NO. _____

In the Supreme Court of the United States

RONALD WILLIAM BROOKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October 19, 2022

QUESTION PRESENTED

Whether the boilerplate waiver of Petitioner's appellate and post-conviction rights contained within his plea agreement bars his claim under 28 U.S.C. § 2255 that he stands convicted of a non-existent or substantively unconstitutional crime.

DIRECTLY RELATED PROCEEDINGS

United States v. Brooks, No. 3:11-cr-250 (N.D. Tex. Dec. 14, 2012), *as amended* (Jan. 14, 2013)

Brooks v. United States, No. 3:16-cv-1680 (N.D. Tex. April 13, 2020)

United States v. Brooks, No. 20-10401 (5th Cir. July 21, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Ronald W. Brooks respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (2022 WL 2871200, Petition Appendix 1a–5a) was not selected for publication in the Federal Reporter. The opinions of the District Court (2019 WL 3024649, App. 7a–11a) and the Magistrate Judge (2019 WL 4418418, App. 12a–37a) were also unpublished.

JURISDICTION

The Fifth Circuit entered judgment on July 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of 28 U.S.C. § 2255(a), (b), and (f):

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence

him or grant a new trial or correct the sentence as may appear appropriate.

* * * *

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT

In 2012, Petitioner Ronald Brooks pleaded guilty to kidnapping, 18 U.S.C. § 1201; possessing a firearm after felony conviction, 18 U.S.C. § 922(g)(1); and possessing a firearm in furtherance of a "crime of

violence"—kidnapping—under 18 U.S.C. § 924(c). App. 2a, 8a. Everyone now agrees that this conviction is "constitutionally problematic," to use the Government's words, "because kidnapping as defined in Section1201 does not satisfy Section 924(c)(3)(A), and Section 924(c)(3)(B) can no longer support it." App. 10a.

Mr. Brooks's first hint of this now-undisputed problem came years after his guilty plea and sentence. In 2015, this Court decided that the Armed Career Criminal Act's "residual clause" was unconstitutionally vague. *See Johnson v. United States*, 567 U.S. 591, 597 (2015). Correctly perceiving that the substantive constitutional principle announced in *Johnson* would also invalidate his own § 924(c) conviction, Mr. Brooks filed a motion to vacate that conviction in June 2016.

That pro se filing was the first step in a years-long odyssey. The district court appointed counsel, who filed an amended § 2255 motion on Mr. Brooks's behalf. The district court stayed the case several times to await decisions from this Court or the Fifth Circuit. In May 2017, the magistrate judge assigned to the case recommended dismissing it as untimely under § 2255(f)(1) and (3). 5th Cir. R. 77–82. The district court did not take action on that recommendation.

After this Court held that the materially identical residual clause in 18 U.S.C. § 16(b) was unconstitutionally vague, *see Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Government filed its answer and response to the § 2255 motion. App. 151; 5th Cir. R. 102–108. That August 2018 answer raised only one defense: timeliness. According to the Government's

position back then, the "rights" announced in *Johnson* and *Dimaya* did not reset the limitations period for someone like Mr. Brooks who had been convicted under 18 U.S.C. § 924(c)(3)(B). By that logic, Mr. Brooks's post-conviction motion was outside the period specified in 28 U.S.C. § 2255(f)(1).[1] *See* App. 11a.

The court then stayed the case to await this Court's decision in *United States v. Davis*, 139 S. Ct. 2919 (2019). At the time, the Government acknowledged that "the only issue remaining is whether Brooks can bring his Section 924(c)(1) challenge at this time under Section 2255(f)(3) since, otherwise, the Section 2255 motion is untimely." App. 4a–5a (quoting 5th Cir. R. 122).

