No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES SMITH,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED

Whether the Ninth Circuit erred in dismissing the appeal when Mr. Smith'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?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Central District of California, *United States v. Charles Smith,* 14-cr-00338-SJO-7. The district court entered the judgment on April 1, 2019. *See* Appendix B.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Charles Smith,* No. 19-50123. *See* Appendix A.

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Petitioner, Charles Smith, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered July 14, 2022.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered an order dismissing Mr. Smith'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). Appendix A. Relying on *United States v. Goodall*, 21 F.4th 555, 562-65 (9th Cir. 2021), the Ninth Circuit held that Mr. Smith's appellate waiver in his plea agreement foreclosed any challenge to his conviction because the conviction did not fall within the illegal sentence exception to the appeal waiver. Appendix A.

JURISDICTION

The Court of Appeals issued its order on July 14, 2022. No petition for rehearing was filed. This petition is being filed within the 90-day time limit for certiorari petitions. The Court has jurisdiction under 28 U.S.C. §1254(1).

INVOLVED FEDERAL LAW

The Appendix to the petition includes the relevant provisions of 18 U.S.C. § 2 (Appendix C), 18 U.S.C. § 924 (Appendix D), 18 U.S.C. § 1951 (Appendix E), and the Fifth Amendment (Appendix F).

STATEMENT OF THE CASE

On June 11, 2014, the government charged Mr. Smith in a multi-count indictment. [2 ER 331.][1] On December 19, 2017, pursuant to a plea agreement, Mr. Smith entered a plea of guilty to: Count 1, conspiracy to engage in racketeering activity committed pursuant to 18 U.S.C. § 1962(d); Count 4, conspiracy to commit Hobbs Act Robbery pursuant to 18 U.S.C. §§ 1951(a); and Count 104, aiding and abetting brandishing a firearm during and in relation to a crime of violence pursuant to 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. [1 ER 50, 81-82.] The plea agreement included an appellate waiver of the right to appeal Mr. Smith's conviction and a limited waiver of the sentence provided the district court imposed a sentence of no more than 272 months. [1 ER 102-03.]

Specifically, Count 104 alleged Mr. Smith and a co-defendant:

> while aiding and abetting each other, knowingly used and carried a firearm, namely, a silver revolver, during and in relation to, and possessed that firearm in furtherance of a crime of violence, namely, conspiracy to engage in racketeering activity, in violation of Title 18, United States Code, Section 1962(d), as charged in Count One [sic] this Indictment, conspiracy to interfere with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951(a), as charged in Count Four of this Indictment, and interference with commerce through threats or violence, in violation of United States

[1]"ER" refers to the Excerpts of Record which were filed with the Ninth Circuit Court of Appeals.

> Code, Section 1951(a), as charged in Count Seven of this Indictment, and in so doing, brandished that firearm.

[2 ER 311.]

At the change of plea hearing, the government advised Mr. Smith of the elements of the offense. As to count 104, the government stated:

> Defendant understands that for defendant to be guilty of the crime charged in count 104, that is, possessing, using, carrying, and brandishing a firearm during and in relation to, and in furtherance of, a crime of violence, in violation of 18 U.S.C.§ 924(c)(1)(A)(ii), the following must be true: (1) defendant committed crimes of violence, namely, conspiracy to interfere with commerce by robbery, as charged in count four of the first superseding indictment, and interference with commerce by robbery, as charged in count seven of the first superseding indictment; and (2) defendant knowingly brandished a firearm during and in relation to, and in furtherance of, these crimes.
>
> Defendant understands that for defendant to be guilty of aiding and abetting the possessing, using, carrying, and brandishing of a firearm during and in relation to, and in furtherance of, a crime of violence, as charged in count 104, in violation 18 U.S.C.§§ 924(c)(1)(A)(ii) and 2(a), the following must be true: (1) the offense of possessing, using, carrying, and brandishing a firearm during and in relation to, and in furtherance of, a crime of violence was committed by someone; (2) defendant aided, counseled, commanded, induced, or procured that person with respect to at least one element of possessing, using, carrying, and brandishing a firearm during and in relation to, and in furtherance of, a crime of violence; (3) defendant acted with the intent to facilitate the possessing, using, carrying, and brandishing of a firearm during and in relation to, and in furtherance of, a crime of violence; and (4) defendant acted before the crime was complete.

> Defendant admits that defendant is, in fact, guilty of this offense as described in count 104 of the first superseding indictment.

[1 ER 60-62.]

