APPENDIX

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United States Court of Appeals for the Fifth Circuit

No. 21-10117

United States Court of Appeals
Fifth Circuit
FILED
April 21, 2025
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

versus

Plaintiff—Appellee,

CEDRIC RAY JONES,

Defendant—Appellant.

Appeal from the United States District Court for the Northern District of Texas
USDC No. 3:18-CV-584

Before DENNIS, RICHMAN, and HO, *Circuit Judges*.

PRISCILLA RICHMAN, *Circuit Judge*:

Cedric Ray Jones pleaded guilty to, among other charges, conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951(a) and using and brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c). The conspiracy charge

served as the predicate "crime of violence" for the firearm conviction under the residual clause of § 924(c). Pursuant to his plea agreement, Jones waived his rights to challenge his convictions and sentences on direct appeal or through collateral attack. Several years later, in *United States v. Davis*,[1] the Supreme Court struck down the residual clause of § 924(c) as unconstitutionally vague. Jones sought vacatur of his § 924(c) conviction under 28 U.S.C. § 2255, the federal habeas statute, but the district court determined that this collateral attack was barred by Jones's appeal waiver. Because the waiver is enforceable and no exception to it applies, we affirm the decision of the district court. In doing so, we are aligned with the Second,[2] Sixth,[3] Seventh,[4] Ninth,[5] and Eleventh[6] Circuits.

I

Jones and his codefendants robbed pawn shops and auto-parts stores in the Dallas, Texas area. Jones brought handguns and semiautomatic rifles to these

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[1] 588 U.S. 445, 470 (2019).

[2] *Cook v. United States*, 84 F.4th 118, 120 (2d Cir. 2023).

[3] *Portis v. United States*, 33 F.4th 331, 335 (6th Cir. 2022).

[4] *Oliver v. United States*, 951 F.3d 841, 843-45 (7th Cir. 2020)

[5] *United States v. Goodall*, 21 F.4th 555, 558 (9th Cir. 2021).

[6] *King v. United States*, 41 F.4th 1363, 1370 (11th Cir. 2022).

robberies. Jones was charged with one count of conspiracy to interfere with commerce by robbery under 18 U.S.C. § 1951(a) (Count 1); one count of using and brandishing a firearm during that conspiracy under 18 U.S.C. § 924(c) (Count 2); three counts of interference with commerce by robbery under 18 U.S.C. § 1951(a) and 18 U.S.C. § 2 (Counts 3, 5, and 7); and three counts of using and brandishing a firearm during those robberies under 18 U.S.C. § 924(c) and 18 U.S.C. § 2 (Counts 4, 6, and 8).

Jones pleaded guilty to Counts 1, 2, 3, 5, 7, and 8. The other firearms charges relating to the robbery counts were dropped. As part of his plea agreement, he agreed to the following provision:

> 11. **Waiver of right to appeal or otherwise challenge sentence**: Jones waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his convictions and sentences. He further waives his right to contest his convictions and sentences in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Jones, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of his pleas of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

After entering his plea but before sentencing, Jones moved to dismiss the firearm counts, arguing that the residual clause of § 924(c) was unconstitutionally vague under *Johnson v. United States*[7] and that, without the residual clause, Hobbs Act robbery could not satisfy the crime-of- violence requirement under § 924(c). The district court denied the motion.

At the sentencing hearing, the district court reminded Jones that "[he] ha[s] a right to appeal this sentence within the areas that [he] reserved in [his] plea agreement." Jones was sentenced to concurrent 189-month sentences on each of Counts 1, 3, 5, and 7; a consecutive 84-month sentence on Count 2; and a consecutive 300-month sentence on Count 8. The total aggregate sentence is 573 months. Jones appealed, and this court granted appellate counsel's motion to withdraw and dismissed the appeal as presenting no nonfrivolous issues.[8]

Jones then brought a pro se § 2255 motion raising claims of ineffective assistance of counsel. In his pleadings, Jones argued that the appeal waiver should not apply because the exceptions for (1) a direct appeal of a sentence exceeding the statutory maximum and (2) an arithmetic error at sentencing should apply. He sought dismissal of the § 924(c) conviction on Count 2 because "[c]onspiracy to [c]ommit Hobbs Act Robbery is not a crime of

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[7] 576 U.S. 591 (2015).

[8] *United States v. Jones*, 695 F. App'x 813, 814 (5th Cir. 2017) (per curiam).

violence under the element[s] clause" of the statute. He also filed a motion to grant relief raising the same argument as to his § 924(c) conviction on Count 2. The magistrate judge construed Jones's motion to grant relief as a motion to amend his § 2255 motion to add a claim for vacatur of the § 924(c) conviction on Count 2.

While that motion was pending, the Supreme Court granted certiorari in *Davis*, and the district court stayed the proceedings in Jones's case. Following the Court's decision, Jones moved to lift the stay and requested that the district court vacate his conviction on Count 2. The Government maintained that the collateral-review waiver in Jones's plea agreement barred his challenge to the conviction. Jones reiterated that he had raised the § 924(c) claim in conjunction with his ineffective-assistance-of-counsel claim. He also argued that denying relief would be a "manifest injustice."

The magistrate judge recommended that the court deny Jones's § 2255 motion. As to the *Davis* challenge to Count 2, the magistrate judge concluded that the claim was barred by the collateral-review waiver, which she determined Jones entered knowingly and voluntarily. Nonetheless, the magistrate judge recommended that a certificate of appealability be granted "on the following issues: (1) whether the collateral-review waiver in his plea agreement bars his *Davis* claim; and (2) whether the collateral-review waiver is unenforceable under the miscarriage of justice exception." The district court conducted an "independent review of the pleadings,

files and records in this case, and the Findings, Conclusions, and Recommendation of the United States Magistrate Judge." It accepted the magistrate judge's recommendation, denied relief, and granted the certificate of appealability. Jones is represented by counsel in this appeal.

II

Jones raises three arguments as to why the appeal-waiver provision in his plea agreement should not apply to his claims for relief based on *Davis*. First, he argues that the language of the appeal-waiver provision was too broad to encompass the fundamental right not to be invalidly convicted. Second, using contract interpretation principles, he argues that another provision of the plea agreement proves that neither party intended to waive the right at issue. Third, he argues that his waiver was unknowing because the right did not exist when he entered the plea agreement. These arguments are unavailing given our circuit's controlling caselaw.

A

Jones argues that the language of his appeal waiver is "too general to include the right not to be convicted for conduct that did not violate a criminal statute." To support this contention, Jones argues that three cases from this circuit "together establish the rule that the relinquishment of a weighty right—namely freedom from conviction unless the conduct is validly criminalized and the punishment falls within the bounds of the law— demands more than general

waiver language."[9] In Jones's view, he could only waive "the right not to be convicted for conduct that is not validly criminalized" by agreeing to an appeal waiver with "more precise, definitive" language.

