously discussed.

Second, Barnes's claim attempts to restrict this Court's focus solely to his prior convictions listed in his indictment (kidnapping, burglary of a dwelling, attempted robbery),[19] a position that is unsupported under well-established law. In his attempt to produce a viable Samuel Johnson claim, Barnes wholly ignores his other prior convictions identified in his PSR which qualified as "violent felony" predicate offenses under the elements/force clause of the ACCA as acknowledged by precedential authority in existence when he was sentenced, and thus supported Barnes's enhanced sentence.

Third, Barnes states "Johnson (2015) made significant changes to sentencing law in regard to when a defendant is considered an armed career offender. These changes affect the sentence that the Court ordered Mr. Barnes to serve." (docket entry 30, p.31). However, merely citing to the Samuel Johnson decision is not enough to demonstrate that Barnes himself suffered constitutional error, which is required to raise a cognizable claim in a motion to vacate under 28 U.S.C. § 2255. Barnes's conclusory claims and his arguments in support thereof fail to demonstrate that his sentence

[18] Docket entry 30, p.1.

[19] Docket entry 30, p.4.

was in any way influenced by the ACCA residual clause invalidated by Samuel Johnson, or that Barnes is otherwise entitled to collateral relief under the parameters of that decision.

BARNES'S AMENDED MOTION LIKEWISE FAILS TO STATE A COGNIZABLE CLAIM OF CONSTITUTIONAL INJURY

Barnes's amended motion more directly asserts that he was sentenced under the residual clause provisions of the ACCA, yet that claim remains factually unsupported. (docket entry 37, p.2). His amended motion incorporates by reference his arguments in support of his initial motion, which the Government has previously addressed. (docket entry 37, p.4). Barnes's amended motion does take an additional step: he claims to have demonstrated by exclusion that his prior convictions listed in his indictment must have fallen within the residual clause of the ACCA because, in his view, they did not satisfy the physical force standard of Curtis Johnson (2010). (docket entry 37, p.16). However, as previously discussed, at the time this Court sentenced Barnes, precedential legal authority concerning his Florida convictions for attempted robbery, armed robbery, or aggravated battery, determined these felonies nonetheless qualified as predicates under the ACCA elements/force clause.

As the Government points out, Barnes argues that he followed pre-Samuel Johnson procedure outlined in United States v. Harrimon, 568 F.3d 531, 534 (5th Cir. 2006) to demonstrate that his 2013

sentence was affected by the residual clause of the ACCA, as opposed to the elements/force clause or the enumerated clause. (docket entry 38, p.11). However, Harrimon is readily distinguishable and virtually of no value to the analysis of the issues before this Court. The Harrimon Court did not face the question of whether a conviction qualified as a predicate offense under the elements/force clause or the enumerated clause or the residual clause. The Harrimon Court noted that the Government did not contend that Harrimon's conviction (for evading arrest or detention by use of a vehicle) qualified under the elements/force clause or under the enumerated clause; thus, the residual clause was the only remaining clause under which that conviction could be analyzed for ACCA application. The analysis used by the Harrimon Court was limited to whether or not a particular crime fell within the parameters of the ACCA's residual clause, and nothing more. Post-Samuel Johnson, it is an analysis of no import under the ACCA. The Harrimon decision, which was in place at the time of Barnes's sentencing hearing, does not demonstrate that any of Barnes's prior convictions listed in his indictment, or those listed in his PSR, qualified solely under the ACCA's residual clause. Thus, Harrimon has no application to the analysis of the issues before this Court.

Even if Barnes's motions had successfully demonstrated that the residual clause in fact informed his ACCA sentence, he would still not be entitled to the relief he seeks. The United States

Supreme Court instructed in Welch that even if a defendant's prior conviction was counted under the residual clause, courts can consider whether that conviction counted under another clause of the ACCA. In re Moore, 830 F.3d 1268, 1272 (11th Cir. 2016)(quoting Welch, 136 S.Ct. at 1268 (2016)("It may well be that the Court of Appeals on remand will determine on other grounds that the District Court was correct to deny Welch's motion to amend his sentence. For instance, the parties continue to dispute whether Welch's strong-arm robbery conviction qualifies as a violent felony under the elements clause of the Act, which would make Welch eligible for a 15-year sentence regardless of [Samuel] Johnson.").

Notably, Barnes's substantive argument in his collective motions focuses upon how his prior convictions in his indictment would not qualify as predicate violent felonies under the elements/force clause based on the Curtis Johnson decision. Barnes suggests that the Curtis Johnson decision and its analysis of physical force has only now become relevant to his sentence given the demise of the residual clause in the Samuel Johnson decision, thus Barnes suggests that his claim should not be deemed to be untimely. But even if his argument could be accepted as true, for it to apply in this case Barnes must show that each of his remaining prior felonies reflected in his PSR fell only within the parameters of the residual clause at the time he was sentenced. From the case law previously cited, it is clear that the law

rejects and defeats such an argument. Consequently, Barnes's collective motions fail to present the constitutional question on which Samuel Johnson and Welch permit collateral review.

In an effort to show a constitutional injury, Barnes in his Amended Motion (Docket entry 37, pp.13-15) devotes significant effort to urge this Court to follow the Fourth Circuit's "may have been used" standard as described in Winston, and/or the standard formerly applied in the Eleventh Circuit pre-Beeman. However, the Fifth Circuit in Taylor has broadcast its interest in the state of the law at the time of sentencing, to enlighten the Court on which provisions of the ACCA were used at sentencing where the sentencing record is silent, as it is in Barnes's case.

Nonetheless, applying the same approach used by the Fifth Circuit in Taylor, 873 F.3d at 482, under each standard Barnes's claim fails. When this Court sentenced Barnes on September 30, 2013, the relevant "background legal environment" demonstrated that he had "violent felony" prior convictions that were recognized as falling within the parameters of the ACCA elements/force clause. In light of such precedential authority, there is no reasonable basis to contend that this Court "may have" needed to resort to the residual clause to enhance Barnes's sentence. Nor is there any reasonable basis to contend that Barnes "more likely than not" was sentenced under the residual clause. Thus, Barnes has failed to demonstrate a constitutional injury under the Samuel Johnson

decision, and has failed to satisfy the showing required under Section 2255(a) and (f), requiring dismissal of Barnes's Petition and Amended Motion.

Since Barnes cannot demonstrate that he is entitled to relief under the limits of Samuel Johnson and Welch, as previously noted, Barnes's plea agreement waiver of appeal provision (docket entry 17, p.4) remains effective and bars Barnes's Section 2255 petition.

The law in the Fifth Circuit is well-settled that a "defendant's waiver of appeal may entitle the government to dismissal on contractual grounds." United States v. Story, 439 F.3d 226, 230 n.5 (5th Cir. 2006). See also United States v. Bond, 414 F.3d 542, 546 (5th Cir. 2005)(dismissing appeal based on appeal waiver); United States v. Burns, 433 F.3d 442, 451 (5th Cir. 2005)(same); United States v. Harris, 434 F.3d 767, 774 (5th Cir. 2005), cert. denied, 547 U.S. 1104 (2006)(same).

In Barnes's case, the Government moves for dismissal based on its entitlement to enforce the provision in its plea agreement with Barnes, by which Barnes agreed to waive appeal. See United States v. Portillo, 18 F.3d 290, 292 (5th Cir.), cert. denied, 513 U.S. 893 (1994)(affirming based on appeal waiver); United States v. Brown, 328 F.3d 787, 791 (5th Cir. 2003)(same); United States v. Cuevas-Andrade, 232 F.3d 440, 446 (5th Cir. 2000), cert. denied, 532 U.S. 1014 (2001)(absent any "indication that the waiver provision was involuntary, we must enforce it").

The United States is entitled to receive the benefit of its bargain under the plea agreement by which Barnes agreed to forego his right of appeal. A defendant may waive his right to file a Section 2255 motion, although such a waiver might not apply to an ineffective assistance of counsel claim. United States v. White, 307 F.3d 336, 339 (5th Cir. 2002). While Barnes also may not be able to waive his right to appeal an illegal or unconstitutional sentence, he certainly can exercise his right to waive a legally and constitutionally imposed sentence, and he did so in his Plea Agreement. (docket entry 17, p.4). Five affirmations by Barnes concerning his Plea Agreement appear in bold on page 6 of the agreement immediately preceding Barnes's signature. (docket entry 17, p.6).

Consequently, Barnes does not challenge the knowing and voluntary nature of his Plea Agreement with the Government. Nevertheless, he asserts that the waiver should not be enforced for two reasons: (1) he could not knowingly and voluntarily waive an unknown right later afforded to him by Samuel Johnson, and (2) it would be a miscarriage of justice to apply the waiver to his case.

