No. _____

In The
Supreme Court of the United States

DAMION KENTRELL WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether due process requires that a provision in a plea agreement waiving the right to file a motion to vacate sentence under 28 U.S.C. § 2255 be construed as containing an exception that allows a motion challenging a sentence that exceeds the statutory maximum.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

RELATED PROCEEDINGS

The following cases are related to this case.

United States v. White, U.S. District Court for the Northern District of Texas, No. 3:14 CR 00078-N-2, Judgment entered November 10, 2016.

United States v. White, U.S. Court of Appeals for the Fifth Circuit, No. 16-11614, Judgment entered February 7, 2018.

White v. United States, Supreme Court of the United States, No. 17-8798, Certiorari denied June 11, 2018.

United States v. White, U.S. District Court for the Northern District of Texas, Nos. 3:14 CR 00078-N-2 and 3:18-CV-2561-N-BH, Judgment entered November 10, 2016.

United States v. White, U.S. Court of Appeals for the Fifth Circuit, No. 21-10595, Judgment entered November 10, 2022.

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Damion White asks that a writ of certiorari issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 10, 2022.

OPINION BELOW

The unpublished opinion of the court of appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on November 10, 2022. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

STATUTORY PROVISION INVOLVED

Title 18 Section U.S.C. § 16 provides in relevant part that a crime of violence is "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another[.]"

Title 18 Section U.S.C. § 1952 provides in relevant part that:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

. . .

(2) commit any crime of violence to further any unlawful activity

. . .

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

STATEMENT

This case presents the Court with an opportunity to consider whether a criminal defendant may waive his right to be sentenced within the statutory maximum set by Congress. Petitioner Damion White challenged his 20-year sentence for violating the Travel Act, 18 U.S.C. § 1952(a)(2) and (B). He argued in his motion to vacate sentence under 28 U.S.C. § 2255, as he had since his sentencing, that his conviction was not for a crime of violence and thus that the maximum sentence for his offense was five years' imprisonment. The government conceded that White's conviction was not for a crime of violence because his offense can be committed by fraud. *See United States v. Jackson*, 7 F.4th 261, 263 (5th Cir. 2021). Nonetheless, the government persuaded the Fifth Circuit that, in his plea

agreement, White had given up his right to challenge a sentence beyond the statutory maximum.

In 2015, White, pursuant to a plea agreement, waived indictment and pleaded guilty to two counts of a superseding information.[1] The count at issue in this appeal charged White with violating the Travel Act, 18 U.S.C. § 1952(a)(2) and (B), by using a facility of interstate commerce with intent to commit a crime of violence in further of a racketeering activity. The crime of violence alleged was sex trafficking by force, fraud, or coercion in violation of 18 U.S.C. § 1591(a)(1). The definition of crime of violence that applied to the Travel Act offense came from 18 U.S.C § 16.

White was told at his guilty plea hearing that an element of the § 1952(a)(2) Travel Act offense he was pleading to was the commission of, or attempted commission of, a crime of violence. He was also told that he faced a maximum sentence of 20 years' imprisonment on that count. He objected that his Travel Act predicate offense under § 1591(a)(1) offense was not a crime of violence as that term was defined in 18 U.S.C. § 16(a), and that it could not be a crime of violence as defined in 18 U.S.C. § 16(b) because that provision was impermissibly vague. He argued that because his offense was not a crime of violence he faced a maximum sentence of only five years' imprisonment. The district

[1] The district court exercised jurisdiction in the original criminal case under 18 U.S.C. § 3231 and in the motion to vacate proceeding under 28 U.S.C. § 2255.

court rejected his arguments and sentenced him to 20 years' imprisonment.

White appealed. He challenged the district court's ruling that he had committed a crime of violence and the 20-year sentence. The court of appeals read the argument of White's then-appellate counsel as challenging only White's particular conduct, and thus not presenting a categorical challenge to the crime-of-violence determination and the maximum sentence.[2] It therefore dismissed the appeal, finding it barred by the appeal-waiver provision in White's plea agreement.

White filed a petition for writ of certiorari, again arguing that he had been sentenced above the applicable statutory maximum. While the petition was pending, the Court decided in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) that § 16(b) was unconstitutionally vague and could not be used to determine whether an offense was a crime of violence. The Court later denied White's certiorari petition.

Three months after that denial, White filed a § 2255 motion to vacate sentence in the district court. He argued that his Travel Act charge rested on § 1591(a), which, because it could be committed by fraud, did not satisfy the elements test of 18 U.S.C.