The Government responds that Jones's *Davis* claim falls squarely within the scope of his appeal waiver, broad language notwithstanding. In particular, the Government disagrees with Jones's interpretation of our cases, contending that the dispositive factor in each case was either that the sentence "exceeded the statutory maximum at the time [it was] imposed" or the "conviction [was] premised on an indictment that failed to state an offense at the time it was initiated." According to the Government, the specificity or generality of the language of the appeal-waiver provisions in the plea agreements did not alone determine whether waiver applied to the circumstances at issue.

While the cases Jones cites in favor of his interpretation did involve sweeping, boilerplate appeal-waiver provisions, that aspect was not by itself dispositive.[10] When faced with broad appeal-waiver provisions, we have consistently held that the waivers are enforceable, even when that meant waiving "the right to challenge both illegal and unconstitutional

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[9] *See United States v. Leal*, 933 F.3d 426 (5th Cir. 2019); *United States v. Hollins*, 97 F. App'x 477 (5th Cir. 2004) (per curiam); *United States v White*, 258 F.3d 374 (5th Cir. 2001).

[10] *See Leal*, 933 F.3d at 428, 430-31; *Hollins*, 97 F. App'x at 479; *White*, 358 F.3d at 380.

sentences."[11] Furthermore, in a case involving an identical appeal-waiver provision, we held that the waiver barred the defendant's *Davis* claim.[12] Just as the appeal waiver applied there, the appeal waiver in Jones's plea agreement applies here.[13]

B

Next, Jones employs contract principles to argue that the parties did not intend for the appeal waiver to include his *Davis* claim.[14] He suggests that another provision of his plea agreement, when read together with the appeal-waiver provision, indicates that "neither party intended the plea agreement to bar challenges to illegal sentences." That provision states that "Jones fully understands that the actual sentences imposed (so long as they are within the statutory maximum) are solely in the discretion of the Court."

In support of this argument, Jones cites *United States v. Leal*.[15] In *Leal*, the "plea agreement stated that any sentence imposed would be 'solely in the discretion of the Court,' '*so long as it is within the statutory maximum*.'"[16] We said in *Leal*: "That

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[11] *United States v. Barnes*, 953 F.3d 383, 385, 389 (5th Cir. 2020); *see also id.* at 389 n.11 (collecting cases).

[12] *See United States v. Caldwell*, 38 F.4th 1161, 1161-62 (5th Cir. 2022) (per curiam).

[13] *See id.* at 1162.

[14] *See* 11 WILLISTON ON CONTRACTS § 30.2 (4th ed. 2020).

[15] 933 F.3d 426 (5th Cir. 2019).

[16] *Id.* at 431.

qualification reflects 'that both parties to the plea agreement[] contemplated 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.'"[17] The *Leal* decision involved a direct appeal of the amount of restitution ordered during sentencing in a child pornography case, and Leal contended that the district court violated then- existing law, which required that losses must be proximately caused by the defendant.[18] Our court reasoned, "But a district court imposes a sentence expressly foreclosed by statute when it orders restitution under § 2259 for losses not proximately caused by the defendant."[19]Our reasoning and holding was limited to a district court's application of sentencing law as it existed or was then-interpreted. We decline to extend *Leal* to circumstances like those in the present case.

Jones's waiver included an exception for *direct appeals* of sentences exceeding the statutory maximum. The separate provision Jones references reiterates this—the imposed sentence must fall within the statutory maximum. However, we agree with the Sixth Circuit that "[t]he only fair reading of a 'statutory maximum' carve-out that comes with a collateral- attack waiver is that it applies only to

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[17] *Id.* (quoting *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996), *superseded by Rule*, Fed. R. Crim. P. 11(b)(1)(N), *as recognized in United States v. Cook*, 722 F.3d 477 (2d Cir. 2013)).

[18] *Id.* at 428-29.

[19] *Id.* at 431.

sentences that exceed the statutory maximum at the time of the sentence."[20] That court reasoned, and we agree, that "[t]reating 'statutory maximum' language in a plea agreement accompanied by a collateral-attack waiver as referring only to the law at the time of sentencing gives independent meaning to all of this language."[21]

C

Last, Jones argues that he did not knowingly and intelligently waive the right announced in *Davis* because it did not exist at the time of the plea agreement, rendering the collateral-review waiver unenforceable here. We recently rejected this argument under similar circumstances. In *United States v. Barnes*,[22] we explained that to make a knowing waiver a defendant "needn't have understood all the possible eventualities that could,

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[20] *Portis v. United States*, 33 F.4th 331, 337 (6th Cir. 2022) ("Else, it would cover all manner of later developments—later cases construing the relevant statutes, later constitutional rulings, even later decisions by Congress to lower the statutory maximum. That would give the collateral-attack waiver little, if any, work to do. Plea agreements are contracts, *see United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991), and where possible we should construe each provision to have independent meaning and force, *see Kovach v. Zurich Am. Ins. Co.*, 587 F.3d 323, 336 (6th Cir. 2009); RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981).").

[21] *Id.*

[22] 953 F.3d 383 (5th Cir. 2020).

in the future, have allowed him to challenge his conviction or sentence. His waiver only needed to be 'knowing,' not 'all-knowing.'"[23]

When Jones "waived his right to post-conviction review, . . . 'he assumed the risk that he would be denied the benefit of future legal developments.'"[24] Jones attempts to distinguish *Barnes* as applying only in the context of sentencing enhancements that do not result in a sentence exceeding the statutory maximum. The Government contends that *Barnes* "*did* involve a sentence that exceeded the statutory

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[23] *Id.* at 388.

[24] *See id.* (quoting *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017)); *see also Cook v. United States*, 84 F.4th 118, 124 (2d Cir. 2023) ("'[T]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.' This principle follows from the fact that plea agreements, like all contracts, allocate risk between the parties—and we are not free to disturb the bargain the parties strike." (citation omitted) (quoting *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005))); *id.* at 125 ("Petitioners counter that they have a 'due process right not to be convicted of a non-existent offense.' But the question is not whether Petitioners have a right not to be convicted of a non-existent offense. It is whether Petitioners have a right to bring a collateral attack when, in exchange for valid consideration, they executed binding plea agreements admitting their criminal conduct and waiving their ability to challenge the resulting convictions. And on that score, our precedent is clear that 'ignorance of future rights is unavoidable and not a basis for avoiding a plea agreement.'" (citation omitted) (quoting *United States v. Haynes*, 412 F.3d 37, 39 (2d Cir. 2005) (per curiam))).

maximum, because absent the . . . enhancement, the statutory maximum sentence would have been" lower than the imposed sentence. Even if Jones's distinction between *Barnes* and his case were correct, that does not bear on whether the waiver itself was knowing and voluntary. *Barnes* forecloses Jones's argument.

