

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

ERIC JAMAR GOODALL, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Ninth Circuit err in dismissing the appeal when Mr. Goodall's plea agreement contains a count of conviction and resulting sentence that is no longer a crime, and an illegal sentence is a jurisdictional defect that is not waivable?

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I.

PRAYER FOR RELIEF

Mr. Eric Jamar Goodall petitions for a writ of certiorari to review the decision of United States Court of Appeals for the Ninth Circuit that dismissed Mr. Goodall's appeal based upon a waiver of a later change in the law and count of conviction. The Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. This includes Mr. Goodall having an in-effect plea agreement containing a conviction that does not qualify as a crime. Committing an act prohibited by an unconstitutional statute should not equal a conviction and sentence rendered against Mr. Goodall. The ruling by this Court is thus in conflict with the Eleventh Circuit case of *United States v. St. Hubert*, 883 F.3d 1319, 1326 (11th Cir. 2018), as well as the United States Supreme Court cases of *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) and *Ex parte Siebold*, 100 U.S. 371, 376-377 (1880).

A guilty plea does not bar a federal criminal defendant from challenging the constitutionality of conviction on direct appeal, which means that the opinion of the Ninth Circuit in conflict with the United States Supreme Court cases of *Class v. United States*, 138 S.Ct. 798 (2018), and *United States v. Cotton*, 535 U.S. 625, 630 (2002). The Ninth Circuit opinion is also in conflict with other circuits that found that an appellate waiver does not waive a jurisdictional defect, or results in a "miscarriage of justice" under equitable principles. *See, e.g., McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001).

The Ninth Circuit’s opinion in *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) and *Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020) conflict with other circuit court decisions that have recognized that waivers can be invalid or inapplicable under a variety of theories similar to Mr. Goodall’s challenge on appeal. *See, e.g.*, *United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016); *see also United States v. Caruthers*, 458 F.3d 459, 472 (6th Cir. 2006); *United States v. Borden*, 16 F.4th 351 (2d Cir. 2021). For the reasons stated herein, Mr. Goodall’s petition should be granted.

II.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered an order and amended opinion that dismissed Mr. Goodall’s appeal seeking to vacate his conviction and sentence for brandishing a firearm in relation to a crime of violence pursuant to 18 U.S.C. § 924(c). *United States v. Goodall*, 15 F.4th 987 (9th Cir. 2021) (as amended by *United States v. Goodall*, 2021 U.S. App. LEXIS 38394 (9th Cir. 2021)). *Appendix A*. The Ninth Circuit held that Mr. Goodall’s appellate waiver in his plea agreement foreclosed any challenge to his conviction because: (1) the text of the appellate waiver as to “the right to appeal any...aspect of the conviction or sentence” included a waiver to challenge this Court’s ruling in *United States v. Davis*, 139 S.Ct. 2319 (2019) that was issued following Mr. Goodall’s plea and sentencing, and (2) the waiver was knowing and voluntary. *Appendix A*. The Ninth Circuit reasoned that when a defendant waives his appellate rights, the defendant “knows that he is giving up on all appeals, no matter what unforeseen events may happen.” *Appendix A*.

The Ninth Circuit further held that the “illegal sentence” exception to an appellate waiver did not apply to Mr. Goodall. The Ninth Circuit declined to apply or extend *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), which held that an appellate waiver does not apply to an “illegal sentence,” to invalidate Mr. Goodall’s appellate waiver when the conviction and not the sentence was later found to be illegal under *Davis*. *Appendix A*. The Ninth Circuit stated that an “illegal sentence” has a precise legal meaning, and does not include illegal convictions, as well as addresses the “inherent uncertainty” in sentencing that does “not exist for convictions.” *Appendix A*. The Ninth Circuit wrote that Mr. Goodall assumed the risk under his plea agreement that the law would later change in Mr. Goodall’s waiver, and that the “practical effect” of Mr. Goodall’s argument would “undo nearly all appellate waivers, yielding perverse consequences.” *Appendix A*.

III.

BASIS FOR JURISDICTION

On December 28, 2021, the United States Court of Appeals for the Ninth Circuit issued an order and amended opinion that dismissed Mr. Goodall’s appeal, and denied Mr. Goodall’s petition for panel rehearing and rehearing *en banc*. *Appendix A*. This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Title 18 United States Code Section 924(c)(1)(A):

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

V.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

B. Facts Material to the Questions Presented.

- a. The Government Indicted Mr. Goodall for Hobbs Act Robbery Conspiracy and Brandishing a Firearm in Relation to a Crime of Violence.