As to the first point, the United States points out that under the legal authority and argument previously presented to the Court, Barnes has no constitutional injury that affords him any relief under Samuel Johnson. Since Samuel Johnson affords Barnes no exercisable right under the facts of his case, his plea agreement

waiver remains viable and unaffected by that decision. As to the second point, the United States submits that it would be a miscarriage of justice to fail to apply the clear and unambiguous waiver in Barnes's case.

The law in the Fifth Circuit is well-established that "an informed and voluntary waiver of post-conviction relief is effective to bar such relief." United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994)(per curiam). In United States v. White, 307 F.3d 336, 343, n.4 (5th Cir. 2002), the Fifth Circuit recognized one exception to this general rule: An ineffective assistance of counsel claim survives a Section 2255 waiver only when the claimed ineffective assistance directly affected the validity of the waiver or the plea itself. This left open the question of whether a Section 2255 waiver could be enforced "where the sentence facially (or perhaps indisputably) exceeds the statutory limits." Id.

Approximately two years later, this question was addressed in United States v. Hollins, 97 Fed.App'x 477, 478 (5th Cir. 2004)(unpublished), wherein the Fifth Circuit faced the problem of a Section 2255 motion alleging ineffective assistance of counsel in which defense counsel did not object to a sentence improperly calculated under U.S.S.G. § 5G1.2(d). In Hollins, the district court imposed consecutive sentences on multiple counts that facially exceeded the statutory maximum allowed. Hollins waived his right to bring a collateral attack based on his sentence.

Under these facts, the Fifth Circuit did not enforce the waiver. The Fifth Circuit found that Hollins was prejudiced by his lawyer's deficient performance, and held that Hollins's counsel was ineffective in neither objecting to nor appealing each of his sentences on the basis that they exceeded the statutory maximum for the crime to which Hollins pleaded guilty. Id.

The sentence this Court imposed upon Barnes neither "facially" nor "indisputably" exceeds the statutory maximum sentence Barnes faced, and thus it does not present the constitutional concerns appeals courts have faced when a defendant's appeal waiver might deny him any appellate challenge for an unconstitutional sentence that exceeds the statutory maximum allowed, as was the case in Hollins. Barnes's appeal waiver remains intact and viable.

The decisions on this issue cited by Barnes rely upon either a concession or a supposition that the defendant in the particular case experienced constitutional injury from the ACCA residual clause described in the Samuel Johnson decision, and consequently the defendant would have received an unconstitutional sentence. In those decisions, the concession or supposition arose from the historical facts in the particular case. However, the historical facts in Barnes's case demonstrate that his sentence at all times was subject to enhancement for prior violent felony convictions qualifying under the ACCA elements/force clause, the constitutionality of which remained unquestioned after Samuel

Johnson. Since Barnes neither demonstrates that this Court imposed an unconstitutional sentence upon him, nor demonstrates that he received ineffective assistance of counsel in the execution of his plea agreement, Barnes's plea agreement waiver of collateral review of his sentence remains valid and binding, and its legitimacy and vitality is completely unaffected by the decisions in Samuel Johnson and Welch.

Barnes's reliance upon United States v. Torres, 828 F.3d 1113, 1124-25 (9th Cir. 2016) post-Samuel Johnson is misplaced. Barnes has claimed that "[i]t is hard to imagine a case with more comparable legal issues than the subject case and Torres. Both involve waiver of appeal issues that relate to filing Section 2255 petitions pursuant to the holdings in [Samuel] Johnson." (Docket entry 37, p.7). However, the only actual similarity between Torres and Barnes's case is that each defendant appealed a sentence that was imposed after a guilty plea to the offense of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). United States v. Torres, 828 F.3d at 1117.

Unlike Barnes's case, Torres involved a direct appeal of Torres's sentence, and was not raised under the rubric of a Section 2255 motion as alleged in Barnes's Amended Motion. (docket entry 37, p.7). Also, unlike Barnes, Torres appealed the constitutionality of the residual clause in section 2K2.1 of the sentencing guidelines. Torres's case was heard prior to the U.S.

Supreme Court decision in Beckles v. United States, 137 S.Ct. 886 (2017), which held that the U.S. Sentencing Guidelines were not subject to a constitutional challenge for vagueness. Beckles, 137 S.Ct. at 890, 897. At that time, the Ninth Circuit found that an "open question" existed as to whether or not a similarly-worded residual clause in the sentencing guidelines remained viable after the Samuel Johnson decision. Id. The Ninth Circuit correctly recognized that "a waiver of appellate rights will also not apply if a defendant's sentence is 'illegal,' which includes a sentence that 'violates the Constitution.'" Torres, 828 F.3d at 1125 (internal citations omitted).

However, in Torres's case, based upon the Government's concession that it believed Samuel Johnson's holding also would apply to U.S.S.G. § 2K2.1(a)(2), the Ninth Circuit assumed without deciding that Samuel Johnson's holding also would nullify an identically-worded residual clause in the sentencing guidelines. Consequently, the Ninth Circuit assumed that Torres was sentenced pursuant to a provision that was unconstitutionally vague, causing the Ninth Circuit to also assume that Torres's sentence was illegal. Consequently, the Ninth Circuit concluded that the waiver in Torres's plea agreement could not bar his appeal. The Ninth Circuit stated, "[B]ecause the government agrees that Torres's prior convictions do not justify the imposition of § 2K2.1(a)(2)'s crime-of-violence enhancement absent the residual clause, we vacate

Torres's sentence and remand for resentencing." Id. Unlike in Torres, in Barnes's case the United States makes no such concession, and the United States has demonstrated that Barnes's ACCA enhancement applied without consideration of the residual clause.

On the facts of Barnes's case, the Court cannot assume that Barnes is entitled to collateral relief under Samuel Johnson merely because Barnes was sentenced before the Samuel Johnson decision was handed down. Nor can the Court assume that Barnes's plea agreement provision waiving his right to bring a motion under 28 U.S.C. § 2255 is invalid because Barnes could not waive a right he did not yet have. To do so would require the Court to assume that Barnes, in fact, was sentenced under the residual clause of the ACCA giving rise to such right. For the reasons previously stated, any such assumptions would be misplaced and erroneous.

United States v. McBride, 826 F.3d 293, 295-96 (6th Cir. 2016), another direct appeal, also fails to advance Barnes's argument regarding the viability of his plea agreement waiver. Nor does McBride offer protection to Barnes's motion on any of the procedural defenses raised by the United States. The McBride decision did not involve a § 2255 motion to vacate sentence, and therefore the McBride court could not address whether a defendant had properly demonstrated a constitutional injury in order to advance his § 2255 motion under the Samuel Johnson decision. The

question in McBride was whether or not federal bank robbery still qualified as a crime of violence under U.S.S.G. § 4B1.1(a).

On direct appeal, McBride argued that, post-Samuel Johnson, he was not bound by his plea agreement stipulation that he was a career offender having at lease two prior crime of violence convictions pursuant to U.S.S.G. § 4B1.1(a). The Sixth Circuit recognized that "a defendant can only abandon known rights" and "could not have intentionally relinquished a claim based on Johnson, which was decided after his sentencing." McBride, 826 F.3d at 295. Importantly, the Sixth Circuit noted: "The only claim that McBride could not have waived is that his prior convictions for bank robbery were crimes of violence before Johnson, but through the residual clause alone." Id. (emphasis in original).

As this language clearly verifies, a petitioner can only place himself under the umbrella of relief afforded by the Samuel Johnson decision, and hope to avoid a waiver when his prior convictions "were crimes of violence before Samuel Johnson, but through the residual clause alone." Id. (emphasis added). The Sixth Circuit rejected McBride's argument that bank robbery was a crime of violence through § 4B1.2(s)'s now-defunct residual clause, but not through its physical-force clause. Id. The Sixth Circuit affirmed the district court's judgment and sentence. Id. at 296.

Applying McBride to Barnes's case, it is apparent that several of Barnes's convictions were crimes of violence before Samuel

Johnson, but not through the residual clause alone. Thus, McBride does not advance or protect Barnes's motion, but rather shows that his motion is barred for failing to show a constitutional injury under the parameters of Samuel Johnson, and is further barred as untimely, thus effectively waived under the terms of Barnes's plea agreement.

Finally, Barnes suggests that enforcing the waiver in his plea agreement would be tantamount to a "miscarriage of justice," citing United States v. Powell, 574 Fed.App'x. 390, 394-95 (5th Cir. 2014). Barnes concedes that the Fifth Circuit has not adopted such a third step in analyzing whether an appeal of a sentence is barred by an appeal waiver provision in a plea agreement, but still he suggests that the Court should take this opportunity to do so. However, Powell construed an appeal-waiver clause that, by its terms, exempted a sentence "above the applicable sentence guideline range." Id. Because the word "applicable" was subject to different interpretations, applying precedential authority the Fifth Circuit adopted an interpretation favorable to the defendant and did not enforce that particular waiver. Id. But the Fifth Circuit did enforce against Powell a separate waiver provision where Powell reserved the right to appeal a sentence "greater than the maximum sentence authorized by statute." The Fifth Circuit found this waiver to be enforceable because Powell's sentence obviously did not exceed the statutory maximum term of

imprisonment. Id.