Barnes also forecloses Jones's argument that two other cases decided by this court, *Smith v. Blackburn*[25] and *United States v. Wright*,[26] establish that Jones could not waive a not-yet-existent right. *Barnes* explained that *Smith* was "inapposite" as to appeal-waiver issues because there was "no indication that the defendant in *Smith* agreed to an appellate or collateral-review waiver."[27] *Barnes* also explained that *Wright* conflicted[28] with an earlier precedential opinion, which held that "an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker*[29] . . . issue (whether or not that issue would have substantive merit), merely because the waiver was made before *Booker*."[30] Under the rule of orderliness, the earlier decision controls.[31]

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[25] 632 F.2d 1194 (5th Cir. Unit A 1980) (per curiam).

[26] 681 F. App'x 418 (5th Cir. 2017) (per curiam).

[27] *Barnes*, 953 F.3d at 387.

[28] *Id.* at 387-88.

[29] *United States v. Booker*, 543 U.S. 220 (2005).

[30] *United States v. Burns*, 433 F.3d 442, 450-51 (5th Cir. 2005).

[31] *See Barnes*, 953 F.3d at 387-88 ("[Appellant] is correct that *Wright* held that '[w]here, as here, a right is established by precedent that does not exist at the time of purported waiver, a party cannot intentionally relinquish

Likewise, *United States v. Caldwell*[32] forecloses Jones's argument because the argument hinges on "new caselaw," and, in the *Davis* context, a waiver precludes "any argument based on . . . new caselaw."[33] Jones knowingly and intelligently waived his right to collateral review, regardless of later legal developments.

III

Having concluded that the waiver applies to the circumstances at hand, we next address whether any exception bars its enforcement. The "general rule" is that knowing and voluntary collateral-review waivers are enforceable.[34] We have recognized only two exceptions: "first, ineffective assistance of counsel, and second, a sentence exceeding the statutory maximum."[35]

Jones argues that the waiver is unenforceable for two reasons. First, he avers that this circuit has recognized an exception to appeal waivers when the

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that right because it is unknown at that time.' But *Wright*, which is unpublished, didn't cite or even consider the published opinion in [] *Burns*. And to the extent the decisions conflict, [] *Burns* controls under our rule of orderliness." (citation omitted)).

[32] 38 F.4th 1161 (5th Cir. 2022) (per curiam).

[33] *See id.* at 1162 (quoting *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (KAVANAUGH, J., respecting the denial of certiorari)).

[34] *Barnes*, 953 F.3d at 388-89.

[35] *Id.* at 389 (citation omitted).

district court lacked the authority to impose punishment. Second, he contends that our recognized exception for a sentence exceeding the statutory maximum applies here. We address these arguments in turn.

A

Jones argues that our precedents, taken together, establish a general rule that "an appeal waiver does not bar a defendant's challenge to a punishment that a court lacked the authority to impose in the first place." In making this argument, Jones discusses cases from this circuit which seem to support his more broadly framed exception.[36] At the same time, other cases from this court are explicit that a defendant can waive the right "to challenge an illegal or unconstitutional sentence."[37]

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[36] *See United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001) (holding, without deciding whether a plea agreement can ever "accomplish an intelligent waiver of the right not to be prosecuted (and imprisoned) for conduct that does not violate the law," that the "language of [the] conditional plea agreement . . . is insufficient to" do so); *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002); *United States v. Baymon*, 312 F.3d 725, 727-28 (5th Cir. 2002).

[37] *See Barnes*, 953 F.3d at 388-89 ("Barnes . . . avers that his sentence was imposed unlawfully because . . . it violated the Constitution. Unfortunately for Barnes, however, that doesn't get him out from under the collateral-review waiver to which he agreed. As the *Timothy Burns* panel recognized, defendants can waive the right to challenge both illegal and unconstitutional sentences.");

In explaining the exception as it applies in our circuit, we have phrased it narrowly as applying to sentences that exceed the statutory maximum.[38] Put differently, the statutory-maximum exception applies to a particular kind of illegal sentence, not necessarily all illegal sentences. The exception is not as inclusive as Jones suggests.

Similarly, Jones also asserts a general principle that a defendant must have the ability to challenge a punishment the law cannot impose. He relies on Supreme Court cases in which, according to him, the Court relied on this principle in permitting challenges

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United States v. Keele, 755 F.3d 752, 757 (5th Cir. 2014) ("Here, because the appeal waiver in [defendant's] signed, written plea agreement waived his right to appeal his sentence with only three specific exceptions, none of which apply here, we conclude that his Eighth Amendment claims are also waived." (footnote omitted)); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (holding that an appeal waiver barred a challenge to a conviction on Fifth Amendment grounds); *United States v. Baty*, 980 F.2d 977, 979 (5th Cir. 1992) ("After waiving her right to appeal, the district court could err in its application of the Sentencing Guidelines or otherwise impose an illegal sentence. Indeed, the defendant may find herself serving unnecessary jail time. Yet, the defendant, who has waived her right to appeal, cannot appeal these errors.").

[38] *See United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019) ("[W]e find that [the defendant's] statutory maximum challenge is not barred by his waiver of appeal."); *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (per curiam) ("[A] § 2255 waiver does not preclude review of a sentence that exceeds the statutory maximum.").

to a court's power to convict or sentence a defendant.[39] The Government responds that these Supreme Court cases are distinguishable. All of them "involved whether a guilty plea, not a bargained-for appellate or collateral-review waiver, barred consideration of an unconstitutional or illegal conviction or sentence." The issue here is not whether there was an implicit waiver of a broadly construed constitutional right but rather whether the explicit waiver of the statutory right to bring a direct appeal or collateral attack may be enforced.

We decline to recognize, based on our caselaw or that of the Supreme Court, a broad exception to appeal waivers for all illegal convictions or sentences, and we decline to construe our existing statutory-maximum exception as encompassing all illegal convictions or sentences. To reiterate, our circuit has recognized only two exceptions: "first, ineffective assistance of counsel, and second, a sentence exceeding the statutory maximum."[40]

B

Jones argues that his collateral-review waiver should not be enforced because the statutory-

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[39] *See Class v. United States*, 583 U.S. 174, 181-82 (2018); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974).

[40] *See Barnes*, 953 F.3d at 388-89 (citation omitted) (first citing *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002); and then citing *Leal*, 933 F.3d at 431).

maximum exception applies.[41] He argues that "the maximum term of years the court could impose based on the invalid residual clause of Section 924(c) is zero." Jones's sentence exceeds zero, and so, he contends, it exceeds the statutory maximum. The Government responds that cases involving the statutory-maximum exception "looked to whether the sentence was within the statutory maximum at the time it was initially imposed." According to the Government, it follows that, because Jones's sentence was within the maximum when it was imposed, the exception does not apply.