After *Davis*, the "only issue remaining" in the case was resolved in Petitioner's favor. Even so, the court invited the Government to "supplement" its response. App. 2a, 9a. Only then—more than a year after its answer, and more than three years after Mr. Brooks's *pro se* motion to vacate—did the Government argue that Mr. Brooks had waived his right to seek relief under § 2255 as part of his plea agreement. App. 2a–

[1] The Fifth Circuit's pronouncements on the (f)(3) timeliness question are difficult to reconcile with one another (Some might say impossible). *Compare and contrast United States v. Williams*, 897 F.3d 660, 662 (5th Cir. 2018) (holding that *Johnson* triggered § 2255(f)(3) for ACCA-residual-clause challenges; *Dimaya* "opened the door" and commenced the § 2255(f)(3) period for 18 U.S.C. § 16(b) challenges; and neither decision triggered (f)(3) for someone convicted under § 924(c)(3)(B)), *with United States v. Vargas-Soto*, 35 F.4th 979, 991 (5th Cir. 2022) ("It's wrong to suggest that *Dimaya* reset the (f)(3) trigger" to challenge § 16(b).").

3a, 11a. The revised answer also explicitly waived the timeliness defense previously asserted. 5th Cir. R. 135.

Mr. Brooks cried foul. First, the Government waived or forfeited any waiver defense by omitting it from the original answer. Second, those boilerplate appellate waivers in federal plea agreements do not bar a claim that the "crime" of conviction was not really a crime at all. Third, enforcing the waiver to leave in place an unconstitutional and substantively unauthorized conviction would work a miscarriage of justice. App. 11a–16a.

In March 2020, the district court dismissed the action because of the waiver but granted a Certificate of Appealability on three issues: "(1) whether the Government forfeited the right to invoke the post-conviction remedy waiver, (2) whether the waiver bars [Brooks's] *Davis* claim, and (3) whether the waiver is unenforceable under the miscarriage of justice exception." App. 3a.

On appeal, the Fifth Circuit affirmed the district court on all three issues. App. 1a–5a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit was wrong.

Imagine this scenario: you've done something wrong, and you are willing to admit it rather than putting the Government to its burden at trial. You, your lawyer, and the prosecutor reach an agreement about the appropriate punishment that should be imposed, and you also agree that that aggregate punishment should be allocated among three separate

federal crimes. But, unbeknownst to any of you, one of the crimes you promised to plead guilty to is not really a crime—it is "no law at all." *Davis*, 139 S. Ct. at 2323.

There are many safeguards in place to try to avoid this scenario. Of course, the Constitution itself is *supposed to* govern the actions of all three branches of the federal government. That doesn't always happen, but the federal criminal justice is filled with people who are *supposed to* keep you from falling into this kind of a trap. You are entitled to be represented by an attorney who is familiar with any available defenses, and who puts your interests first. There is also a judge who cannot let you plead guilty (or accept your plea) if the thing that you are admitting is not a crime. In legal terminology, your guilty plea must be "intelligent"—preceded by "real notice of the true nature of the charge against" you, which is "the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618, (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, (1941)).

Even if you understand the nature of the charge against you, a federal judge cannot lawfully accept your plea without determining that the conduct you have admitted really is a crime—in other words, "that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "The purpose underlying this rule is to protect a defendant who may plead with an understanding of the nature of the charge, but 'without realizing that his conduct does not actually fall within the definition of the crime charged.'" *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002) (internal citations omitted).

Now imagine that the plea agreement contains a boilerplate waiver of appellate and post-conviction rights:

> Brooks waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. He further waives his right to contest his conviction and sentence in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. He further waives his right to seek any future reduction in his sentence (e.g., based on a change in sentencing guidelines or statutory law). Brooks, however, reserves the rights (a) to bring a direct appeal of a sentence exceeding the statutory maximum punishment that is applicable at the time of his initial sentencing, (b) to challenge the voluntariness of his plea of guilty or this waiver, or (c) to bring a claim of ineffective assistance of counsel.

5th Cir. Sealed R. 399, quoted in part at App. 3a.