Mr. Smith did not enter a plea of guilty to Count 7 of the Indictment, nor did the court state the elements of that particular offense. Count 7 alleged that Mr. Smith and a co-defendant aided and abetted each other and:

> did unlawfully take and obtain personal property consisting of approximately $2500 in cash from the person and in the presence of victim K.H., which victim K.H. had just withdrawn from BBCN Bank, which operates in interstate commerce, and did so against victim K.H.'s will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to her person, that is, by threatening victim K.H. with a silver revolver.

[1 ER 242.]

The government also stated the factual basis for Mr. Smith's plea, stating that:

> in furtherance of the racketeering conspiracy and the conspiracy to interfere with commerce by robbery, defendant committed at least the following acts: On March 12, 2013, defendant and co-conspirator VH, armed with a silver revolver, followed victim K.H., an Asian female, from the BBCN Bank in Torrance, California, to K.H.'s home; brandished and placed a gun initially against K.H.'s head and later her ribcage, in order to intimidate K.H; robbed K.H. of $2,500 that she had just withdrawn from the bank and a total of approximately $7,000 worth of cash and personal items; and fled in a vehicle. Defendant agrees that defendant and coconspirator VH both intended to commit

> and aided each other in committing this robbery and brandishing/using a firearm in furtherance of the robbery.

[1 ER 74, 76.]

The case proceeded to sentencing on April 1, 2019. Prior to imposing sentence, counsel for Mr. Smith argued the court should reduce Mr. Smith's sentence by the amount of time he had already served in state custody for the same conduct. Specifically, counsel noted that as part of the factual basis supporting his guilty plea in this case, Mr. Smith acknowledged his participation in specific conduct in 2003, 2009 and 2013 for which he had already served 146 months in state prison. [PSR 147, 149, 150; 1 ER 25-26.]

Prior to imposing sentence, the district court noted Mr. Smith did not physically harm anyone and he was more of a "follower than a leader." [1 ER 26, 30.] The government acknowledged the robberies were conducted with two or three people, that Mr. Smith never possessed a gun, but rather was the driver. [1 ER 32-33.] The court agreed Mr. Smith did not actually use or possess the firearm in any of the robberies, but was merely present with the others who did. [1 ER 40.] The district court ultimately sentenced Mr. Smith to 84 months custody as to counts 1 and 4 to run concurrently, and 84 months custody as to count 104, to run consecutive to counts 1 and 4, for a total of 168 months custody. [1 ER 42, 43.]

Mr. Smith pursued his appeal before the United States Court of Appeals for the Ninth Circuit. On July 14, 2022, the Ninth Circuit granted the government's motion to dismiss the appeal based on the appellate waiver in Mr. Smith's plea agreement.

This petition follows.

REASON TO GRANT 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. Smith's appeal. The Ninth Circuit erred by denying Mr. Smith's appeal when his 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. Smith's underlying conviction not qualifying as a "crime of violence;" (2) Mr. Smith'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 *United States v. Torres,* 828 F.3d 1113 (9th Cir. 2016) applying differently in order to grant Mr. Smith's request for relief. As these material points of fact were overlooked by the Ninth Circuit, it is respectfully requested that Mr. Smith's petition for writ of certiorari be granted.

A. Mr. Smith's petition should be granted because neither Hobbs Act Conspiracy or Aiding and Abetting Hobbs Act Robbery is a crime of violence, and an unconstitutional statute is not a crime.

Count 104 of the superseding indictment alleged Mr. Smith aided and abetted the brandishing of a firearm in furtherance of a crime of violence by committing Hobbs Act Conspiracy and Aiding and Abetting Hobbs Act Robbery. [2 ER 311.] Neither predicate offense is a crime of violence under the elements clause of section 924(c).[2]

First, Hobbs Act Conspiracy is not a crime of violence under the "elements clause" of § 924(c), as it does not have as an element the use, attempted use, or threatened use of force by a conspirator. *See* 18 U.S.C. § 1951. One can commit Hobbs Act Conspiracy while being incapable of committing the underlying substantive crime. *Salinas v. United States*, 522 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). Thus,

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[2]This Court held section 924(c)(3)(B)'s residual clause is unconstitutionally vague. *United States v. Davis*, ___ U.S. ___, 139 S.Ct. 2319, 2336 (2019). Thus, a conviction pursuant to section 924(c) may only stand if the underlying offense satisfies the elements clause. *See id.* at 2325; U.S. Const. amend. V.