Our decision in *United States v. Caldwell* forecloses application of the statutory-maximum exception here. *Caldwell* involved nearly identical facts. There, the defendant "pleaded guilty to conspiracy to interfere with commerce by robbery under 18 U.S.C. § 1951(a) and brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c)."[42] The conspiracy charge was the predicate crime of violence for the firearm charge.[43] Caldwell waived his right to challenge the conviction and sentence.[44] Following *Davis*, Caldwell collaterally attacked his conviction.[45] We held that the appeal-waiver provision in his plea agreement barred the challenge: "As five

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[41] *See United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021); *Leal*, 933 F.3d at 431.

[42] *United States v. Caldwell*, 38 F.4th 1161, 1161 (5th Cir. 2022) (per curiam).

[43] *Id.*

[44] *Id.*

[45] *Id.*

Supreme Court justices recently reaffirmed, . . . plea waivers such as the one entered here 'preclude[] any argument based on the new caselaw.'"[46] Ultimately, Jones's argument is based on new caselaw—the statutory maximum disappeared due to *Davis*—and so the waiver precludes it.

Furthermore, in declining to apply the statutory-maximum exception here, we are in accord with three other circuits that have addressed this issue.[47] In the context of *Davis* claims, those circuits declined to apply their statutory-maximum exceptions to the defendants' appeal waivers.[48]

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[46] *Id.* at 1162 (second alteration in original) (first quoting *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2580 (2022) (KAVANAUGH, J., respecting the denial of certiorari); and then citing *Grzegorczyk v. United States*, 997 F.3d 743 (7th Cir. 2021)).

[47] *See King v. United States*, 41 F.4th 1363, 1369 (11th Cir. 2022); *Portis v. United States*, 33 F.4th 331, 336-37 (6th Cir. 2022); *see also United States v. Goodall*, 21 F.4th 555, 563-65 (9th Cir. 2021) (declining to apply the Ninth Circuit's "illegal sentence" exception).

[48] *See King*, 41 F.4th at 1369 (defining statutory maximum as "the meaning understood by both parties when the appeal waiver was signed: the statutory maximum in effect at that time" and "not the maximum punishment permitted by a line of decisions that was evolving at the time" (quotation omitted)); *Portis*, 33 F.4th at 336-37; *Goodall*, 21 F.4th at 563-65 (distinguishing between an illegal conviction and illegal sentence, and declining to apply its exception for illegal sentences to a *Davis* claim because the challenge was to an illegal conviction).

IV

Last, Jones argues that we should recognize and apply a miscarriage-of-justice exception to the collateral-review waiver. "[W]e have declined explicitly either to adopt or to reject" such an exception.[49] In avoiding recognizing the exception, we have noted that its proponents may waive the argument by failing to "(1) explain the proper scope of that exception, (2) cite any cases purporting to do so, or (3) detail how and why it should apply to [their] case."[50]

Jones does more than "briefly allud[e]" to the exception.[51] First, as to the proper scope of the exception, Jones argues that while we "need not define every contour" of it, we should recognize that "appeal waivers cannot bar defendants' challenges to illegal sentences or convictions." While this is an attempt to explain the exception's scope, it would leave us with a capacious carveout. If the alleged illegality of sentences and convictions became the limiting principle, then appeal and collateral-review waivers would serve little to no purpose.

Second, Jones cites a litany of other circuits that do apply the miscarriage-of-justice exception.[52] In

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[49] *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020).

[50] *Id.*

[51] *See id.*

[52] *See United States v. Adams*, 814 F.3d 178, 182-83 (4th Cir. 2016); *United States v. Guillen*, 561 F.3d 527, 531

particular, Jones cites an unpublished case out of the Fourth Circuit in which the court applied its miscarriage-of- justice exception to the defendant's appeal waiver when the defendant raised a *Davis* claim.[53] However, Jones does not acknowledge the case going the other way. In *Oliver v. United States*,[54] the Seventh Circuit declined to apply its miscarriage-of-justice exception to a case in which *Davis* invalidated the defendants' § 924(c) convictions.[55] The Seventh Circuit enforced the collateral-review waivers because "[i]t is not a miscarriage of justice to refuse to put [the defendants] in a better position than they would have been in if all relevant actors had foreseen *Davis*."[56] Rather, the "only arguable 'wrongdoing' here was failing to anticipate changes in the Supreme Court's jurisprudence."[57]

(D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (per curiam); *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003) (en banc); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001).

[53] *See United States v. Sweeney*, 833 F. App'x 395, 396 (4th Cir. 2021) (per curiam).

[54] 951 F.3d 841 (7th Cir. 2020).

[55] *Id.* at 847; *see also Portis v. United States*, 33 F.4th 331, 339 (6th Cir. 2022) ("Because the defendants offer no argument for such an exception, because our court has yet to recognize this exception, and because any such exception likely would not apply given the multitude of crimes for which the defendants were indicted, there is no basis for applying it here.").

[56] *Oliver*, 951 F.3d at 847.

[57] *Id.*

Third, Jones claims that it would be a miscarriage of justice to leave his conviction in place and keep him imprisoned for conduct "the law does not make criminal."[58] Despite Jones's urging, the circumstances here do not appear to work a miscarriage of justice. As counsel acknowledged during oral argument, we declined to recognize and apply a miscarriage-of-justice exception in *Caldwell*, which involved identical circumstances.[59]

Although Jones makes a credible argument for a miscarriage-of-justice exception, he does not provide a workable explanation for how to narrow its scope, nor does he show how the facts of his case warrant breaking new ground by announcing and applying the exception. We decline to recognize and apply a miscarriage-of-justice exception here.

* * *

For the foregoing reasons, we AFFIRM the judgment of the district court.

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[58] *See Davis v. United States*, 417 U.S. 333, 346 (1974).

[59] *See United States v. Caldwell*, 38 F.4th 1161, 1162 (5th Cir. 2022) (per curiam).

JAMES L. DENNIS, *Circuit Judge*, dissenting:

In 2015, Cedric Jones pleaded guilty to conspiracy to commit Hobbs Act robbery, *see* 18 U.S.C. § 1951(a), and using, carrying, and brandishing a firearm in furtherance of a "crime of violence" in violation of 18 U.S.C. § 924(c)(1)(A)(ii). At the time of Jones's conviction, the phrase "crime of violence" was defined in § 924(c)(3)'s residual clause to include any felony "that by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3)(B). The Government relied on Jones's conspiracy to commit Hobbs Act robbery as the predicate crime of violence for the purposes of § 924(c). The Supreme Court in *United States v. Davis* later held that Hobbs Act robbery could not qualify as a crime of violence under § 924(c)'s residual clause because that clause is unconstitutionally vague. 588 U.S. 445 (2019). Relevant to this appeal, Jones, relying on *Davis*, moved to vacate his § 924(c) conviction and sentence.

All agree that Jones is currently serving a sentence for a crime held to be unconstitutional under Supreme Court precedent. Yet the panel majority avoids that conclusion and seeks shelter behind a boilerplate collateral review waiver included in Jones's plea agreement. The majority views the waiver's general language as a waiver of Jones's right not to be convicted for conduct that is not a criminal offense. The majority is mistaken for at least one reason: our holding in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), dictates that an indictment's failure to charge a valid predicate offense is a defect

that cannot be waived by the general language of Jones's collateral review waiver.[1]

Because we are a court bound by precedent, I would abide by *White*. I respectfully dissent.