Barnes's waiver contains no terms subject to different interpretations. Powell fails to support Barnes's argument that his waiver is unenforceable. To the contrary, in Powell the Fifth Circuit upheld its well-established practice of enforcing such waivers where, as in Barnes's case, the language of the waiver is unambiguous, and the facts and posture of the case support its applicability.

Historical facts and precedential authority show that Barnes's sentence was not influenced by the ACCA residual clause at sentencing, nor was it influenced thereafter by the Samuel Johnson decision. The Court constitutionally enhanced Barnes's sentence under the ACCA's elements/force clause and the ACCA's serious drug offense clause, based upon qualifying predicate prior convictions reflected in Barnes's Presentence Report.

Barnes failed to state a cognizable constitutional claim of error under Samuel Johnson. Thus, Barnes's position is untimely and barred under 28 U.S.C. § 2255(f). Inasmuch as Barnes's lawfully imposed sentence does not exceed the statutory maximum sentence, Barnes's appeal waiver remains valid and enforceable and his motion remains waived under the terms of his plea agreement.

BARNES'S RESPONSE

In response to the Government's Motion to Dismiss, Barnes

cites United States v. Batchelder, 442 U.S. 114, 124 (1979), for the proposition that "[w]hether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecution's discretion." Barnes contends that the prosecutor can choose to narrowly draw an indictment, and that this is what happened in his case, limiting the ACCA analysis to considering only the four prior convictions specifically stated in the Indictment. Further, Barnes claims that since the prosecutor knowingly excluded the two additional priors (a Florida state conviction for armed robbery (see PSR, p.7 ¶ 31) and a Florida state conviction for aggravated battery (see PSR, p. 7 ¶ 31), the prosecution's reliance on these two additional prior convictions is error for at least two reasons.

First, Barnes quotes United States v. Batchelder, 442 U.S. 114, 124 (1979): "Whether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecution's discretion." According to Barnes, the prosecutor can choose to narrowly draw an indictment, as Barnes contends happened here, to limit the ACCA analysis to considering only the four prior convictions specifically stated in the Indictment. Barnes objects that the prosecutor knowingly excluded the two additional priors from the Indictment, and therefore he should not be allowed to resurrect them for consideration in Barnes's ACCA analysis.

Second, Barnes contends that the prosecution ignores the language of 18 U.S.C. § 924(e)(1), which states in part:

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

Barnes contends that under the emphasized language, prior crimes must have occurred "on occasions different from one another" to be counted as separate prior convictions in the ACCA analysis.

The PSR indicates that the two additional priors that the prosecution seeks to inject into the analysis – convictions for armed robbery and aggravated battery under Florida law – were crimes committed at the same time as the Florida conviction for kidnapping. The kidnapping conviction is stated in the Indictment as one of the prior convictions relied on by the prosecution for ACCA purposes, so it is Barnes's contention that the prior convictions for armed robbery and aggravated battery cannot be considered in the analysis.

Barnes also challenges the prosecution's use of the waiver of appeal provision in Barnes's Plea Agreement as barring Barnes's § 2255 petition. In support of his position, Barnes cites a recent opinion by District Judge Henry Wingate finding that the waiver of

appeal provision does not bar a court from considering the merits of a § 2255 petition based on the holdings in Samuel Johnson. See Ben v. United States, criminal no. 4:12-cr-11(HTW)(May 18, 2018).

As in the case sub judice, the petitioner in Ben sought a sentence reduction under the holdings in Samuel Johnson. Likewise, the prosecutor sought dismissal of the Petition based on the waiver of appeal provision in Ben's Plea Agreement. Rejecting the prosecution's argument, Judge Wingate held: "This court is persuaded that this Fifth Circuit jurisprudence speaks to waiver and holds that a defendant does not waive an unknown right at the time of his plea agreement. To find that Ben could not later challenge an allegedly unconstitutional action based on law, made retroactive after his own sentencing would not comport with the fairness standards of the United States Constitution, nor would it comport with Due Process." Ben, 4:12-cr-11, docket entry 29 at p.6.

Based on Ben, Barnes urges this Court to find that Barnes' waiver of appeal provision does not bar his § 2255 action.

THE GOVERNMENT'S REPLY

Concerning Barnes's first argument, the Government contends that this Court is not limited to the prior convictions identified in Barnes's indictment in determining whether his sentence was properly enhanced under the ACCA. Barnes cites no legal authority

to support that argument, and his argument is contrary to existing law. Barnes's Response ignores prevailing federal law as pronounced by the United States Supreme Court in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)), and as recognized as authoritative in the Fifth Circuit in United States v. Stapleton, 440 F.3d 700, n.1 (5th Cir. 2006)("The Supreme Court has held that recidivist provisions like those in the Armed Career Criminal Act are neither substantive offenses nor elements thereof and thus the fact of a prior conviction need not be alleged in an indictment nor proven beyond a reasonable doubt.")(citing Almendarez-Torres, supra).

To support his first argument, Barnes relies on a single sentence in United States v. Batchelder, 442 U.S. 114, 124, 99 S.Ct. 2198, 2204 (1979), which states, "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." No issue has been presented to this Court concerning the propriety of Barnes's underlying prosecution for violation of 18 U.S.C. § 922(g)(1) based upon the offense conduct in this case. (See PSR, ¶¶ 6-12). Nothing in Batchelder addresses the sentencing issues faced by this Court. However, from this lone sentence in Batchelder, Barnes extrapolates his argument that Batchelder somehow requires this Court to erase from consideration any criminal history other than those convictions listed in Barnes's indictment. Barnes's argument

is foreclosed by Almendarez-Torres and by United States v. Stapleton, 440 F.3d 700, n.1 (5th Cir. 2006). Moreover, further reading within Batchelder exposes the decoupling of Barnes's extrapolated argument to limit his sentencing exposure:

> Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.

Batchelder, 99 S.Ct. at 2205.

Barnes's second argument on this issue, that other convictions referenced in his PSR cannot be considered alternatively because they were committed at the same time as the Florida kidnapping conviction, appears to rest upon his apparent misreading of the United States' Amended Motion to Dismiss, wherein the United States argues that "[i]n lieu of" the kidnapping conviction, either Barnes's Florida Armed Robbery conviction or his Florida Aggravated Battery conviction readily could be substituted into the Court's ACCA analysis. Notably, Barnes raises no constitutional challenge concerning either of these convictions.

In Barnes's Response (docket entry 40, p.5), his argument against the enforceability of his appeal waiver rests on the recent district court opinion by Judge Wingate in Ben, supra, which involved different facts and legal arguments. Barnes claims similarity between his case and Ben. However, reviewing the record in Ben reveals no similarity apart from the United States' desire

to enforce the appeal waiver and the Petitioner's desire to defeat it. Comparing the briefs in Ben to those presented to this Court reveals that the defense presented an almost verbatim argument to Judge Wingate as it has presented in the case at bar. Barnes's citation to this opinion suggests that Judge Wingate found the defense analysis and legal authority to be persuasive, but in fact those arguments were rejected by Judge Wingate.

Petitioner Ben relied on United States v. Torres, 828 F.3d 1113, 1124-25 (9th Cir. 2016) and United States v. McBride, 826 F.3d 293, 295-96 (6th Cir. 2016), both of which the United States distinguished from the case at bar in the Government's Amended Motion to Dismiss. (docket entry 39, pp.23-26). Notably, Judge Wingate declined to follow both Torres and McBride, and instead reached his decision based on United States v. Wright, 681 Fed. App'x 418, 420 (5th Cir. 2017), quoting the following passage:

> Waiver occurs when a party intentionally abandons a right that is known." United States v. Traxler, 390 Fed. App'x, 363, 367 (5th Cir. 2010)(citing United States v. Arviso-Mata, 442 F.3d 382, 384 (5th Cir. 2006)). Where, as here, a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time. Id.; see also, e.g. Smith v. Blackburn, 632 F.2d 1194, 1195 (5th Cir. 1980).