Hobbs Act Conspiracy is not a crime of violence under the elements clause. See e.g. *United States v. Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019) (noting Government's concession); *United States v. Barrett*, 937 F.3d 126, 127 (2d Cir. 2019); *United States v. Todd*, 2022 WL 3210717 (4th Cir. 2022).[3]

Second, Aiding and Abetting a Hobbs Act Robbery is not a crime of violence under the elements clause of section 924(c). The government charged Mr. Smith as an accomplice under 18 U.S.C. § 2 for both the Hobbs Act Robbery alleged in Count Seven and for the section 924(c) brandishing conviction in Count 104. [1 ER 50, 81-82.] Mr. Smith argued on appeal that the least facts he admitted to sustain these convictions as an accomplice do not satisfy section 924(c)(3)(A)'s use of force. This Court should grant the writ to apply its recent authority to this distinct issue and hold the least elements needed to prove aiding and abetting Hobbs Act Robbery are broader than section 924(c)(3)(A)'s elements, and thus his conviction obtained under sections 2, 924(c), and 1951(a) must be dismissed.

Section 2 provides: "[w]hoever commits an offense against the United States or aids, abets … its commission, is punishable as a principal." This Court previously found a section 924(c) conviction could be obtained under accomplice

[3]Several district courts granted habeas relief after concluding Hobbs Act Conspiracy is not a crime of violence under section 924(c). See e.g. *United States v. McQuiddy*, 09cr00240-3, (M.D. Tenn.) Dkt. 3307.

liability, if the Government proved the defendant committed an affirmative act towards a triggering predicate felony and intended its commission, with advance knowledge a principal was armed. *Rosemond v. United States*, 572 U.S. 65, 74-78 (2014). However, *Rosemond* addressed a drug trafficking predicate, which is distinctly defined in section 924(c)(2). To the extent *Rosemond* included violent felonies in its statements of the test, such dicta should be foreclosed by this Court's subsequent analysis in *Davis* and *Borden v. United States*, 141 S.Ct. 1817 (2021). *See id.* at 67.

All the circuits which have upheld accomplices' section 924(c) convictions predicated on crimes of violence following *Davis* have done so by misfocusing on section 2's statement that an accomplice may be *punished* as a principal and ignoring the requisite categorical analysis of the least-culpable conduct required to obtain an accomplice's conviction. Whether an accomplice or co-conspirator is *punishable* as a principal may have been relevant for a section 924(c) conviction predicated on a drug-trafficking felony, but it has no relevance to the distinct elements-based test for a crime of violence. *Compare* 18 U.S.C. § 924(c)(2) ("'drug trafficking crime' means any felony punishable under" specified statutes) with 18 U.S.C. § 924(c)(3)(A).

Nevertheless, in a remarkable example of circular reasoning unassisted by briefing on the issue, the Eleventh Circuit was the first to conclude that:

> [b]ecause an aider and abettor is *responsible* for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery *necessarily commits* all the elements of a principal Hobbs Act robbery. And because the substantive offense of Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," … then an aider and abettor of a Hobbs Act robbery necessarily commits a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

In re Colon, 826 F.3d 1301, 1305 (11th Cir. 2016). Judge Martin sounded the alarm in dissent:

> It seems plausible that a defendant could aid and abet a robbery without ever using, threatening, or attempting any force at all. For example, the aider and abettor's contribution to a crime could be as minimal as lending the principal some equipment, sharing some encouraging words, or driving the principal somewhere. And even if Mr. Colon's contribution in his case involved force, this use of force was not necessarily an *element* of the crime, as is required to meet the "elements clause" definition. The law has long been clear that a defendant charged with aiding and abetting a crime is not required to aid and abet (let alone actually commit, attempt to commit, or threaten to commit) every element of the principal's crime. *See Rosemond*[, 572 U.S. at 73-74] ("As almost every court of appeals has held, a defendant can be convicted as an aider and abettor *without proof that he participated in each and every element* of the offense . . . .")

Id. at 1306-07. Nevertheless, the *Colon* majority's "legal fiction" carried the day and was ultimately adopted by the First, Third, Sixth, and now Ninth

Circuits. *Boston v. United States,* 939 F.3d 1266, 1273 (11th Cir. 2019) (Pryor, J., concurring) (criticizing *Colon* majority for "tak[ing] a legal fiction—that one who aids and abets a robbery by, say, driving a getaway car, is deemed to have committed the robbery itself—and transform[ing] it into a reality—that a getaway car driver actually committed a crime involving the element of force"); *United States v. Velazquez-Fontanez*, 6 F.4th 205, 218-19 (1st Cir. 2021) (upholding accomplice's conviction for section 924(c), without considering personal use or distinctly-broader proof permitted for accomplice); *United States v. Henry*, 984 F.3d 1343, 1356 (9th Cir. 2021); *United States v. Richardson*, 948 F.3d 733, 741-42 (6th Cir. 2020); *United States v. McKelvey*, 773 F. App'x 74, 75 (3d Cir. 2019); *United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018).