I

In 2014, Cedric Jones and his co-defendants were convicted of robbing pawn shops and auto-parts stores in and around Dallas, Texas. A grand jury charged Jones with one count of conspiracy to interfere with commerce by robbery under 18 U.S.C. § 1951(a) (Hobbs Act robbery) (Count 1); one count of using and brandishing a firearm during that conspiracy under § 924(c) (Count 2); three counts of interference with commerce by robbery under 18 U.S.C. § 1951(a) and 18 U.S.C. § (2) (Counts 3, 5, 7);

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[1] While I conclude our holding in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), plainly governs the disposition of Jones's appeal, I am not blind to the force of his alternative argument. He urges us to adopt, as most of our sister circuits have done, a miscarriage-of-justice exception to collateral-review waivers—an exception that would permit relief in cases where rigid adherence to a collateral review waiver would work an egregious wrong. *See, e.g.*, *United States v. Atherton*, 106 F.4th 888, 895–96 (9th Cir. 2024) (collecting cases). To be sure, the majority's holding does not foreclose such an argument from being raised in the future. But in pretermitting Jones's "credible argument for a miscarriage-of-justice exception" in this case, I believe the majority commits a regrettable error.

and three counts of using and brandishing a firearm during those robberies under § 924(c) (Counts 4, 6, 8).

Jones pleaded guilty to Counts 1, 2, 3, 5, 7, and 8. His plea agreement included the following collateral review waiver that waived the right to appeal except in certain limited circumstances:

> **11. Waiver of right to appeal or otherwise challenge sentence**: Jones waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his convictions and sentences. He further waives his right to contest his convictions and sentences in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Jones, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing, (b) to challenge the voluntariness of his pleas of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

The district court sentenced Jones to a concurrent 189-month sentence on each of Counts 1, 3, 5, and 7; a consecutive 84-month sentence on Count 2; and a consecutive 300-month sentence on Count 8—for a grand total of 573-months imprisonment. Jones directly appealed his sentence, which our court dismissed after granting an *Anders* motion. *See Anders v. California*, 386 U.S. 738 (1967).

Jones then brought a § 2255 motion arguing that his § 924(c) conviction in Count 2 should be vacated because his Hobbs Act robbery conviction on which Count 2 was predicated is not a crime of violence as defined in § 924(c) following our decision in *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018), *aff'd in part, vacated in part, remanded*, 588 U.S. 445 (2019). In the meantime, the Supreme Court granted certiorari and later affirmed our conclusion in *Davis* that Hobbs Act robbery could not qualify as a crime of violence under § 924(c)'s residual clause because that clause is unconstitutionally vague. *United States v. Davis*, 588 U.S. 445, 470 (2019). In light of the Supreme Court's holding, Jones reiterated his request that the district court vacate his conviction under Count 2 while the Government maintained the collateral review waiver in Jones's plea agreement barred the challenge to his conviction.

In a report and recommendation, a magistrate judge recommended that Jones's § 2255 motion be denied because his *Davis* claim was barred by his plea agreement's collateral review waiver. However, the magistrate judge recommended that a certificate of appealability be granted "on the following issues: (1) whether the collateral-review waiver in his plea agreement bars his *Davis* claim; and (2) whether the collateral-review waiver is unenforceable under the miscarriage of justice exception." The district court, after conducting an "independent review" of the record and the magistrate judge's recommendation, accepted the magistrate judge's recommendation. Jones timely appealed.

II

Contrary to the majority's view, I conclude that the language of Jones's collateral review waiver is too general to encompass his *Davis* claim, which our holding in *United States v. White*, 258 F.3d 374 (5th Cir. 2001), confirms. *White* involved the applicability of an appeal waiver by a defendant who pleaded guilty to possessing a firearm after having been previously convicted of a "misdemeanor crime of domestic violence." *Id.* at 376. Like Jones's waiver, the waiver in *White* broadly stated the "[d]efendant waives *any appeal*, including collateral appeal under 28 U.S.C. § 2255, of *any error* which may occur surrounding substance, procedure, or form of the conviction and sentencing in this case." *Id.* at 380 (emphasis added). On appeal, the defendant asserted that neither of the predicate offenses listed in his indictment were a misdemeanor crime of domestic violence, rendering his conviction invalid. *Id.* "Without deciding whether that character of defect is ever waivable in a civilized system of justice," we held the sweeping, general language of the defendant's waiver "fail[ed] to embrace" such a defect as "an indictment's failure to charge an offense," as would be the case if the predicate offense was not a misdemeanor crime of domestic violence. *Id.*; *see also United States v. Leal*, 933 F.3d 426, 431 (5th Cir. 2019) (approving of *White*); *United States v. West*, 99 F.4th 775, 780 (5th Cir. 2024) (approving of *Leal*).

The same is true here. Like the defendant in *White*, Jones waived his right "to appeal from his

convictions and sentences" including "in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255." *Cf.* 258 F.3d at 380. Nevertheless, *Davis*, 588 U.S. at 470, made it so that Count 2 of Jones's indictment did not charge a valid predicate offense, and we have held this rule is retroactive. *United States v. Reece*, 938 F.3d 630, 634–35 (5th Cir. 2019). The indictment's failure to charge an offense in Count 2, then, is a defect that cannot be waived by the generic language of Jones's collateral review waiver. *White*, 258 F.3d at 380; *United States v. Picazo-Lucas*, 821 F. App'x 335, 338 (5th Cir. 2020) (applying *White* and holding a plea agreement's broad appeal-waiver provision did not include a defendant's *Davis* claim).

The majority never grapples with the dispositive effect of *White*'s holding, but instead bucks our rule of orderliness[2] and credits two inapposite cases as compelling a contrary result. The majority first cites *United States v. Barnes* for the proposition that "broad appeal-waiver provisions" are enforceable "even when that meant waiving 'the right to challenge both illegal and unconstitutional sentences.'" *Ante*, at 6 (quoting 953 F.3d 383, 386 (5th Cir. 2020)). But the defendant in *Barnes* never argued that the language of his waiver was too broad or general to foreclose his

[2] *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision.").

appeal. *See* Brief of Appellant at 15, 23, *United States v. Barnes*, No. 18-60497 (5th Cir. 2020). Instead, the isolated excerpt relied on by the majority referenced the defendant's "theory that he can't waive his right to challenge an illegal or unconstitutional sentence . . . ." *Barnes*, 953 F.3d at 390. The *Barnes* panel, in turn, addressed the question left open by *White*: "whether that character of defect *is ever waivable* in a civilized system of justice[.]" 258 F.3d at 380 (emphasis added). *Barnes* concluded that "defendants *can waive* the right to challenge both illegal and unconstitutional sentences"[3] but says nothing to support that Jones *did waive* that right here vis-à-vis a general, boilerplate waiver; after all, it was not even an issue on appeal. 953 F.3d at 390 (emphasis added). As detailed above, *White* holds that he did not. 258 F.3d at 380.