Based upon the record that was before him, Judge Wingate resolved the appeal waiver issue solely on the fact that the constitutional right Ben sought to enforce arose after he executed

his plea agreement and, therefore, Ben did not knowingly waive it. Judge Wingate then moved directly to the merits of Ben's motion to vacate, denying the motion for failure to demonstrate a constitutional injury. Review of the pleadings and briefs filed in Ben reveals that Judge Wingate was presented with different facts and legal arguments than those presented to this Court in Barnes's case. Those differences dictate a different result in Barnes's case, as the United States discussed in its Motion to Dismiss (docket entry 36, pp.7-10) and Amended Motion to Dismiss (docket entry 39, pp.20-26).

Barnes cannot avoid the consequences of the appeal and post-conviction waiver in his plea agreement based on Samuel Johnson, because that decision does not apply in Barnes's case. Absent the applicability of Samuel Johnson, Barnes has no basis to claim that his appeal and post-conviction waiver is unenforceable. Since Barnes does not reap the benefit of Samuel Johnson, he has no newly recognized constitutional right that arose after the executed his plea agreement. Thus, United States v. Wright, 681 Fed. App'x 428, 420 (5th Cir. 2017) does not salvage Barnes's argument, and his appeal and post-conviction waiver in his plea agreement remains enforceable.

The unavailability of Samuel Johnson has another consequence for Barnes. Because (consistent with his appeal waiver) he did not appeal, his conviction became final in November of 2013 (docket

entries 24,25). See United States v. Scruggs, 691 F.3d 660, 669 (5th Cir. 2012)("When a defendant does not file a direct appeal, his conviction becomes final on the day when the time for filing a direct appeal expires."). Barnes had one year in which to file for § 2255 relief, which means his deadline for seeking post-conviction relief expired a year later in 2014. Id. (§ 2255 movant generally must file for relief within one year of the date when his conviction becomes final). Without the applicability of Samuel Johnson, Barnes is unable to benefit from retroactive application of that decision. See Welch v. United States, 136 S. Ct. 1257, 1268 (2016)(Samuel Johnson retroactive to cases on collateral review).

The Court finds that Barnes's claim is untimely. The Court further finds that Barnes previously waived his right to collaterally attack his sentence in a § 2255 motion; that he failed to demonstrate that he was entitled to proceed under the auspices and parameters of the Samuel Johnson decision; and that his argument under the Curtis Johnson decision is both untimely and procedurally barred. In conclusion, the Court agrees with the Government that Barnes's § 2255 motion must be dismissed.

ACCORDINGLY,

IT IS HEREBY ORDERED AND ADJUDGED that the first Motion to Dismiss **(docket entry 36**) and second Motion to Dismiss **(docket entry 39**) filed by the United States of America are GRANTED;

IT IS FURTHER ORDERED AND ADJUDGED that Petitioner Barnes's Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody **(docket entry 30)** is DISMISSED as untimely and as procedurally barred.

SO ORDERED AND ADJUDGED, this the 6th day of July, 2018.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 23, 2020
Lyle W. Cayce
Clerk

No. 18-60497

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

MICHAEL JAMES BARNES,

Defendant–Appellant.

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

Before JOLLY, SMITH, and STEWART, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Per a plea agreement, Michael Barnes pleaded guilty, waived his right to challenge his conviction and sentence (both directly and collaterally), and was sentenced under the Armed Career Criminal Act ("ACCA"). Then in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Court held ACCA's residual clause unconstitutional. Based on *Johnson*, Barnes filed a 28 U.S.C. § 2255 motion to vacate his sentence. The district court dismissed his challenge, and

Barnes appeals. Because Barnes's petition is barred by the collateral-review waiver in his plea agreement, we dismiss the appeal.

I.

In July 2013, Barnes pleaded guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The plea agreement identified four of Barnes's past convictions that constituted either "violent felon[ies]" or "serious drug offense[s]," which triggered ACCA's mandatory minimum sentence of fifteen years. *Id.* § 924(e)(1).

As part of the plea agreement, Barnes agreed to waive his "right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255 . . . ." Barnes waived that right, among others, "in exchange for the United States Attorney entering into this Plea Agreement and accompanying Plea Agreement Supplement."[1] The district court accepted Barnes's plea and sentenced him to the fifteen-year mandatory minimum. Barnes didn't appeal.

In June 2015, the Supreme Court held that one of ACCA's clauses defining what constitutes a "violent felony"—§ 924(e)(2)(B)(ii), also called § 924(e)(2)(B)'s residual clause—was unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2557. About three months later—and notwithstanding his collateral-review waiver promising not to do so—Barnes filed a § 2255 motion challenging his sentence as "imposed in violation of the Constitution" because, after *Johnson*, he had no longer been convicted of the three necessary violent

[1] The U.S. Attorney agreed to recommend the fifteen-year mandatory minimum, which was a below-guidelines sentence based on Barnes's criminal history and significantly lower than the statutory maximum of life. The U.S. Attorney also agreed not to prosecute Barnes for any other conduct "arising out of any event covered by the Indictment" that Barnes disclosed before accepting the plea agreement.

felonies or serious drug offenses. The government opposed his challenge on two grounds: (1) *Johnson* didn't apply, and thus Barnes's petition was untimely, because his sentence could be sustained under another of ACCA's definitions of "violent felony"; and (2) Barnes's collateral-review waiver barred his § 2255 petition.

The district court dismissed Barnes's petition. The court found that (1) "Barnes previously waived his right to collaterally attack his sentence in a § 2255 motion," (2) "he failed to demonstrate that he was entitled to proceed under the auspices and parameters of [*Johnson*]," and (3) his contention that he didn't have the requisite number of "violent felonies" was "both untimely and procedurally barred." The court also rejected Barnes's "miscarriage of justice" contention. The district court denied Barnes a certificate of appealability, but a judge of this court granted him one on two issues: (1) "whether Barnes's *Johnson* claims are barred by the collateral-review waiver" and (2) "whether the district court erred by dismissing the § 2255 motion as time-barred based on its determination that *Johnson* did not affect his sentence under the ACCA."

II.

We review *de novo* whether a collateral-review waiver bars an appeal.[2] We consider "(1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019). "A waiver is knowing and voluntary if the defendant knows that he has the right to collateral review and that he is waiving it in the plea agreement."[3]

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[2] *See United States v. Timothy Burns*, 770 F. App'x 187, 189 (5th Cir.) (per curiam), *cert. denied*, 140 S. Ct. 279 (2019); *see also Gaylord v. United States*, 829 F.3d 500, 505 (7th Cir. 2016) ("We review de novo the enforceability of a plea agreement's waiver of direct or collateral review.").

[3] *Timothy Burns*, 770 F. App'x at 190; see also *Kelly*, 915 F.3d 344, 348 ("For a waiver

Though we construe waivers in plea agreements narrowly, *United States v. Pleitez*, 876 F.3d 150, 156 (5th Cir. 2017), the government nonetheless "has a strong and legitimate interest in both the finality of convictions and in the enforcement of plea bargains." *United States v. Dyer*, 136 F.3d 417, 429 (5th Cir. 1998) (footnote omitted).

Before considering Barnes's contentions, it's important to identify what he *isn't* challenging. He doesn't dispute that he was aware of his right to collateral review or that he agreed to waive that right. Nor is he asserting that the language of his waiver doesn't apply to his *Johnson*-based challenge or that his waivers were tainted by ineffective assistance of counsel. Instead, he posits that his waiver is unenforceable for three reasons. First, he maintains that "a defendant cannot waive a right that is unknown at the time that the waiver provision is executed." Second, relying on *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), he avers that he can't waive his right to challenge an illegal or unconstitutional sentence. And finally, we could adopt a "miscarriage of justice" exception and refuse to enforce his waiver on that ground.

Unfortunately for Barnes, we already confronted—and rejected—each of those positions in *Timothy Burns*, 770 F. App'x at 190–91. Barnes acknowledged as much in his reply brief. Though *Timothy Burns* is unpublished, "we may consider the opinion as persuasive authority." *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322 n.1 (5th Cir. 2019) (per curiam). And given the strong support that its reasoning finds in our caselaw, *Timothy Burns* is instructive.

A.

Barnes's contention that he couldn't have waived a right that was

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to be knowing and voluntary, a defendant must know that he had a right to appeal his sentence and that he was giving up that right." (cleaned up)).

unknown at the time of his waiver is foreclosed by *United States v. Creadell Burns*, 433 F.3d 442 (5th Cir. 2005). There, the defendant pleaded guilty, waived his right to appeal, and was sentenced under the then-mandatory sentencing guidelines. *Id.* at 443–44. After the Supreme Court held that the mandatory guidelines violated the Sixth Amendment,[4] Creadell Burns contended that he couldn't have waived his right to assert a *Booker*-based challenge on appeal because that case hadn't yet been decided when he entered his plea. *See id.* at 446–47. We rejected that position, holding instead that "an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* . . . issue (whether or not that issue would have substantive merit), merely because the waiver was made before *Booker*." *Id.* at 450–51. Said differently, "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757 (1970).