The circuit courts' arbitrarily elevating punishment over the statutory elements needed to prove accomplice liability, as if they were resolving a chicken-and-egg problem, goes against every decision by this Court addressing categorical analysis for violent felonies. While a section 924(c) conviction attaches heightened punishment to crimes that contain certain elements; and section 2 makes defendants punishable as principals, even if they did not commit the same elements; section 924(c) is its *own substantive criminal*

offense, with its own statutory elements. Thus, the additional punishment it carries should not trump the threshold elements required to sustain it.

When a defendant is charged under sections 2 and 1951(a) together as an accomplice to Hobbs Act robbery, the Government can obtain his conviction through proof of less-serious conduct on his part than that required to prove section 924(c)(3)(A)'s elements. *See Rosemond*, 572 U.S. at 73-74. Thus, offenses charged under section 2 and another statute fail the elements test under a pure comparison of their combined statutory elements, and prior decisions which had declined to compare the statutory elements, based on precedent describing how such charges are to be *punished*, are contrary to this Court's authority, section 924(c)(3)(A)'s precise language, and section 924(c)'s distinct statutory mechanism as a separate substantive offense.

When courts, including this one, *have* categorically approached claims that defendants' convictions as accomplices made them ineligible for additional statutory outcomes, the nature of the statute dictated how the accomplice elements were treated. For example, in distinct statutory frameworks matching state convictions with generic offenses contained in broadly-defined federal statutes, courts have included the federal accomplice liability elements within the generic offense, to allow those federal statutory consequences to attach to

accomplices. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 188-90 (2007) (so construing 8 U.S.C. § 1101(a)(43)(G), "a theft offense (including receipt of stolen property)"); *United States v. Valdivia-Flores*, 876 F.3d 1201, 1207 & 1211-12 (9th Cir. 2017) (placing federal accomplice-liability within scope of generic "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B), which includes drug offenses broadly defined by multiple statutes).

Section 924(c)(3)(A) differs from these generic-offense statutes by identifying specific elements that are incompatible with accomplice liability's broader reach. *See Shular v. United States*, 140 S. Ct. 779, 783-87 (2020) (finding § 924(e)(2)(A)(ii)'s "serious drug" offense delineates specific conduct/elements, which prior conviction must share, and abrogating *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018), which had treated it as a generic-offense statute that included federal accomplice-liability elements with narrower intent than Washington's "knowledge" standard). *Shular* analogized section 924(e)(2)(A)(ii)'s elements structure to language that is identical to section 924(c)(3)(A)'s, and hence, the distinct generic-offense framework likewise does not apply here. *Id.* at 783 (citing *Stokeling v. United States*, 139 S.Ct. 544, 554 (2019); § 924(e)(2)(B)(i)). Section 2's elements cannot be incorporated *within* section 924(c)(3)(A), because adding them necessarily *modifies* 924(c)(3)(A)'s precisely-delineated elements.

While courts cannot logically read section 2's elements into section 924(c)(3)(A), courts can and should consider whether sections 2 and 1951(a)'s elements *together* encompass broader conduct than section 924(c)(3)(A)'s elements. One workable solution this Court might adopt is to simply determine whether multiple statutory provisions are charged and proven together, and thereby identify the least elements, i.e., the least-culpable conduct, the Government had to prove to obtain them. *See Borden*, 141 S.Ct. at 1832 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)); *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016); *United States v. Rodriguez*, 2020 WL 1878112, at *15 (S.D.N.Y. 2020) (finding "§ 924(c) conviction must be vacated unless the record (plea or trial) establishes, in addition to a conspiracy conviction, the valid [substantive] predicate of defendant's conduct that comes within the element clause"). Whether this would be properly classified as a "modified categorical approach" in the current-conviction context could be addressed by this Court on certiorari. *See Mathis*, 136 S.Ct. at 2249-54 (noting modified categorical approach only applies to identify prior's statutory elements and rejecting reviewing Shepard documents to identify defendant's conduct where state statute addressed alternative means, rather than divisible elements).