The government indicted Mr. Goodall in March of 2015 with two counts each of:

- (1) Conspiracy to Interfere with Commerce by Robbery (Hobbs Act Robbery Conspiracy)

under 18 U.S.C. § 1951(a) and (2) Brandishing of a Firearm in Relation to a Crime of Violence pursuant to 18 U.S.C. § 924(c)(1)(A)(ii) and (2).

- b. Mr. Goodall's Plea Agreement Included One Count of Brandishing a Firearm in Relation to a Crime of Violence pursuant to 18 U.S.C. § 924(c).

Mr. Goodall entered into a plea agreement in May of 2015. Mr. Goodall agreed to plead guilty to: (a) two counts of Hobbs Act Robbery Conspiracy, and (b) one count of Brandishing of a Firearm in Relation to a Crime of Violence. The plea agreement also included an appellate waiver as to “the right to appeal any...aspect of the conviction or sentence.”

- c. Mr. Goodall's Sentencing Included an Additional Eighty-Four (84) Month Custodial Sentence as to the § 924(c) Conviction.

The district court sentenced Mr. Goodall on December 20, 2017. The plea agreement included a joint recommendation of two hundred and forty (240) months in custody. Mr. Goodall argued during his sentencing hearing that following this Court’s decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), his count for Brandishing a Firearm in Relation to a Crime of Violence should not apply due to Hobbs Act Robbery conspiracy not being a crime of violence.

The district court determined Mr. Goodall’s offense level to be twenty-five (25), with a criminal history score of seven (7), placing Mr. Goodall in a criminal history category of IV. The sentencing guideline range for the two counts of Hobbs Act Robbery Conspiracy was between eighty-four (84) and one hundred five (105) months of imprisonment. The count of Brandishing a Firearm in Relation to a Crime of Violence

called for a statutory minimum of seven (7) years in custody, consecutive to all other counts.

The sentencing judge stated that he was bound by the seven-year minimum as to the count of Brandishing a Firearm in Relation to a Crime of Violence. Mr. Goodall was sentenced to one hundred and sixty-eight (168) months of custody in total, including eighty-four (84) months of custody as to the Hobbs Act Robbery Conspiracy counts, and eighty-four (84) months of custody as to the Brandishing a Firearm in Relation to a Crime of Violence count, consecutive to the Hobbs Act Robbery Conspiracy counts. Mr. Goodall was also sentenced to three (3) years of supervised release as to all counts.

- d. Appeal of Mr. Goodall's Sentence that Included a Consecutive and Additional Eighty-Four (84) Months in Custody as to the § 924(c) Conviction.

Mr. Goodall pursued his appeal before the United States Court of Appeals for the Ninth Circuit. On September 19, 2018, the Ninth Circuit denied the government's motion to dismiss without prejudice, with the ability to renew in the government's answering brief. On May 21, 2019, the Ninth Circuit issued an order that stayed the proceedings pending: (1) the Supreme Court's decision in *United States v. Davis*, 139 S.Ct. 2319 (2019), (2) the Ninth Circuit's decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), or (3) further order of the Ninth Circuit. Following supplemental briefing in 2020, the stay lifted as of March of 2021, and oral argument took place in July of 2021.

On October 13, 2021, an opinion issued that dismissed Mr. Goodall's appeal under the appellate waiver in the plea agreement. The panel found that:

- a. Mr. Goodall's appellate waiver foreclosed any challenge to his conviction because the provision in which Mr. Goodall waived the "right to appeal any...aspect of the conviction or sentence," meets both condition for enforcement of: (1) the text of the appellate waiver bars any challenge based on *Davis*, and (2) the waiver knowing and voluntary. The waiver included all types of appeals, even if there are unforeseen new case rulings that may happen after a plea agreement is entered into.
- b. The "illegal sentence" exception to the appellate waiver did not apply to a conviction that might later be found to be illegal, and *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016) was not extended to Mr. Goodall's case to cover an illegal conviction.

Contemporaneous with the denial of a petition for panel rehearing and rehearing *en banc* filed by Mr. Goodall, the Ninth Circuit issued an order and amended opinion that added a footnote regarding Mr. Goodall not raising an exception for miscarriage of justice. The opinion otherwise remained unchanged.