In that scenario, are you *stuck with* a conviction and sentence for a so-called "crime" defined by a concededly invalid and unconstitutional law? The Fifth Circuit said "yes." App. 1a–5a. The right answer is "no."

A. If a plea to a non-existent crime is unintelligent, then a boilerplate waiver of postconviction rights entered during the same plea proceeding is unenforceable.

"[A]ll jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019) & cases cited at note 6.

Mr. Brooks pressed this argument in the district court and on appeal. *See* App. 13a–15a; Brooks C.A. Br. 13–17. The Fifth Circuit skated over this issue without addressing it, but it shouldn't have. As soon as the Government invoked the putative waiver, Mr. Brooks responded that a federal court "cannot allow a defendant to plead guilty to a non-existent offense." App. 13a. Since the guilty plea *itself* was bad—it turns out that one of the "crimes" was not really a crime at all—then court's acceptance of the plea *agreement* was also irrevocably tainted. The parties harbored a mistaken assumption about the law when they entered into the plea agreement, and the district court embraced that same mistaken assumption when it accepted the plea and the associated agreement.

If any of the players had realized the error, none of this would have happened. The prosecutor would not have asked the grand jury to indict for the noncrime; the defense attorney would not have advised Mr. Brooks to plead guilty to the noncrime; the prosecutor, the defense attorney, and Mr. Brooks would not have structured a plea agreement so as to include

conviction for a noncrime; the district court (and the defense attorney) would have *advised* Mr. Brooks that the conduct he was admitting would not violate 18 U.S.C. § 924(c); and, failing all of that, the district court would have *refused to accept* the guilty plea because there was no factual basis to support that plea.

The Fifth Circuit's decision must rest on one of three dubious premises: (a) that Mr. Brooks's guilty plea and plea agreement were "intelligent" despite the fact that he was advised and mistakenly believed his admitted conduct was an actual crime; (b) Mr. Brooks's plea agreement, including the waiver of the right to file a post-conviction challenge, was "intelligent" even though the plea itself was unintelligent; or (c) it's fine if someone pleads guilty to a noncrime if everyone believes otherwise at the time, so long as that defective plea is rendered in exchange for "major benefits." App. 5a. None of these arguments holds water.

B. Even if the postconviction waiver were constitutionally valid, the miscarriage-of-justice exception would prevent its enforcement to insulate a defendant's conviction of a noncrime from judicial review.

As explained below, many appellate courts have recognized that a defendant can avoid enforcement of an appeal or post-conviction waiver where dismissal would work a miscarriage of justice. "[C]onviction and punishment" "for an act that the law does not make criminal" "inherently results in a complete miscarriage of justice." *Davis v. United States,* 417

U.S. 333, 346 (1974); *accord Bousley*, 523 U.S. at 626 (Stevens, J., concurring in part and dissenting in part).

C. At a minimum, the interests of justice did not favor tardy amendment of the Government's answer and enforcement of the waiver.

There are some who might argue that a defendant who is aware of the right to appeal and the right to file a post-conviction challenge under 28 U.S.C. § 2255, but executes a plea agreement waiving those procedural rights, should be held to the waiver, regardless of how badly the person was advised by court, attorney, prosecutor, and regardless of the miscarriage of justice that results from leaving in place a conviction for a noncrime. Someone making that argument would probably say that procedural rules should followed, no matter how sharp the consequences, because geese and ganders should always be offered the same sauce.

Even that argument won't work here. There is no question that *someone* is going to prevail by asserting a procedural right that was, by all appearances, previously given up, and then asserted later. Mr. Brooks signed a plea agreement containing a boilerplate waiver of the right to contest his conviction in "any collateral proceeding." App. 3a. At the time, nothing suggested to him that one of the convictions was substantively invalid. It would be years before this Court's decision in *Johnson* revealed and recognized the vagueness problems with ordinary-case residual clauses. But Mr. Brooks *did* sign the plea agreement.