This Court has paid careful attention to the specific statutory language in each case before it and has distinctly adapted the requisite categorical

inquiries accordingly. *See*, *e.g.*, *Davis*, 139 S.Ct. at 2328-39; *Shular*, 140 S.Ct. at 786. Its prior discussions of the modified-categorical approach as limited to statutorily-divisible offenses should be contextualized with the provisions and facts considered therein, as well as its definition of "elements" as necessarily admitted conduct. *Mathis*, 136 S.Ct. at 2248. Rather than decide whether section 1951(a) is divisible into separate accomplice and principal statutory offenses; or apply a legal fiction and substitute section 2's punishment of accomplices as principals for the requisite determination of what elements were necessarily proven; or artificially incorporate section 2's elements within section 924(c)(3)(A)'s specified elements; or invalidate all section 924(c) convictions because all crimes could be obtained pursuant to accomplice liability; it may simply look to the current-conviction *Shepard* documents to see how the predicate was charged and proven, and if those combined statutory elements are broader than section 924(c)(3)(A)'s elements, the section 924(c) conviction cannot stand.

Once the precedential threads of the Court's distinct statutory analyses are carefully separated and the applicable ones knitted together, it is inescapable that section 924(c)(3)(A) requires an elements-focused inquiry, and ignoring the broader elements required to prove crimes charged under section 2 contravenes

this Court's precedent and principles of statutory construction. The only remaining question is the first one asked by Petitioner: must section 924(c)(3)(A)'s use of force be personally committed by the section 924(c) defendant? For the reasons discussed in the preceding parts, this Court should find that the violent "offense that is a felony" supporting a section 924(c) conviction must be premised on that defendant's personal, practically-certain, conduct. *Davis*, 139 S.Ct. at 2327-28; *Borden*, 141 S.Ct. at 1823. Because the least-culpable conduct needed to prove a defendant aided and abetted a Hobbs Act Robbery, with advance knowledge that a principal intended to brandish a firearm, does not supply this use of force, it cannot sustain that defendant's section 924(c) conviction as an accomplice or a principal. *See Rosemond* 572 U.S. at 74-78; *see Rodriguez,* 2020 WL 1878112, at *17 (expressing doubts "aiding and abetting the criminal conduct of other individuals" would satisfy section 924(c)(3)(A)).

The conduct Mr. Smith admitted to establish his conviction under sections 2 and 1951(a) is broader than section 924(c)(3)(A)'s elements, and thus his case presents a realistic mechanism for this Court to grant certiorari, clarify the remaining ambiguities in the legal frameworks, remedy the inconsistencies in the lower courts' application of the law, and reverse Mr. Smith's unlawful conviction.

In Mr. Smith'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 that does not qualify as a crime.[4] Committing an act prohibited by an unconstitutional statute is not a crime. "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." *Exparte Siebold*, 100 U.S. 371, 376-377 (1880).

B. Mr. Smith's petition should be granted because jurisdictional defects or 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 *Goodall*, the following issues were left undecided and should be what compel a decision in

[4]See e.g. *Fields v. United States*, 20cv1063-JCM, (D. Nev.) (vacating 924(c) conviction as aiding and abetting Hobbs Act Robbery is not a crime of violence).

Mr. Smith'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*, 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 that an appeal waiver does not waive 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. Smith's case, there was at least one, if not more, jurisdictional defects that now "require correction" under the subject-matter jurisdiction defect holding from *Cotton*. First, the § 924(c) statute at issue in Mr. Smith's plea agreement 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. Smith's conviction for § 924(c) when there was not an underlying crime of violence.

Moreover, keeping the count of Aiding and Abetting Brandishing of a Firearm in Relation to a Crime of Violence in Mr. Smith'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* and *Oliver*. 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 *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. Smith's case. Mr. Smith's petition should be granted on this basis.

C. Mr. Smith's Petition Should be Granted Because the Ninth Circuit's *Torres* Case Should be Applied in Mr. Smith's Favor.

The facts and ruling in *United States v. Torres* match the facts in this case, and should apply in Mr. Smith'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*. The government conceded 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 did not justify an enhancement for a crime of violence. *Id*. Like the defendant in *Torres*, Mr. Smith has an unconstitutional conviction under his count of Aiding and Abetting Brandishing of a Firearm in Relation to a Crime of Violence that renders his related sentence "illegal." When the conviction in Mr. Smith's case is illegal, then the sentence imposed from that conviction is also illegal.

Mr. Smith'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. Smith'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. Smith's count of Aiding and Abetting Brandishing of a Firearm in Relation to a Crime of Violence should be vacated. Mr. Smith respectfully requests that his petition be granted on this basis.

CONCLUSION

For the foregoing reasons, Mr. Smith respectfully requests this Court grant his petition for writ of certiorari.

Dated: October 12, 2022

Respectfully submitted,
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