Barnes attempts to discount *Creadell Burns* by contending that it either conflicts with or was called into doubt by (1) *Smith v. Blackburn*, 632 F.2d 1194 (5th Cir. Unit A 1980) (per curiam), (2) *United States v. Wright*, 681 F. App'x 418 (5th Cir. 2017) (per curiam), (3) three orders from the Southern District of Mississippi,[5] and (4) *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016). None of those efforts is persuasive.

In *Smith*, 632 F.2d at 1195, a Louisiana defendant was offered two

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[4] *United States v. Booker*, 543 U.S. 220, 243–44 (2005) (opinion of Stevens, J.) (holding that the mandatory guidelines violated the Sixth Amendment); *id.* at 245 (opinion of Breyer, J.) (holding that provision making the guidelines mandatory was severable).

[5] *See United States v. Culpepper*, No. 3:12-CR-00118-CWR-FKB-10, 2017 WL 658777 (S.D. Miss. Feb. 15, 2017); *United States v. Tarrio*, No. 3:08-CR-00001-TSL-LRA (S.D. Miss. Mar. 13, 2017); *United States v. Craven*, 2:08-CR-00005-KS-MTP (S.D. Miss. Mar. 22, 2017).

choices: (1) a jury of six members who could convict by five votes or (2) a jury of five members who could convict by a unanimous vote. The defendant chose the latter, thereby waiving his right to the former. *Id.* After he was convicted, the Supreme Court determined that both of those options were unconstitutional.[6] On appeal of his federal habeas petition, this court held that Smith hadn't waive a "known right or privilege" because *Ballew* wasn't decided until three years after he was put to his choice. *Id.* But critically, and unlike this case, there is no indication that the defendant in *Smith* agreed to an appellate or collateral-review waiver. *Smith* is therefore inapposite.

Next, Barnes is correct that *Wright* held that "[w]here, as here, a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time." *Wright*, 681 F. App'x at 420. But *Wright*, which is unpublished, didn't cite or even consider the published opinion in *Creadell Burns*. And to the extent the decisions conflict, *Creadell Burns* controls under our rule of orderliness.[7] The same naturally holds true for the three rulings from the Southern District of Mississippi.[8]

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[6] *See Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (Blackmun, J., announcing the judgment of the Court) ("Petitioner, therefore, has established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments."); *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (holding that Sixth and Fourteenth Amendments required "verdicts rendered by six-person juries to be unanimous").

[7] *See Jacobs v. Nat'l Drug Intell. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court."); *see also Dick v. Colo. Hous. Enters., L.L.C.*, 872 F.3d 709, 711–12 (5th Cir. 2017) (per curiam) (refusing to apply an unpublished decision when doing so would conflict with a published case).

[8] Even if those decisions could call *Creadell Burns*'s rule into doubt, the reasoning undergirding them flatly doesn't. In *Culpepper*, 2017 WL 658777 at *2, the court stated only that it "denie[d] the Government's motion to dismiss and f[ound] it appropriate to reach the merits of Culpepper's motion." It offered no explanation for why it refused to enforce the

Finally, even if, hypothetically, an out-of-circuit decision could trump *Creadell Burns*, *McBride* doesn't provide any help to Barnes. In *McBride*, 826 F.3d at 295, the Sixth Circuit did find that the defendant "could not have intentionally relinquished a claim based on *Johnson*." "But the *McBride* plea agreement, unlike the one here, did not include an appeal waiver." *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017). And based on that distinction, the Sixth Circuit held in *Morrison* that a defendant's appellate waiver barred his *Johnson*-based challenge, even though *Johnson* wasn't decided until after he was sentenced. *Id.*

At base, Barnes needn't have understood all the possible eventualities that could, in the future, have allowed him to challenge his conviction or sentence. His waiver only needed to be "knowing," not "all-knowing." When Barnes waived his right to post-conviction review, he was aware of the right that he was giving up. By doing so, "he assumed the risk that he would be denied the benefit of future legal developments." *Id.* Most other circuits have reached the same conclusion when considering appellate or collateral-review waivers in the context of *Johnson*-based challenges.[9]

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collateral-review waiver. The other two decisions didn't even acknowledge whether the government tried to enforce the collateral-review waivers at all.

[9] *See, e.g.*, *United States v. Bey*, 825 F.3d 75, 82–83 (1st Cir. 2016) (enforcing appellate waiver to bar *Johnson* challenge, even after considering "miscarriage of justice" exception); *Sanford v. United States*, 841 F.3d 578, 581 (2d Cir. 2016) (per curiam) ("Sanford's collateral attack waiver therefore bars the present motion because the waiver encompasses any challenge to his sentence."); *In re Garner*, 664 F. App'x 441, 442 (6th Cir. 2016) ("[W]e must deny Garner's motion for the same reason he lost his direct appeal and his § 2255 action: Garner waived his right to challenge his sentence collaterally in his plea agreement."); *United States v. Ford*, 641 F. App'x 650, 651 (8th Cir. 2016) (per curiam) (enforcing appeal waiver to bar defendant's *Johnson* challenge); *United States v. Hurtado*, 667 F. App'x 291, 292 (10th Cir. 2016) (per curiam) ("The government unequivocally establishes that the [*Johnson*-based] appeal falls within the scope of the waiver, the waiver was knowing and voluntary, and enforcing the waiver will not result in a miscarriage of justice."). *But see Torres*, 828 F.3d at 1125 (refusing to enforce appeal waiver on the ground that such waivers don't apply "a defendant's sentence is 'illegal,' which includes a sentence that 'violates the Constitution'");

B.

Barnes's theory that he can't waive his right to challenge an illegal or unconstitutional sentence is similarly foreclosed by precedent. We have recognized only two exceptions to the general rule that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002), and second, a sentence exceeding the statutory maximum.[10]

Barnes invokes neither exception but, instead, avers that his sentence was imposed unlawfully because, after *Johnson*, it violated the Constitution. Unfortunately for Barnes, however, that doesn't get him out from under the collateral-review waiver to which he agreed. As the *Timothy Burns* panel recognized, defendants can waive the right to challenge both illegal and unconstitutional sentences.[11] Barnes's reliance on *Torres* is misplaced. The fact that

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United States v. Cornette, 932 F.3d 204, 210 (4th Cir. 2019) ("[W]e may review Cornette's sentencing challenge [under *Johnson*] notwithstanding the appeal waiver.").

[10] *See United States v. Leal*, 933 F.3d 426, 431 (5th Cir.), *cert. denied*, 140 S. Ct. 628 (2019). *Leal* appears to be the first published case, in this circuit, specifically to adopt that exception, but a past panel purported to adopt it in an unpublished decision. *See United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (per curiam). The government brought *Hollins* to the attention of the district court and Barnes in its motion to dismiss. Nonetheless, Barnes didn't cite *Hollins* or make any argument—in either his district-court briefing or on appeal—that his sentence exceeded the applicable statutory maximum. To the extent that Barnes tried to claim the benefit of *Leal* at oral argument, he had already forfeited any opportunity to do so. *Cf. Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 247 (5th Cir. 2005) ("No authority need be cited for the rule that, generally, we do not consider an issue first raised at oral argument on appeal.").

[11] *See Timothy Burns*, 770 F. App'x at 190; *see also Kelly*, 915 F.3d at 347 (holding that defendant's appeal waiver barred court from considering his claim that the district court improperly "appl[ied] the ACCA enhancement because he lacks the requisite number of violent felony predicates"); *United States v. Keele*, 755 F.3d 752, 757 (5th Cir. 2014) ("Here, because the appeal waiver in Keele's signed, written plea agreement waived his right to appeal his sentence with only three specific exceptions, none of which apply here, we conclude that his Eighth Amendment claims are also waived." (footnote omitted)); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (holding that defendant's appellate waiver barred challenge to statute of conviction on Fifth Amendment grounds, because his plea agreement reserved only his right to challenge the statute on Second Amendment grounds);

Ninth Circuit caselaw runs counter to ours doesn't empower us to refuse to apply binding precedent.

C.

Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a "miscarriage of justice" exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it. *See United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (per curiam). Barnes does not, however, (1) explain the proper scope of that exception, (2) cite any cases purporting to do so, or (3) detail how and why it should apply to his case.[12] By only briefly alluding to that theory, Barnes has waived any contention that such an exception applies. *See United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010). When confronted with a similarly phrased argument, the *Timothy Burns* panel, 770 F. App'x at 191, reached the same conclusion.

Barnes's § 2255 motion is barred by his collateral-review waiver. The appeal is DISMISSED.

United States v. Baty, 980 F.2d 977, 979 (5th Cir. 1992) ("After waiving her right to appeal, the district court could err in its application of the Sentencing Guidelines or otherwise impose an illegal sentence. . . . Yet, the defendant, who has waived her right to appeal, cannot appeal these errors.").