This petition follows.

VI.

REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that dismissed Mr. Goodall's appeal. The Ninth Circuit erred by denying Mr. Goodall's appeal when Mr. Goodall's plea agreement contains a conviction that is no longer a crime under the current law. The issues raised in this petition state a valid claim of the denial of a constitutional right, including: (1) Mr. Goodall's underlying conviction not qualifying as a "crime of violence," (2) Mr. Goodall's current plea agreement containing a count of conviction that does not qualify as a crime, (3) jurisdictional defects not being waivable in a plea agreement, and (4) the Ninth Circuit case of *Torres* applying differently in order to grant Mr. Goodall's request for relief. As these material points of fact were overlooked by the Ninth Circuit, it is respectfully requested that Mr. Goodall's petition for writ of certiorari be granted.

A. Mr. Goodall's Petition Should be Granted Because Hobbs Act Conspiracy is Not a Crime of Violence, and an Unconstitutional Statute is Not a Crime.

Hobbs Act conspiracy is not a crime of violence under the "elements clause" of § 924(c). The predicate crime of violence for Mr. Goodall, Hobbs Act Robbery Conspiracy, does not have as an element the use, attempted use, or threatened use of force by a conspirator. *See* 18 U.S.C. § 1951. The Hobbs Act under 18 U.S.C. § 1951 is a divisible statute, criminalizing both robbery and extortion. *Id.*

Hobbs Act Robbery Conspiracy is complete when the agreement is reached. For

conspiracy to commit Hobbs Act robbery: (1) two or more people agreed to commit a robbery or extortion of the type in the Hobbs Act, (2) the defendant had knowledge of the conspiratorial goal, and (3) the defendant voluntarily participated in trying to accomplish the conspiratorial goal. *See* Ninth Cir. Crim. Jury Inst. 8.20 (2010). A conviction can be obtained without proving beyond a reasonable doubt that the defendant committed the crime that was the conspiracy's object. *See* 18 U.S.C. § 371. Merely agreeing to participate in a robbery is less likely to involve the use, attempted use, or threatened use of physical force. Thus, Hobbs Act conspiracy can be committed without employing force.

Individual intent is also missing with Hobbs Act Robbery Conspiracy. One can commit Hobbs Act conspiracy while being incapable of committing the underlying substantive crime. *Salinas v. United States*, 552 U.S. 52, 65 (1997); *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). Hobbs Act Robbery Conspiracy does not require the defendant to have the specific intent to commit underlying offense to be found guilty, and instead merely must enter into an agreement with the "specific intent that the underlying crime be committed" by some member of said conspiracy. *Ocasio v. United States*, 136 S.Ct. 1423, 1429 (2016).

The Ninth Circuit case of *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) does not apply to the findings in Mr. Goodall's case when in *Dominguez*: (1) the defendant had the specific intent to commit the robbery and (2) the defendant had taken a "substantial step" toward its completion. In order to be found guilty of

attempt, a defendant must intend to commit every element of the completed crime, including a specific intent to use violence. *Id.*, at 1261.

Mr. Goodall’s case additionally differs from *Dominguez* when the type of intent for Hobbs Act Robbery Conspiracy is different from other attempt-based crimes, where the defendant is required to have the specific intent to commit the underlying offense. The *mens rea* for attempt is knowingly or willingly instead of reckless or negligent for Hobbs Act Robbery Conspiracy. Thus, the attempt-based crimes meld with the crime itself. The crime may be incomplete, but the intent is complete.

Compared to attempted Hobbs Act robbery as in *Dominguez*, the force clause of § 924(c) does not include the word conspiracy. The definition of crime of violence in § 924(c)(3)(A) explicitly includes as crimes of violence offenses that have as an element the “attempted” or “threatened” use of force. Finally, compared to attempted Hobbs Act robbery, the government does not need to prove a “substantial step” toward commission of the crime for conspiracy.

In Mr. Goodall’s case, it is fundamentally unfair to have a plea agreement that does not reflect the current law. This is true even with an appellate waiver in the plea agreement, because the sentence itself is based on a conviction that does not qualify as a crime. Committing an act prohibited by an unconstitutional statute is not a crime. *United States v. St. Hubert*, 883 F.3d 1319, 1326 (11th Cir. 2018) (a district court is without jurisdiction to accept a guilty plea to a “non-offense”). “An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no

protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). An offense created by an unconstitutional act is not a crime, and a conviction under it is “illegal and void, and cannot be a legal cause of imprisonment.” *Ex parte Siebold*, 100 U.S. 371, 376-377 (1880).