The majority then makes a fleeting reference to *United States v. Caldwell* where a panel of our court enforced a collateral review waiver on a *Davis* claim, holding the at-issue "plea waiver[] . . . 'precludes any argument based on the new caselaw.'" 38 F.4th 1161, 1162 (5th Cir. 2022) (quoting *Grzegorczyk v. United States*, 142 S. Ct. 2580 (2022) (KAVANAUGH, J., statement respecting the denial of certiorari)). Like *Barnes*, however, the defendant in *Caldwell* did not

[3] In any event, it appears *Barnes* is an improper departure from precedent in this circuit because, as my distinguished colleague pointed out in his dissent, its holding conflicts with and ignores *Leal*, an earlier and therefore controlling precedent. *Barnes*, 953 F.3d at 390 (Jolly, J., dissenting); *see also United States v. Walker*, 302 F.3d 322, 325 (5th Cir. 2002) (holding that under the rule of orderliness, "the earlier precedent controls").

argue that the language of his waiver was too broad or general to prohibit his appeal, nor did he "dispute that he waived the right to bring a collateral challenge as part of his plea agreement." *Id.* Even if *Caldwell* were analogous, it cannot be squared with our earlier holding in *White* and to the extent *Caldwell* purports to overrule *White*, the panel was powerless to do so under the rule of orderliness. *See Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). So too is this panel.

True, the relevant portion of *Caldwell*'s holding relied on a statement published by the Supreme Court accompanying denial of certiorari, which was joined by five justices. *Id.* But neither that statement nor the appellate decision below discussed the breadth of the waiver's language. *Grzegorczyk*, 142 S. Ct. at 2580; *see also Grzegorczyk v. United States*, 997 F.3d 743, 747 (7th Cir. 2021). The only holding by the Supreme Court in *Grzegorczyk* was "that fewer than four members of the Court thought [the petition for a writ of certiorari] should be granted" and the Supreme Court has "rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *See State of Md. v. Balt. Radio Show*, 338 U.S. 912, 919 (1950) (FRANKFURTER, J., statement respecting the denial of certiorari). "The Court has said this again and again; again and again the admonition has to be repeated." *Id.*; *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1336 (5th Cir. 1981) ("[T]he denial of certiorari [is] without precedential effect[.]").

III

The bottom-line is that *White* controls this case, and the panel majority's failure to follow circuit precedent is a violation of this court's well- respected rule of orderliness. I respectfully dissent.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

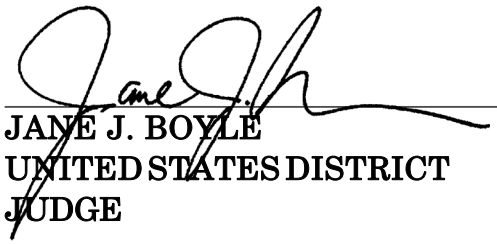
CEDRIC RAY JONES, Movant,	§	
v.	§	No. 3:18-cv-584-B (BT)
	§	[**Filed 12/29/20**]
UNITED STATES OF AMERICA, Respondent.	§	

JUDGMENT

The Court has entered its Findings in the case, accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge. Therefore, it is ORDERED, ADJUDGED, and DECREED that the motion filed pursuant to 28 U.S.C. § 2255 is DENIED, any other pending motions are DENIED as moot, and a certificate of appealability is GRANTED.

The Clerk shall transmit to the parties a true copy of this Judgment and the Order adopting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

SIGNED this 29th day of December, 2020



JANE J. BOYLE
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

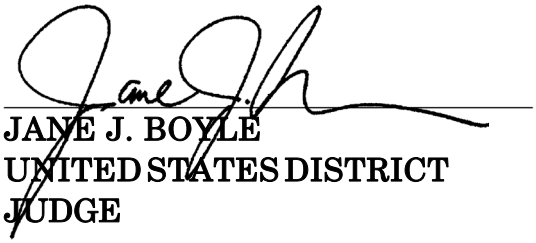
CEDRIC RAY JONES,	§	
Movant,	§	
	§	
v.	§	No. 3:18-cv-584-B (BT)
	§	**[Filed 12/29/20]**
UNITED STATES OF	§	
AMERICA,	§	
Respondent.	§	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions, and Recommendation of the United States Magistrate Judge dated December 10, 2020, the Court finds that the Findings and Recommendation of the Magistrate Judge are correct and they are accepted as the Findings, Conclusions, and Recommendation of the Court.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions, and Recommendation of the United States Magistrate Judge are accepted. Considering the record in this case, the Court **GRANTS** a certificate of appealability.

SO ORDERED this 29th day of December, 2020.



JANE J. BOYLE
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CEDRIC RAY JONES,	§	
	§	
Movant,	§	
	§	No. 3:18-cv-00584-B (BT)
v.	§	No. 3:14-cr-00300-B-1
UNITED STATES of AMERICA,	§	**[Filed 12/10/2020]**
	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Movant Cedric Ray Jones, a federal prisoner, filed a *pro se* motion to vacate, set-aside, or correct sentence under 28 U.S.C. § 2255. The District Court referred the resulting civil action to the United States magistrate judge pursuant to 28 U.S.C. § 636(b) and a standing order of reference. For the following reasons, the Court should deny Jones's § 2255 motion, as amended, deny his other pending motions as moot, and issue a certificate of appealability.

I.

Jones pleaded guilty to six felony offenses charged in a second superseding indictment: conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. § 1951(a) (count one); using,

carrying, and brandishing a firearm during and in relation to and possessing and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) (count two); interference with commerce by robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951(a) and 2 (count three); interference with commerce by robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951(a) and 2 (count five); interference with commerce by robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951(a) and 2 (count seven); and using, carrying, brandishing, and discharging a firearm during and in relation to and possessing, brandishing, and discharging a firearm in furtherance of a crime of violence and aiding and abetting in violation of 18 U.S.C. §§ 924(c)(1)(C)(i) and 2 (count eight).

On September 7, 2016, the District Court sentenced Jones to a total term of 573 months' imprisonment: 189 months' imprisonment on counts one, three, five, and seven, to run concurrently; 84 months' imprisonment on count two, to run consecutive to all counts; and 300 months' imprisonment on count eight, to run consecutive to all counts. He appealed to the Fifth Circuit Court of Appeals, but the Court dismissed his appeal as frivolous.