[12] Barnes states merely that "[m]any defendants" have had their sentences reduced under *Johnson* and that it would be "patently unjust and unfair" to deny him relief because he agreed to a collateral-review waiver. But he doesn't offer any explanation of why it's unfair to treat defendants who agree to waive their rights differently from those who don't.

E. GRADY JOLLY, Circuit Judge, dissenting:

I dissent because I respectfully disagree with the majority's disregarding a binding and precedential decision of this court: *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019).

The majority dismisses Appellant's *Leal* argument on the grounds that he did not raise it in the district court nor in his briefing to this court. *See* footnote 10 ("To the extent that Barnes tried to claim the benefit of *Leal* at oral argument, he had already forfeited any opportunity to do so."). A flimsy reason indeed when *Leal* had not been decided at the time of briefing in the district court or in this court. Yet the majority thus holds that by failing in his briefing to cite *Leal*—which was impossible for Barnes or anyone else to have known—Barnes somehow "forfeited" the right to raise *Leal* at oral argument.

"Forfeiture is the failure to make the timely assertion of a right." *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006). Yet, at oral argument was timely here. Even assuming a forfeiture, however, "[f]orfeited errors are reviewed under the plain error standard." *Id.* The majority, nevertheless, fails to apply plain error review to Barnes's *Leal* claim, effectively treating it as waived. "[W]aiver is the intentional relinquishment of a known right." *Id.* I repeat myself to say that at the time of briefing, *Leal* was not a known right. In short, I would join Judge Smith and his panel in *DSC Commc'ns Corp. v. Next Level Commc'ns*, 107 F.3d 322 (5th Cir. 1997), which said it was "unwilling to . . . perpetuate incorrect law, merely because [a precedent] was decided after briefing . . . in this case." *Id.* at 326 n.2.

It would seem to me that the panel is obligated to address *Leal* as it applies to this case. I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 23, 2020
Lyle W. Cayce
Clerk

No. 18-60497

D.C. Docket No. 3:15-CV-682

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MICHAEL JAMES BARNES,

Defendant - Appellant

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

Before JOLLY, SMITH, and STEWART, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the appeal is dismissed.

E. GRADY JOLLY, Circuit Judge, dissenting.

APPENDIX 3

KeyCite Yellow Flag - Negative Treatment
Distinguished by Thompson v. United States, N.D.Tex., April 17, 2020

953 F.3d 383
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Michael James BARNES, Defendant–Appellant.

No. 18-60497
|
FILED March 23, 2020

Synopsis

Background: Defendant, who had entered a negotiated guilty plea to being a felon in possession of a firearm, filed motion to vacate sentence, relating to enhancement of his sentence under Armed Career Criminal Act (ACCA). The United States District Court for the Southern District of Mississippi, David C. Bramlette, Senior District Judge, dismissed the motion. Defendant appealed.

[Holding:] The Court of Appeals, Smith, Circuit Judge, held that defendant's collateral-review waiver in his plea agreement was knowing and voluntary, even though defendant had not known that the Supreme Court would issue its decision in *Johnson v. United States*, concerning the ACCA.

Appeal dismissed.

Jolly, Senior Circuit Judge, filed a dissenting opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (13)

[1] Criminal Law Review De Novo

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 In general

The Court of Appeals reviews de novo whether a collateral-review waiver in a plea agreement bars a motion to vacate sentence. 28 U.S.C.A. § 2255.

[2] Criminal Law Effect of guilty or nolo contendere plea

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea

In determining whether a collateral-review waiver in a plea agreement bars a motion to vacate sentence, the Court of Appeals considers: (1) whether the waiver was knowing and voluntary, and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the plea agreement. 28 U.S.C.A. § 2255.

1 Cases that cite this headnote

[3] Criminal Law Effect of guilty or nolo contendere plea

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea

A collateral-review waiver in a plea agreement is knowing and voluntary if the defendant knows that he has the right to collateral review and that he is waiving it in the plea agreement.

1 Cases that cite this headnote

[4] Criminal Law Representations, promises, or coercion; plea bargaining

Criminal Law Effect of guilty or nolo contendere plea

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) Representations, promises, or coercion; plea bargaining
110 Criminal Law
110XXX Post-Conviction Relief

110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
While collateral-review waivers in plea agreements are construed narrowly, the government nonetheless has a strong and legitimate interest in both the finality of convictions and in the enforcement of plea bargains.

[5] **Courts** Operation and effect in general
106 Courts
106II Establishment, Organization, and Procedure
106II(K) Opinions
106k107 Operation and effect in general
A panel of the Court of Appeals may consider another panel's unpublished opinion as persuasive authority.

[6] **Criminal Law** Voluntary Character
110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(1) In general
A voluntary plea of guilty, intelligently made in the light of the then applicable law, does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.

[7] **Criminal Law** Effect of guilty or nolo contendere plea
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
Defendant's collateral-review waiver in his plea agreement was knowing and voluntary and therefore it barred defendant's motion to vacate sentence, which challenged enhancement of his sentence under the Armed Career Criminal Act (ACCA), though defendant had not known when he entered into plea agreement that the Supreme Court would issue its decision in *Johnson v. United States*, which held that the residual clause of definition of violent felony in the ACCA was unconstitutionally vague under due process principles. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. § 2255.

[8] **Criminal Law** Effect of guilty or nolo contendere plea
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
Collateral-review waiver in defendant's plea agreement needed only to be knowing, not all-knowing, and defendant need not have understood all the possible eventualities that could, in the future, have allowed him to challenge his conviction or sentence.

[9] **Criminal Law** Effect of guilty or nolo contendere plea
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
When defendant, with awareness of the right he was giving up, waived in his plea agreement his right to post-conviction review, he assumed the risk that he would be denied the benefit of future legal developments.

1 Cases that cite this headnote

[10] **Criminal Law** Plea of Guilty or Nolo Contendere
Criminal Law Effect of guilty or nolo contendere plea
110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(2.1) In general
110 Criminal Law
110XXX Post-Conviction Relief

110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
Knowing and voluntary appeal waivers and collateral-review waivers in plea agreements are enforceable, except in cases of ineffective assistance of counsel or a sentence exceeding the statutory maximum. U.S. Const. Amend. 6.

[11] **Criminal Law** Post-conviction relief
Criminal Law Points and authorities
110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042.7 Proceedings After Judgment
110k1042.7(2) Post-conviction relief
110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) Points and authorities
Argument that defendant raised for first time at oral argument at Court of Appeals was already forfeited, i.e., argument under what appeared to be the first published opinion from Court of Appeals specifically adopting the exception, for sentences exceeding the statutory maximum, to general rule that knowing and voluntary appeal waivers and collateral-review waivers in plea agreements are enforceable, where in District Court the government had brought to attention of defendant and District Court an unpublished Court of Appeals opinion purporting to adopt the exception, yet defendant did not cite the unpublished opinion or make any argument, in either his District Court briefing or on appeal, that his sentence exceeded the applicable statutory maximum.

[12] **Criminal Law** Plea of Guilty or Nolo Contendere
Criminal Law Effect of guilty or nolo contendere plea
110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(2.1) In general
110 Criminal Law
110XXX Post-Conviction Relief
110XXX(A) In General
110k1434 Effect of guilty or nolo contendere plea
In appeal waivers and collateral-review waivers in plea agreements, defendants can waive the right to challenge both illegal sentences and unconstitutional sentences.

[13] **Criminal Law** Points and authorities
110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) Points and authorities
Defendant, by only briefly alluding, in his appellate briefing, to a miscarriage of justice theory for refusing to enforce the collateral-review waiver in his plea agreement, waived any contention that such an exception applied to his motion to vacate sentence; defendant merely stated that "[m]any defendants" had their sentences reduced under Supreme Court's decision in *Johnson v. United States*, which held that the residual clause of definition of violent felony in Armed Career Criminal Act (ACCA) was unconstitutionally vague under due process principles, and defendant merely stated that it would be "patently unjust and unfair" to deny him relief because he agreed to a collateral-review waiver. U.S. Const. Amend. 5; 18 U.S.C.A. § 924(e)(2)(B)(ii); 28 U.S.C.A. § 2255.

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

***383** Appeal from the United States District Court for the Southern District of Mississippi, David C. Bramlette, III, U.S. District Judge

Attorneys and Law Firms

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Michael L. Scott, Esq., Thomas Creagher Turner, Jr., Esq., Federal Public Defender's Office, Southern District of Mississippi, Jackson, MS, for Defendant-Appellant

Before JOLLY, SMITH, and STEWART, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge:

***385** Per a plea agreement, Michael Barnes pleaded guilty, waived his right to challenge his conviction and sentence (both directly and collaterally), and was sentenced under the Armed Career Criminal Act ("ACCA"). Then in *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), the Court held ACCA's residual clause unconstitutional. Based on *Johnson*, Barnes filed a 28 U.S.C. § 2255 motion to vacate his sentence. The district court dismissed his challenge, and Barnes appeals. Because Barnes's petition is barred by the collateral-review waiver in his plea agreement, we dismiss the appeal.