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[2] The test for whether an offense qualifies as a crime of violence is a categorical one—if a defined offense can be committed without the use of force, then the offense is not a crime of violence under § 16(a). *Mathis v. United States*, 579 U.S. 500 (2016); *United States v. Rodriguez-Flores*, 25 F.4th 185, 388 (5th Cir. 2022).

§ 16(a). He also argued that, because *Dimaya* had invalidated § 16(b), § 1591 could not be a crime of violence under that subsection. The government responded by asserting that the waiver provision in the plea agreement barred the § 2255 motion, pointing out that, while a challenge to a sentence in excess of the maximum had been reserved for direct appeal, it was not reserved for a § 2255 motion. *See* Appendix B. White responded that a sentence in excess of the statutory maximum was a recognized exception to broad waivers of the right to appeal or seek review. The district court disagreed and denied the motion. Appendix A.

White appealed. The Fifth Circuit granted him a certificate of appealability. The government moved to dismiss the appeal. White opposed dismissal, arguing that the Fifth Circuit had recognized that an exception existed to review waivers for cases in which the claim was that the statutory maximum sentence had been exceeded. *See United States v. Leal*, 933 F.3d 426, 430–31 (5th Cir. 2019). The Fifth Circuit, following its recent decision in *United States v. Caldwell*, 38 F.4th 1161 (5th Cir. 2022), that narrowed review of purportedly waived § 2255 claims, dismissed the appeal.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD CONSIDER WHETHER DUE PROCESS REQUIRES AN EXCEPTION TO APPEAL AND COLLATERAL WAIVER PROVISIONS WHEN THE SENTENCE IMPOSED EXCEEDS THE STATUTORY MAXIMUM.

Guilty pleas resolve nearly all the cases brought in the criminal justice system. *Missouri v. Frye*, 566 U.S. 133, 143–44 (2012); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). A large percentage of those plea-resolved cases involve plea bargain agreements between the government and the accused. The law treats these agreements as contractual in nature, *Santobello v. New York*, 404 U. S. 257, 262–63 (1971), but they are "unique contracts" because "they implicate the deprivation of human freedom[.]" *United States v. Mankiewicz*, 122 F.3d 399, 403 n.1 (7th Cir. 1997). When a defendant agrees to enter a plea of guilty, he forgoes all the rights and protections that he would have at a trial and, in most cases, accepts that the agreement will lead to his imprisonment.

Plea bargains in federal court now commonly include a provision that requires the defendant to waive his ability to appeal from his conviction and sentence. Increasingly, they also include a provision that requires the defendant to waive his right to file a post-conviction motion to vacate sentence under 28 U.S.C. § 2255. Although plea agreements are treated as contractual in nature, *Santobello*, 404 U.S. at 262–63, these rights-waiving agreements are often less negotiated than imposed by the prosecutor as a sine qua non of plea agreement.

The courts of appeals have largely approved of both appeal waivers and § 2255 waivers, finding them to be an acceptable part of the plea bargain process. *See*, *e.g.*, *United States v. Khattack*, 273 F.3d 557, 560 (3d Cir. 2001) (appeal waiver); *United States v. Barnes*, 953 F.3d 383, 386–89 (5th Cir. 2020) (§ 2255 waiver). The courts have reasoned that, because defendants can waive constitutional rights, such as proof beyond a reasonable doubt, by pleading guilty, so too they may waive statutory rights, including the rights to appeal a sentence or to challenge a conviction and sentence through a § 2255 motion. *See*, *e.g.*, *Khattack*, 273 F.3d at 560; *United States v. Wiggins*, 905 F.2d 51, 52–54 (4th Cir. 1990); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). That analogy appears inexact. A defendant is specifically aware of the substantive character and effect of the constitutional rights he is waiving by a plea of guilty. By contrast, he does not know when he waives the right to appeal or to bring a § 2255 motion, what substantive matters he is giving up. *Cf. Johnson v. Zerbst*, 304 U.S. 458 (1938) (waiver is intentional relinquishment of a known right).

Recognizing this, the courts of appeals, while generally approving of appeal waivers have put some limits on the enforcement of them to ensure that a particular appeal-waiver provision does not violate basic principles of fairness. Many have referred to this exception to appellate waivers as a miscarriage-of-justice exception. *See United States v. Teeter*, 257 F.3d 14,

21–27 (1st Cir. 2001); *Khattak*, 273 F.3d at 559–62; *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 have reasoned that "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept *any* defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." *Guillen*, 561 F.3d at 530 (emphasis added). "When all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)." *Teeter*, 257 F.3d at 25. Among the few matters that trigger the manifest-miscarriage-of-justice exception are constitutionally impermissible factors such as race, *see*, *e.g.*, *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000), and sentences that exceed the statutory maximum, *id. See also United States v. Black*, 201 F.3d 1296, 1302 (10th Cir. 2000) (exception for sentence that exceeds the statutory maximum); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005) (same).