The case law related to Mr. Goodall’s conviction changed the view on Mr. Goodall’s conviction for Brandishing of a Firearm in Relation to a Crime of Violence being based upon an actual crime of violence. Mr. Goodall currently has a plea agreement in which one of the counts is based upon an unconstitutional statute, and is therefore not a crime. The district court imposed an enhancement on Mr. Goodall’s now unconstitutional count before any court had an opportunity to consider the applicability of new law and without a full understanding of what our law now requires to be the elements of a crime of violence. *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010). In light of this “marked shift” in case law, this is a plausible ground for dismissal of the charge, as Mr. Goodall has pleaded guilty to something that is not a crime. *United States v. Garcia-Lopez*, 903 F.3d 887 (9th Cir. 2018). Mr. Goodall respectfully requests that his petition be granted on this basis.

B. Mr. Goodall’s Petition Should be Granted Because Jurisdictional Defects or Things that Would Cause a “Miscarriage of Justice” are Not Waivable in a Plea Agreement.

A guilty plea does not bar a federal criminal defendant from challenging the constitutionality of conviction on direct appeal. *Class v. United States*, 138 S.Ct. 798

(2018). In the Seventh Circuit case of *Oliver v. United States*, 951 F.3d 841, 845-848 (7th Cir. 2020) relied upon by the Ninth Circuit in its decision in Mr. Goodall's case, the following issues were left undecided and should be what compel a decision in Mr. Goodall's favor:

1. a guilty plea, standing alone, is not construed as waiving "jurisdictional" claims;
2. An enforcement of the appellate waiver would cause a "miscarriage of justice;" or
3. The appellate waiver should not be enforced when the conviction rests on a "constitutionally impermissible factor."

As to the first undecided issue under *Oliver v. United States*, because subject-matter jurisdiction involves the power of a court to hear a case, then jurisdiction "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Consequently, defects in subject-matter jurisdiction "require correction regardless of whether the error was raised in district court." *Id.*

The Ninth Circuit and other circuits agree with an appeal waiver not waiving a jurisdictional defect. *See, e.g., McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) ("Because parties cannot by acquiescence or agreement confer jurisdiction on a federal court, a jurisdictional defect cannot be waived or procedurally defaulted...a judgment tainted by a jurisdictional defect must be reversed"); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (an appeal waiver will not apply if the sentence

violates the law; a sentence is illegal if it violates the Constitution).

What constitutes a jurisdictional defect is not entirely clear. The Ninth Circuit previously decided that such claims are limited to claims where: (1) the underlying statute is facially unconstitutional, (2) the indictment failed to state a valid claim, and (3) vindictive/selective prosecution. *United States v. Johnston*, 199 F.3d 1015, 1019-20 n.3 (9th Cir. 1999).

In Mr. Goodall's case, there was at least one, if not more, jurisdictional defects that now "require correction" under the subject-matter jurisdiction defect holding from *United States v. Cotton*. First, the § 924(c) statute at issue in Mr. Goodall's was unconstitutional because it is not properly based upon a crime of violence. Second, the indictment failed to state a valid claim as to Mr. Goodall's conviction for § 924(c) when there was not an underlying crime of violence.

Moreover, keeping the count of Brandishing of a Firearm in Relation to a Crime of Violence in Mr. Goodall's guilty plea also results in a "miscarriage of justice," including the equitable theory of "actual innocence" pursuant to the Eleventh Circuit decision of *McCoy v. United States*, 266 F.3d at 1249 and *Oliver v. United States*. An unconstitutional statute is as void as if it had never been passed, and cannot be the cause of imprisonment. *Siebold*, 100 U.S. at 376-377. Pursuant to *United States v. Cotton*, defects in jurisdiction as well as a plea that results in a "miscarriage of justice" require correction even if they were not raised in the district court in Mr. Goodall's case. Mr. Goodall's petition should be granted on this basis.