I.

In July 2013, Barnes pleaded guilty of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The plea agreement identified four of Barnes's past convictions that constituted either "violent felon[ies]" or "serious drug offense[s]," which triggered ACCA's mandatory minimum sentence of fifteen years. *Id.* § 924(e)(1).

As part of the plea agreement, Barnes agreed to waive his "right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255 ...." Barnes waived that right, among others, "in exchange for the United States Attorney entering into this Plea Agreement and accompanying Plea Agreement Supplement." [1] The district court accepted Barnes's plea and sentenced him to the fifteen-year mandatory minimum. Barnes didn't appeal.

[1] The U.S. Attorney agreed to recommend the fifteen-year mandatory minimum, which was a below-guidelines sentence based on Barnes's criminal history and significantly lower than the statutory maximum of life. The U.S. Attorney also agreed not to prosecute Barnes for any other conduct "arising out of any event covered by the Indictment" that Barnes disclosed before accepting the plea agreement.

In June 2015, the Supreme Court held that one of ACCA's clauses defining what constitutes a "violent felony"—§ 924(e)(2)(B)(ii), also called § 924(e)(2)(B)'s residual clause —was unconstitutionally vague. *See Johnson*, 135 S. Ct. at 2557. About three months later—and notwithstanding his collateral-review waiver promising not to do so—Barnes filed a § 2255 motion challenging his sentence as "imposed in violation of the Constitution" because, after *Johnson*, he had no longer been convicted of the three necessary violent felonies or serious drug offenses. The government opposed his challenge on two grounds: (1) *Johnson* didn't apply, and thus Barnes's petition was untimely, because his sentence could be sustained under another of ACCA's definitions of "violent felony"; and (2) Barnes's collateral-review waiver barred his § 2255 petition.

The district court dismissed Barnes's petition. The court found that (1) "Barnes ***386** previously waived his right to collaterally attack his sentence in a § 2255 motion," (2) "he failed to demonstrate that he was entitled to proceed under the auspices and parameters of [*Johnson*]," and (3) his contention that he didn't have the requisite number of "violent felonies" was "both untimely and procedurally barred." The court also rejected Barnes's "miscarriage of justice" contention. The district court denied Barnes a certificate of appealability, but a judge of this court granted him one on two issues: (1) "whether Barnes's *Johnson* claims are barred by the collateral-review waiver" and (2) "whether the district

court erred by dismissing the § 2255 motion as time-barred based on its determination that *Johnson* did not affect his sentence under the ACCA."

II.

[1] **[2]** **[3]** **[4]** We review *de novo* whether a collateral-review waiver bars an appeal.[2] We consider "(1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019). "A waiver is knowing and voluntary if the defendant knows that he has the right to collateral review and that he is waiving it in the plea agreement."[3] Though we construe waivers in plea agreements narrowly, *United States v. Pleitez*, 876 F.3d 150, 156 (5th Cir. 2017), the government nonetheless "has a strong and legitimate interest in both the finality of convictions and in the enforcement of plea bargains." *United States v. Dyer*, 136 F.3d 417, 429 (5th Cir. 1998) (footnote omitted).

2 *See* *United States v. Timothy Burns*, 770 F. App'x 187, 189 (5th Cir.) (per curiam), *cert. denied*, —— U.S. ——, 140 S. Ct. 279, 205 L.Ed.2d 185 (2019); *see also* *Gaylord v. United States*, 829 F.3d 500, 505 (7th Cir. 2016) ("We review de novo the enforceability of a plea agreement's waiver of direct or collateral review.").

3 *Timothy Burns*, 770 F. App'x at 190; see also *Kelly*, 915 F.3d 344, 348 ("For a waiver to be knowing and voluntary, a defendant must know that he had a right to appeal his sentence and that he was giving up that right." (cleaned up)).

Before considering Barnes's contentions, it's important to identify what he *isn't* challenging. He doesn't dispute that he was aware of his right to collateral review or that he agreed to waive that right. Nor is he asserting that the language of his waiver doesn't apply to his *Johnson*-based challenge or that his waivers were tainted by ineffective assistance of counsel. Instead, he posits that his waiver is unenforceable for three reasons. First, he maintains that "a defendant cannot waive a right that is unknown at the time that the waiver provision is executed." Second, relying on *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), he avers that he can't waive his right to challenge an illegal or unconstitutional sentence. And finally, we could adopt a "miscarriage of justice" exception and refuse to enforce his waiver on that ground.

[5] Unfortunately for Barnes, we already confronted—and rejected—each of those positions in *Timothy Burns*, 770 F. App'x at 190–91. Barnes acknowledged as much in his reply brief. Though *Timothy Burns* is unpublished, "we may consider the opinion as persuasive authority." *Light-Age, Inc. v. Ashcroft-Smith*, 922 F.3d 320, 322 n.1 (5th Cir. 2019) (per curiam). And given the strong support that its reasoning finds in our caselaw, *Timothy Burns* is instructive.

A.

[6] Barnes's contention that he couldn't have waived a right that was unknown ***387** at the time of his waiver is foreclosed by *United States v. Creadell Burns*, 433 F.3d 442 (5th Cir. 2005). There, the defendant pleaded guilty, waived his right to appeal, and was sentenced under the then-mandatory sentencing guidelines. *Id.* at 443–44. After the Supreme Court held that the mandatory guidelines violated the Sixth Amendment,[4] Creadell Burns contended that he couldn't have waived his right to assert a *Booker*-based challenge on appeal because that case hadn't yet been decided when he entered his plea. *See* *id.* at 446–47. We rejected that position, holding instead that "an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* ... issue (whether or not that issue would have substantive merit), merely because the waiver was made before *Booker*." *Id.* at 450–51. Said differently, "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady v. United States*, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

4 *United States v. Booker*, 543 U.S. 220, 243–44, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (opinion of Stevens, J.) (holding that the mandatory guidelines

violated the Sixth Amendment); *id.* at 245, 125 S.Ct. 738 (opinion of Breyer, J.) (holding that provision making the guidelines mandatory was severable).

Barnes attempts to discount *Creadell Burns* by contending that it either conflicts with or was called into doubt by (1) *Smith v. Blackburn*, 632 F.2d 1194 (5th Cir. Unit A 1980) (per curiam), (2) *United States v. Wright*, 681 F. App'x 418 (5th Cir. 2017) (per curiam), (3) three orders from the Southern District of Mississippi, [5] and (4) *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016). None of those efforts is persuasive.

5 *See* *United States v. Culpepper*, No. 3:12-CR-00118-CWR-FKB-10, 2017 WL 658777 (S.D. Miss. Feb. 15, 2017); *United States v. Tarrio*, No. 3:08-CR-00001-TSL-LRA (S.D. Miss. Mar. 13, 2017); *United States v. Craven*, 2:08-CR-00005-KS-MTP (S.D. Miss. Mar. 22, 2017).

In *Smith*, 632 F.2d at 1195, a Louisiana defendant was offered two choices: (1) a jury of six members who could convict by five votes or (2) a jury of five members who could convict by a unanimous vote. The defendant chose the latter, thereby waiving his right to the former. *Id.* After he was convicted, the Supreme Court determined that both of those options were unconstitutional. [6] On appeal of his federal habeas petition, this court held that Smith hadn't waive a "known right or privilege" because *Ballew* wasn't decided until three years after he was put to his choice. *Id.* But critically, and unlike this case, there is no indication that the defendant in *Smith* agreed to an appellate or collateral-review waiver. *Smith* is therefore inapposite.

6 *See* *Ballew v. Georgia*, 435 U.S. 223, 245, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) (Blackmun, J., announcing the judgment of the Court) ("Petitioner, therefore, has established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments."); *Burch v. Louisiana*, 441 U.S. 130, 138, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979) (holding that Sixth and Fourteenth Amendments required "verdicts rendered by six-person juries to be unanimous").

Next, Barnes is correct that *Wright* held that "[w]here, as here, a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish that right because it is unknown at that time." *Wright*, 681 F. App'x at 420. But *Wright*, which is unpublished, didn't cite or even consider the published opinion in *Creadell Burns*. And to the extent the decisions conflict, *Creadell Burns* controls under our rule of ***388** orderliness. [7] The same naturally holds true for the three rulings from the Southern District of Mississippi. [8]

7 *See* *Jacobs v. Nat'l Drug Intell. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court."); *see also Dick v. Colo. Hous. Enters., L.L.C.*, 872 F.3d 709, 711–12 (5th Cir. 2017) (per curiam) (refusing to apply an unpublished decision when doing so would conflict with a published case).