The Government—represented by the most powerful collection of lawyers in the world—also decided not to assert any affirmative or procedural defense of waiver when it filed its first motion to stay the case in September of 2016 or even when it filed its answer to the motion in August of 2018. By that time, it was clear that there *might be* some merit to Mr. Brooks's contention. This Court had already decided *Johnson* and *Dimaya*. To many observers, it was only a matter of time until *Davis* was revealed. At that moment, the Government decided to raise one, and only one, defense: that Mr. Brooks's motion was untimely under § 2255(f)(3).

The Government was required to plead that defense in the answer. Waiver is an affirmative defense that must be raised in a responsive pleading. Fed. R. Civ. P. 8(c)(1). Federal Rule of Civil Procedure 12(b) governs the presentation of defenses in a responsive pleading: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required." *See also* R. 12 of the Rules Governing § 2255 Proceedings (allowing application of the Civil Rules to § 2255 motions).

The Government first asserted the defense of waiver more than a year after it filed its answer, and only after *Davis* confirmed that the § 924(c) conviction was invalid. The district court decided that the Government should not be penalized for waiting so long because, until *Davis* was decided, the Government believed it had a valid limitations defense. In other words, the novelty of *Davis* excused the Government's failure to assert the defense before November 2019, but the novelty of *Johnson*, *Dimaya*,

and *Davis* did not excuse Mr. Brooks's failure to anticipate and request an exception in the plea agreement that would explicitly allow his § 2255 motion in the (presumably unanticipated) event that one of his convictions turned out to be substantively invalid.

This case calls for an assessment of the interests of justice. Mr. Brooks—misadvised about the true nature of the offense to which he pleaded guilty, and admitting conduct that *is not a crime* under § 924(c)(3)(B), also signed a document waiving post-conviction rights. The Government did not assert the waiver at its first opportunity or even when it was required by rule to do so. Before allowing the amended pleading, the lower courts were supposed to consider "whether justice so requires." App. 13a. Here, justice required *granting* Mr. Brooks's § 2255 motion, rather than *dismissing* it.

II. This Court should grant certiorari.

A. The circuits are divided about the "miscarriage of justice" exception.

In *Garza*, this Court recognized that some lower courts applied a "miscarriage of justice" exception but did not comment on the validity of that, or any other exception to the enforceability of appellate waivers. 139 S. Ct. at 745 n.6 (quoting *State v. Dye*, 870 N.W.2d 628, 634 (Neb. 2015)).

The federal courts of appeals are divided over whether a defendant can avoid dismissal by proving a miscarriage of justice. The First, Second, Third, Seventh, Eighth, Tenth, and D.C. Circuit all recognize

a miscarriage-of-justice exception. *See United States v. Teeter*, 257 F.3d 14, 21–27 (1st Cir.2001); *United States v. Johnson*, 347 F.3d 412, 415 (2d Cir. 2003); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir.2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009).

These courts recognize that the parties to the plea agreement assume that any provision would be interpreted "against a general background understanding of legality," that is, "that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement." *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The Ninth Circuit does not recognize this exception, on the theory that it is too "nebulous." *United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011) ("Ligon asks the court to recognize a 'miscarriage of justice' exception to otherwise valid waivers of appellate rights. The court declines the invitation. This court does recognize certain exceptions to valid appellate waivers, but a nebulous 'miscarriage of justice' exception is not among them.") (cleaned up).

Thus far, the Fifth Circuit has neither acknowledged nor rejected the existence of the exception. *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020) ("Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it."). But the court refused to apply

the exception here, despite the stereotypical case of "miscarriage of justice" under this Court's precedent: conviction of a noncrime.

This conflict between the courts of appeals pertains to an issue of great significance, meriting this Court intervention. This Court could clarify whether a defendant can avoid enforcement of a rights-waiver, and could help bring uniformity to its contours by addressing this situation.

B. Granting certiorari would allow the Court to clarify the precedential status and meaning of *Grzegorczyk v. United States*.