C. **Mr. Goodall’s Petition Should be Granted Because the Ninth Circuit’s *Torres* Case Should be Applied in Mr. Goodall’s Favor, and the Seventh Circuit Decision in *Oliver* Case Does Not Properly Address Mr. Goodall’s Case.**

The facts and ruling in *United States v. Torres* match the facts in this case, and should apply in Mr. Goodall’s favor. In *Torres*, the district court sentenced the defendant under a provision in the Sentencing Guidelines that was unconstitutionally vague. 828 F.3d at 1125. At the time of the case, it was an “open question” whether the residual clause of U.S.S.G. § 4B1.2(a)(2) was valid in light of *Johnson*, circuit courts “signaled concern” about the constitutionality of said clause. *Id.* The government conceded that the district court sentenced the defendant to a provision in the Guidelines that was unconstitutionally vague, rendering the related sentence “illegal,” and therefore the plea waiver was not a bar to the defendant’s appeal. *Id.* The Ninth Circuit vacated the sentence and remanded for re-sentencing because the government agreed that the defendant’s prior convictions do not justify an enhancement for a crime of violence. *Id.*

Like the defendant *Torres*, Mr. Goodall has an unconstitutional conviction under his count of Brandishing of a Firearm in Relation to a Crime of Violence that renders his related sentence “illegal.” When the conviction in Mr. Goodall’s case is illegal, then the sentence imposed from that conviction is also illegal.

The facts of the Seventh Circuit decision of *Oliver v. United States* referenced in the decision by the Ninth Circuit are inapplicable to Mr. Goodall. The defendants in

Oliver had filed a motion under 28 U.S.C. § 2255 to vacate his 18 U.S.C. § 924(c) conviction, and the district court denied the motion because the defendants could not show “actual innocence” on the § 924(c) count. 951 F.3d at 844. The Seventh Circuit analyzed other arguments made by the defendants, but ultimately held that the defendants “expressly waived” their collateral attack rights in their plea agreements. *Id.*, at 848.

Even though the Seventh Circuit referenced the “express” waiver of both appellate and collateral attack rights in the holding of *Oliver*, the defendants in *Oliver* were not on direct appeal. The holding in *Oliver* should then not be extended to any defendant on direct appeal as well as in collateral attack, as the standards and limitations are distinctly different in each phase. For example, if there is a change in the law while an appeal is pending, then there is not a bar if a case has not been made retroactive on collateral review, and the issue may be examined for the first time on appeal. *See, e.g., United States v. Garcia*, 77 F.3d 274, 276 (9th Cir. 1996).

Mr. Goodall’s conviction, and his sentence directly resulting from the conviction, were illegal. An illegal sentence is one “not authorized by the judgment of conviction” or “in excess of the permissible statutory penalty for the crime.” *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986). Other circuit court decisions have recognized that waivers can be invalid or inapplicable under a variety of theories similar to Mr. Goodall’s current challenge. *See, e.g., United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016) (defendant “could not have intentionally relinquished a

claim based on *Johnson*, which was decided after his sentencing"); *see also United States v. Caruthers*, 458 F.3d 459, 472 (6th Cir. 2006) ("an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded"). Other circuits have also vacated a § 924(c) conviction based upon *Davis*, and allowed for the defendant to be re-sentenced on a remaining Hobbs Act conspiracy count. *See United States v. Borden*, 16 F.4th 351 (2d Cir. 2021).

Mr. Goodall's count of Brandishing of a Firearm in Relation to a Crime of Violence should have been vacated without an enhancement for a crime of violence. Even though the sentence upon re-sentencing may be the same in practical terms of the 168 months previously imposed, it is not enough that there is potentially a lack of prejudice when Mr. Goodall's current sentence is based upon an offense that does not currently exist. Additionally, although it may be true that under the remaining terms of the plea agreement there is still a joint 240-month sentence recommendation, it is still important to go through a re-sentencing after the exclusion of an illegal conviction, or non-crime, is excised from the plea agreement. *See, e.g., United States v. Aguilar-Muniz*, 156 F.3d 974 (9th Cir. 1998) ("After a plea agreement has been accepted and entered by the [district] court, the [district] court may not rescind the plea agreement on the government's motion unless the defendant has breached the agreement"). Mr. Goodall respectfully requests that his petition be granted on this basis.

VII.

CONCLUSION

For the foregoing reasons, Mr. Eric Jamar Goodall respectfully asks this Court to grant this petition for writ of certiorari.

Dated: March 25, 2022.

Respectfully submitted,

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