Even courts that declined to adopt the manifest-miscarriage-of-justice nomeclature have held that a sentence in excess of the statutory maximum is an exception to broad waiver-language provisions. *See*, *e.g.*, *United States v. Leal*, 933 F.3d 426, 430–31 (5th Cir. 2019). This is because a "court cannot give [a] sentence effect if it is not authorized by law." *Id.* at 431 (quoting

United States v. Gibson, 356 F.3d 761, 766 (7th Cir. 2004) and *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002)). The Fifth Circuit has also held that conviction for an offense that is not the offense defined by the statute is reason to vitiate broad waiver language. *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001) (direct appeal). In so doing, it expressed doubt whether a challenge to a conviction on the basis that the conviction was not for the defined conduct "is *ever* waivable in a civilized system of justice." *Id.* (emphasis added); *cf. United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) ("to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution").

The courts of appeals have treated waivers of § 2255 rights differently, however. With § 2255 waivers, the concern for sentences in excess of the statutory maximum has dropped away. *See*, *e.g.*, *United States v. Caldwell*, 38 F.4th 1161 (5th Cir. 2022). *Caldwell* opined that a statement regarding denial of certiorari had taught that § 2255 waivers would not be excused when retroactive relief was required, even when the defendant alleged his sentence exceeded the maximum set by Congress. 38 F.4th at 1162 (citing *Grzegorczyk v. United States*, 142 S. Ct. 2580 (2022)).

Two other courts of appeals have reached similar conclusions, although without relying on *Grzegorczyk*. *King v. United States*, 41 F.4th 1363 (4th Cir. 2022); *Portis v. United States*, 33 F.4th 331 (6th Cir. 2022). Both the Fourth and the Sixth Circuits believed that

an exception for sentences exceeding the statutory maximum was unnecessary when considering § 2255 waivers. *King*, 41 F.4th at 1368–69; *Portis*, 33 F.4th at 335–36. Both courts of appeals thought that the waiver was based on the assumption that the maximum sentence that applied at the time of sentencing was the "crucial backdrop to any plea agreement." *King*, 41 F.4th at 1368; *Portis*, 33 F.4th at 335. But the reasoning of the courts was flawed. First, no defendant would ever consent to being sentenced above the statutory maximum or consent to conviction for an offense that is not the one set out by statute. Second, the courts' reasoning shows exactly why due process requires an exceed-the-maximum exception for "bargained-for" § 2255 waivers—the waivers are less bargained for than imposed. The Fourth Circuit captured this when it declared that "the waiver is valuable precisely because it allocates the risk to the defendant. If a new constitutional rule favoring the defendant is later announced, no underlying assumption of the plea agreement or its appeal waiver has been upended. All that has happened is that the government's wager has paid off – just as the defendant's wager pays off in the many cases in which no new rule provides a basis for appeal." *King*, 41 F.4th at 1369. But of course this is not a bargain. It is a one-sided triumph for the government because statutory maximums do not go up; that would violate the ex post facto clause. U.S. Const. art. I, § 9. The bargain the Fourth and Sixth Circuits discern in the § 2255 waivers is illusory. Due process and fundamental fairness call for an exceeds-the-maximum

exception. So too do the fair contract principles *Santobello* embraced. 404 U.S. at 262–63.

White's case is a good vehicle for considering the issues presented. His § 1591 predicate was never a crime of violence. It never met the definition of crime of violence in § 16(a) and it never was one under § 16(b) because that law was unconstitutionally vague and "a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319 (2019). A sentence of more than five years' imprisonment was never authorized for White's actual offense. More than that, even if the courts of appeals are correct in finding no exception when purely retroactive post-conviction relief is sought, White's case is different. *DiMaya* was rendered when White's direct appeal was pending. It applied to his case. *Cf. Griffith v. Kentucky*, 479 U.S. 314 (1987). He sought only what he had argued for all along. The exceeds-the-maximum exception that the courts of appeals have applied in direct appeal cases should therefore apply in § 2255 cases such as his. The Fifth Circuit's decision to refuse to allow White to pursue relief from his unauthorized sentence was wrong. The Court should grant certiorari to consider the limits and exceptions applicable to waivers of § 2255 rights in plea agreements.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

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