8 Even if those decisions could call *Creadell Burns*'s rule into doubt, the reasoning undergirding them flatly doesn't. In *Culpepper*, 2017 WL 658777 at *2, the court stated only that it "denie[d] the Government's motion to dismiss and f[ound] it appropriate to reach the merits of Culpepper's motion." It offered no explanation for why it refused to enforce the collateral-review waiver. The other two decisions didn't even acknowledge whether the government tried to enforce the collateral-review waivers at all.

Finally, even if, hypothetically, an out-of-circuit decision could trump *Creadell Burns*, *McBride* doesn't provide any help to Barnes. In *McBride*, 826 F.3d at 295, the Sixth Circuit did find that the defendant "could not have intentionally relinquished a claim based on *Johnson*." "But the *McBride* plea agreement, unlike the one here, did not include an appeal waiver." *United States v. Morrison*,

852 F.3d 488, 491 (6th Cir. 2017). And based on that distinction, the Sixth Circuit held in *Morrison* that a defendant's appellate waiver barred his *Johnson*-based challenge, even though *Johnson* wasn't decided until after he was sentenced. *Id.*

[7] **[8]** **[9]** At base, Barnes needn't have understood all the possible eventualities that could, in the future, have allowed him to challenge his conviction or sentence. His waiver only needed to be "knowing," not "all-knowing." When Barnes waived his right to post-conviction review, he was aware of the right that he was giving up. By doing so, "he assumed the risk that he would be denied the benefit of future legal developments." *Id.* Most other circuits have reached the same conclusion when considering appellate or collateral-review waivers in the context of *Johnson*-based challenges. [9]

9 *See, e.g.*, *United States v. Bey*, 825 F.3d 75, 82–83 (1st Cir. 2016) (enforcing appellate waiver to bar *Johnson* challenge, even after considering "miscarriage of justice" exception); *Sanford v. United States*, 841 F.3d 578, 581 (2d Cir. 2016) (per curiam) ("Sanford's collateral attack waiver therefore bars the present motion because the waiver encompasses any challenge to his sentence."); *In re Garner*, 664 F. App'x 441, 442 (6th Cir. 2016) ("[W]e must deny Garner's motion for the same reason he lost his direct appeal and his § 2255 action: Garner waived his right to challenge his sentence collaterally in his plea agreement."); *United States v. Ford*, 641 F. App'x 650, 651 (8th Cir. 2016) (per curiam) (enforcing appeal waiver to bar defendant's *Johnson* challenge); *United States v. Hurtado*, 667 F. App'x 291, 292 (10th Cir. 2016) (per curiam) ("The government unequivocally establishes that the [*Johnson*-based] appeal falls within the scope of the waiver, the waiver was knowing and voluntary, and enforcing the waiver will not result in a miscarriage of justice."). *But see* *Torres*, 828 F.3d at 1125 (refusing to enforce appeal waiver on the ground that such waivers don't apply "a defendant's sentence is 'illegal,' which includes a sentence that 'violates the Constitution' "); *United States v. Cornette*, 932 F.3d 204, 210 (4th Cir. 2019) ("[W]e may review Cornette's sentencing challenge [under *Johnson*] notwithstanding the appeal waiver.").

B.

[10] **[11]** Barnes's theory that he can't waive his right to challenge an illegal or unconstitutional sentence is similarly foreclosed by precedent. We have recognized only two exceptions to the general rule ***389** that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002), and second, a sentence exceeding the statutory maximum. [10]

10 *See* *United States v. Leal*, 933 F.3d 426, 431 (5th Cir.), *cert. denied*, —— U.S. ——, 140 S. Ct. 628, 205 L.Ed.2d 406 (2019). *Leal* appears to be the first published case, in this circuit, specifically to adopt that exception, but a past panel purported to adopt it in an unpublished decision. *See* *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (per curiam). The government brought *Hollins* to the attention of the district court and Barnes in its motion to dismiss. Nonetheless, Barnes didn't cite *Hollins* or make any argument —in either his district-court briefing or on appeal— that his sentence exceeded the applicable statutory maximum. To the extent that Barnes tried to claim the benefit of *Leal* at oral argument, he had already forfeited any opportunity to do so. *Cf.* *Arsement v. Spinnaker Expl. Co.*, 400 F.3d 238, 247 (5th Cir. 2005) ("No authority need be cited for the rule that, generally, we do not consider an issue first raised at oral argument on appeal.").

[12] Barnes invokes neither exception but, instead, avers that his sentence was imposed unlawfully because, after *Johnson*, it violated the Constitution. Unfortunately for Barnes, however, that doesn't get him out from under the collateral-review waiver to which he agreed. As the

Timothy Burns panel recognized, defendants can waive the right to challenge both illegal and unconstitutional sentences.[11] Barnes's reliance on *Torres* is misplaced. The fact that Ninth Circuit caselaw runs counter to ours doesn't empower us to refuse to apply binding precedent.

11 *See* *Timothy Burns*, 770 F. App'x at 190; *see also* *Kelly*, 915 F.3d at 347 (holding that defendant's appeal waiver barred court from considering his claim that the district court improperly "appl[ied] the ACCA enhancement because he lacks the requisite number of violent felony predicates"); *United States v. Keele*, 755 F.3d 752, 757 (5th Cir. 2014) ("Here, because the appeal waiver in Keele's signed, written plea agreement waived his right to appeal his sentence with only three specific exceptions, none of which apply here, we conclude that his Eighth Amendment claims are also waived." (footnote omitted)); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (holding that defendant's appellate waiver barred challenge to statute of conviction on Fifth Amendment grounds, because his plea agreement reserved only his right to challenge the statute on Second Amendment grounds); *United States v. Baty*, 980 F.2d 977, 979 (5th Cir. 1992) ("After waiving her right to appeal, the district court could err in its application of the Sentencing Guidelines or otherwise impose an illegal sentence.... Yet, the defendant, who has waived her right to appeal, cannot appeal these errors.").

C.

[13] Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a "miscarriage of justice" exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it. *See* *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (per curiam). Barnes does not, however, (1) explain the proper scope of that exception, (2) cite any cases purporting to do so, or (3) detail how and why it should apply to his case.[12] By only briefly alluding to that theory, Barnes has waived any contention that such an exception applies. *See* *United States v. Scroggins*, 599 F.3d 433, 446–47 (5th Cir. 2010). When confronted with a similarly phrased argument, the *Timothy Burns* panel, 770 F. App'x at 191, reached the same conclusion.

12 Barnes states merely that "[m]any defendants" have had their sentences reduced under *Johnson* and that it would be "patently unjust and unfair" to deny him relief because he agreed to a collateral-review waiver. But he doesn't offer any explanation of why it's unfair to treat defendants who agree to waive their rights differently from those who don't.

***390** Barnes's § 2255 motion is barred by his collateral-review waiver. The appeal is DISMISSED.

E. GRADY JOLLY, Circuit Judge, dissenting:

I dissent because I respectfully disagree with the majority's disregarding a binding and precedential decision of this court: *United States v. Leal*, 933 F.3d 426 (5th Cir. 2019).

The majority dismisses Appellant's *Leal* argument on the grounds that he did not raise it in the district court nor in his briefing to this court. *See* footnote 10 ("To the extent that Barnes tried to claim the benefit of *Leal* at oral argument, he had already forfeited any opportunity to do so."). A flimsy reason indeed when *Leal* had not been decided at the time of briefing in the district court or in this court. Yet the majority thus holds that by failing in his briefing to cite *Leal*—which was impossible for Barnes or anyone else to have known—Barnes somehow "forfeited" the right to raise *Leal* at oral argument.

"Forfeiture is the failure to make the timely assertion of a right." *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006). Yet, at oral argument was timely here. Even assuming a forfeiture, however, "[f]orfeited errors are reviewed under the plain error standard." *Id.* The majority, nevertheless, fails to apply plain error review to Barnes's *Leal* claim, effectively treating it as waived. "[W]aiver is the intentional relinquishment of a known right." *Id.* I repeat myself to say that at the time of briefing, *Leal* was not a known right. In short, I would join Judge Smith and his panel in *DSC Commc'ns Corp. v. Next Level Commc'ns*,

107 F.3d 322 (5th Cir. 1997), which said it was "unwilling to ... perpetuate incorrect law, merely because [a precedent] was decided after briefing ... in this case." *Id.* at 326 n.2.

It would seem to me that the panel is obligated to address *Leal* as it applies to this case. I therefore respectfully dissent.

All Citations

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