In June, a divided Court denied certiorari in *Grzegorczyk v. United States*, 142 S. Ct. 2580 (2022). Four Justices joined Justice Kavanaugh's statement respecting the denial of certiorari, 142 S. Ct. at 2580–81, and three Justices joined Justice Sotomayor's dissent from denial of a grant, vacate, and remand order. 142 S. Ct. at 2581–87.

At first glance, this seems like an easy question to answer: there is a long and previously unbroken line of authority explaining the denials of certiorari are *not* precedent. This Court "rigorously insisted . . . again and again; again and again" that denials of certiorari are nonprecedential. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari); *Halprin v. Davis*, 140 S. Ct. 1200, 1202 (2020) (Sotomayor, J., respecting denial of certiorari); *Robertson v. U.S. ex rel. Watson*, 560 U.S. 272, 282 (2010) (Roberts, C.J., dissenting from dismissal).

The Fifth Circuit used to agree. *See Sunbeam Corp. v. Masters of Miami, Inc.*, 225 F.2d 191, 196 (5th Cir. 1955).

Yet the Fifth Circuit has not only treated *Grzegorczyk* as binding precedent, but as binding precedent *on a subject the Court was silent about*. To understand why, we need to delve into the details that were unnecessary in a non-precedential decision denying certiorari.

As the Seventh Circuit explained,

> Grzegorczyk waived, among other rights, the right to "all appellate issues that might have been available if he had exercised his right to trial." *Under the agreement, he could only appeal the validity of his guilty plea and the sentence imposed*.

Grzegorczyk v. United States, 997 F.3d 743, 745 (7th Cir. 2021) (emphasis added). But the defendant-movant in Grzegorczyk never challenged the guilty plea, either on direct appeal or in § 2255 proceedings in district court. *Id.* at 748. He waited until appellate proceedings on his § 2255 motion before alleging that anything was wrong with the plea, and that was too late. *Id.* There is no significant discussion, in the Seventh Circuit's opinion or Justice Kavanaugh's statement about the terms of the plea agreement's appellate waiver.

The Seventh Circuit instead held that Grzegorczyk's unconditional (and, throughout the § 2255 proceedings in district court, unchallenged) guilty plea

barred the claim. The Seventh Circuit says so on every page of its opinion. *Id.* at 745, 746, 747, 748, 749.

Unlike Mr. Brooks, then, Grzegorczyk never told the district court that the rule in *Davis* (and *Johnson* and *Dimaya*) revealed that the plea itself was invalid. Justice Kavanaugh's statement that "the Seventh Circuit correctly concluded that the defendant's unconditional guilty plea precluded any argument" based on *Davis* was surely not a precedential repudiation of the longstanding principle that a defendant should not be induced to plead guilty to a noncrime.

Yet the Fifth Circuit not only gave Justice Kavanaugh's statement precedential force; it did so about a subject the statement did not even discuss or embrace:

> As five Supreme Court justices recently reaffirmed, however, plea waivers such as the one entered here "preclude[ ] any argument based on the new caselaw."

United States v. Caldwell, 38 F.4th 1161, 1162 (5th Cir. 2022). No other Court of Appeals has read *Grzegorczyk* that way.

Here, the Fifth Circuit again held that *Grzegorczyk* foreclosed Mr. Brooks's "reliance on" *Davis*. App. 5a (citing *Grzegorczyk* and *Caldwell*). So the precedent of the Fifth Circuit now includes a principle drawn from a misreading of a non-precedential Supreme Court statement.

This Court's decision-not-to-decide in *Grzegorczyk* sheds no light on the validity of Mr. Brooks's plea, plea

agreement, and waiver-of-postconviction rights. All were "constitutionally invalid" because the district court misadvised him about the "true nature" of 18 U.S.C. § 924(c). *Bousley v. United States*, 523 U.S. 614, 618–19 (1998). If he had been correctly advised, he would not have pleaded guilty to a noncrime, accepted the plea agreement requiring him to do so, or waived his right to further review.

Respectfully submitted,

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