Jones then filed his § 2255 motion, in which he argues that his attorney provided ineffective assistance of counsel by failing to object to (1) him receiving a six-level enhancement for the use of a firearm under U.S.S.G. § 2B3.1(b)(2)(B) when he was also convicted of offenses under 18 U.S.C. § 924(c); (2)

the six-level enhancement under U.S.S.G. § 3A1.2(c)(1); and (3) the Presentence Report (PSR), which called for him to receive a multiple-count adjustment because all of the counts of conviction should have been grouped together. In its response, the Government argues that Jones fails to prove that he received ineffective assistance of counsel. Jones filed a reply.

Thereafter, Jones filed a motion that the Court construed as a motion to amend under Federal Rule of Civil Procedure 15 and a request for court-appointed counsel. The Court directed the Government to file a response to Jones's motion to amend and denied without prejudice Jones's request for court-appointed counsel. On February 15, 2019, the Court administratively closed the case pending a decision by the Fifth Circuit Court of Appeals in *United States v. Davis*, No. 18- 431 (U.S.), which was scheduled for oral argument before the Supreme Court on April 17, 2019. On July 18, 2019, the Court reopened the case and directed the Government to respond to Jones's amended § 2255 motion following the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019).

The Government responded to Jones's new claim that one of his convictions under 18 U.S.C. § 924(c) is invalid because it was predicated on a conspiracy to commit Hobbs Act robbery. The Government argues that Jones's *Davis* claim is barred by the collateral-review waiver in his plea agreement. Jones filed a reply, and the § 2255 motion is ripe for determination.

II.

1. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a movant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense so gravely as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Strickland*, the Court stated that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "every effort [must] be made to eliminate the distorting effects of hindsight." 466 U.S. at 689. Courts, therefore, must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Even if he proves his counsel's performance was deficient, a movant must still prove prejudice. To prove prejudice, a movant must show "a reasonable probability that the result of the proceedings would have been different but for counsel's unprofessional errors." *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999) (citing *Strickland*, 466 U.S. at 694). "[T]he mere possibility of a different outcome is not sufficient to prevail on the prejudice prong." *Id.* "Rather, the defendant must demonstrate that the prejudice rendered sentencing 'fundamentally unfair or unreliable.'" *Id.* (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)).

In his first claim, Jones argues that his attorney provided ineffective assistance of counsel by failing to object to a six-level enhancement for the use of a firearm under U.S.S.G. § 2B3.1(b)(2)(B) when he was also convicted of offenses under 18 U.S.C. § 924(c).

Sentencing Guideline § 2B3.1(b)(2)(A-F) includes enhancements for sentencing in a robbery conviction for the use of a firearm, dangerous weapon, or express death threats by the defendant during the course of a robbery. *United States v. Franks*, 230 F.3d 811, 813 (5th Cir. 2000). But where a defendant convicted of robbery is also convicted under § 924(c) for the use of a firearm in connection with that robbery and sentenced under the mandatory provisions for that offense, "any specific offense characteristic for possession, use, or discharge of a firearm . . . is not to be applied in respect to the guideline for the underlying offense." *Id.* (citing U.S.S.G. § 2K2.4, Application Note 2). And the Fifth Circuit has held that "the offense level for robbery may not be enhanced for the use of a firearm if the defendant has also been convicted of using a firearm during that robbery, which carries a mandatory sentence." *Id.* at 814 (citing *United States v. Washington*, 44 F.3d 1271, 1280 (5th Cir. 1995); *United States v. Rodriquez*, 65 F.3d 932, 933 (11th Cir. 1995)). In this case, Jones was convicted of several robberies, and some of those convictions also involved convictions for the use of a firearm. The PSR shows that the guideline calculation was enhanced only for those robberies where Jones was not also convicted under § 924(c). Where Jones also was convicted under § 924(c), for example with

respect to counts one and seven, the PSR did not include a firearms-use enhancement. Consequently, the PSR correctly calculated the guideline range, and Jones has failed to demonstrate that his attorney provided deficient performance by failing to object to the application of U.S.S.G. § 2B3.1(b)(2)(B) to him at sentencing. Similarly, he cannot demonstrate prejudice.

Jones argues in his second claim that he should not have received a six- level enhancement under U.S.S.G. § 3A1.2(c)(1). He concludes that if his attorney had properly objected, it is possible he could have received a lower sentence.

A six-level enhancement was properly applied to Jones under U.S.S.G. § 3A1.2(c)(1) because his offense involved a substantial risk of serious bodily injury to a law enforcement officer. As the PSR notes, while Jones was attempting to flee a robbery at an AutoZone, he and a codefendant engaged police in a car chase. (PSR ¶ 47.) During the chase, Jones's codefendant fired on police with an assault rifle, and two patrol cars were hit multiple times. (*Id.*) The enhancement was properly applied to Jones due to the status of the victims, as law enforcement officers, and not because a firearm was used. *See* U.S.S.G. § 3A1.2(c)(1). For these reasons, Jones has failed to demonstrate that his attorney provided deficient performance by failing to object to the application of U.S.S.G. § 3A1.2(c)(1). Also, he cannot show prejudice.

In his third claim, Jones argues that his attorney provided ineffective assistance of counsel

when he failed to object to the PSR, which called for him to receive a multiple-count adjustment because he believes that all of the counts of conviction should have been grouped together. He concludes that this sentencing error entitles him to be re-sentenced.

The guidelines specifically exclude robbery from the grouping rules. *United States v. Courrtez Martin*, 794 F. App'x 432, 434 (5th Cir. 2020) ("Guideline § 2B3.1 (robberies) is '[s]pecifically excluded' from Guideline § 3D1.2 (grouping of closely-related conduct) meaning different robberies are not required to be grouped together for sentencing purposes.") (quoting U.S.S.G. § 3D1.2(d)). Because all the counts of conviction were properly not grouped here, any objection from his attorney on this issue would have been meritless. Therefore, Jones has failed to demonstrate that his attorney's failure to object was deficient representation, and he has also failed to show that he suffered any prejudice from his attorney's failure to object. *See United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999) ("[a]n attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim[.]").

2. *Davis* Claim

Jones's amended § 2255 motion raises a *Davis* claim. In *Davis*, the Supreme Court found the residual clause of the "crime of violence" definition contained in 18 U.S.C. § 924(c)(3)(B) was unconstitutionally void for vagueness. The holding in *Davis* applies retroactively to cases on collateral review. *See United*

States v. Reece, 938 F.3d 630, 634-35 (5th Cir. 2019).

The Government concedes that after *Davis*, Jones's § 924(c) conviction, which was predicated on his conviction for conspiracy to commit Hobbs Act robbery, is "problematic" because a conspiracy to commit Hobbs Act robbery does not satisfy § 924(c)(3)(A), and § 924(c)(3)(B) can no longer support it. (ECF No. 22 at 3) (citing *United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018) (holding that a conspiracy to commit Hobbs Act robbery does not satisfy § 924(c)(3)(A)'s force clause)). The Government argues, however, that Jones waived his right to collaterally attack his sentence except to challenge the voluntariness of his plea or claim ineffective assistance of counsel. For the following reasons, the Court agrees.

On December 3, 2015, Jones pleaded guilty pursuant to a written plea agreement. The plea agreement specifically included the following waiver provision:

> **Waiver of right to appeal or otherwise challenge sentence:** Jones waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his convictions and sentences. He further waives his right to contest his convictions and sentences in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. Jones , however, reserves the rights (a) to bring a direct

> appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing (b) to challenge the voluntariness of his pleas of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

(CR ECF No. 74 at 7) (emphasis in original). However, Jones's *Davis* claim does not specifically fall within any of the reservation of rights contained in his plea agreement waiver provision.

The Fifth Circuit upheld the informed and voluntary waiver of post- conviction relief in *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). More recently, the Fifth Circuit noted that it has upheld § 2255 waivers except for ineffective assistance of counsel claims that affect the validity of that waiver or the plea itself or when the sentence exceeds the statutory maximum. *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004).

In this case, there is no indication from the record that Jones's collateral- review waiver was not informed and voluntary. In fact, in his plea agreement, Jones acknowledged his guilty plea was "freely and voluntarily made and [is] not the result of force or threats, or of promises apart from those set forth in this plea agreement. There have been no guarantees or promises from anyone as to what sentences the Court will impose." (CR ECF No. 74 at 6.) Jones additionally acknowledged that he had "thoroughly reviewed all legal and factual aspects of this case with his lawyer and is fully satisfied with

that lawyer's legal representation . . . [he] has received from his lawyer explanations satisfactory to him concerning each paragraph of this plea agreement, each of his rights affected by this agreement, and the alternatives available to him other than entering into this agreement." (CR ECF No. 74 at 7.) Jones then conceded "that he is guilty, and after conferring with his lawyer, [he] has concluded that it is in his best interest to enter into this plea agreement and all its terms, rather than to proceed to trial in this case." (*Id.*)

The Fifth Circuit Court of Appeals has not specifically ruled on the validity of a collateral-review waiver in the context of *Davis*, but the Court recently addressed a case that is otherwise comparable and instructive here: *United States v. Barnes*, 953 F.3d 383 (5th Cir. 2020).[1] In *Barnes*, the movant pleaded guilty pursuant to a plea agreement and waived his right to challenge his conviction and sentence, directly and collaterally, and he was sentenced under the Armed Career Criminal Act (ACCA). 953 F.3d at 385. Then, in *Johnson v. United States*, 576 U.S. 591 (2015), the Supreme Court held the ACCA's residual clause to be unconstitutional. *Barnes*, 953 F.3d at 385. Barnes filed a motion under 28 U.S.C. § 2255, which was based on *Johnson*. *Barnes*, 953 F.3d at 385. The

[1] The Fifth Circuit recently held that a *Davis* claim did not fall within the terms of an appellate rights waiver in a plea agreement. *See United States v. Picazo-Lucas*, 821 F. App'x 335 (5th Cir. 2020) (per curiam). However, that decision, which is unpublished, is not controlling here because it was made in the context of a direct appeal.

district court dismissed Barnes's petition, and he appealed. *Id.*

Before the Fifth Circuit Court of Appeals, Barnes attempted to attack the validity of his waiver by arguing that he could not waive a right that was unknown at the time of his waiver. *Id.* at 386-87. The Court noted his argument was foreclosed by *United States v. Burns*, 433 F.3d 442 (5th Cir. 2005), which held that "an otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* . . . issue (whether or not that issue would have substantive merit), merely because the waiver was made before *Booker*." *Barnes*, 953 F.3d at 387. The Court also noted that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea resulted on a faulty premise." *Id.* at 387 (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)). The Court pointed out that it had only recognized two exceptions to the general rule that a knowing and voluntary appellate and collateral-review waiver is enforceable: (1) ineffective assistance of counsel, and (2) a sentence exceeding the statutory maximum. *Id.* at 388-89. In another attempt to attack the validity of his waiver, Barnes argued that his sentence was unlawfully imposed because, following the Supreme Court's decision in *Johnson*, it violated the Constitution. *Id.* at 389. The Court found "that doesn't get [Barnes] out from under the collateral-review waiver to which he agreed." *Id.* The Court further found that this is so because "defendants can waive the right to challenge both illegal and unconstitutional sentences." *Id.*

Finally, Barnes argued that his waiver should not be enforced due to the "miscarriage of justice" exception. *Id.* The Court refused to apply the exception, noting that although other circuits recognize such an exception, the Fifth Circuit has declined to explicitly adopt or reject it. *Id.* (citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (per curiam)). Ultimately, the Fifth Circuit held that Barnes's § 2255 motion was barred by his collateral-review waiver, and his appeal was dismissed. *Id.* at 390.

In sum, Jones's plea was knowing and voluntary, and his *Davis* claim is barred by the collateral remedy waiver in his plea agreement. *See Brooks v. United States*, 2020 WL 1855382, at *3-*4 (N.D. Tex. Mar. 2, 2020) (Toliver, M.J.) (holding collateral remedy waiver barred movant's *Davis* claim), *rec. adopted* 2020 WL 1848050 (N.D. Tex. Apr. 13, 2020) (Lynn, C.J.); *see also Kimble v. United States*, 2020 WL 4808608, at *2 (E.D. Tex. June 25, 2020), *rec. adopted*, 2020 WL 4793243 (E.D. Tex. Aug. 17, 2020) (same); *Hernandez v. United State*s, 2020 WL 4782336, at *2 (E.D. Tex. June 16, 2020), *rec. adopted*, 2020 WL 4747720 (E.D. Tex. Aug. 15, 2020) (same).

At least one court in this district has found that, with respect to a *Davis* claim, the collateral remedy waiver is unenforceable under the miscarriage of justice exception. *See Thompson v. United States*, 2020 WL 1905817 (N.D. Tex. Apr. 17, 2020) (Kinkeade, J.) (relying on the miscarriage of justice exception to grant relief); *Pearson v. United States*, 2020 WL 1905239 (N.D. Tex. Apr. 17, 2020)

(Kinkeade, J.) (same). Here, however, the Court should decline to apply the miscarriage of justice exception because the Fifth Circuit Court of Appeals recently held: "Though some circuits recognize [the miscarriage of justice] exception, we have declined explicitly either to adopt or reject it." *Barnes*, 953 F.3d at 389 (citing *Ford*, 688 F. App'x at 309); *see also United States v. Flores*, 765 F. App'x 107, 108 (5th Cir. 2019) ("[W]e repeatedly have declined to apply the miscarriage of justice exception.") (citing *United States v. Arredondo*, F. App'x 243, 244 (5th Cir. 2017); *United States v. De Cay*, 359 F. App'x 514, 516 (5th Cir. 2010)); *United States v. Powell*, 574 F. App'x 390, 394 (5th Cir. 2014) (per curiam) (noting that the Fifth Circuit has found it unnecessary to adopt or reject analysis under the miscarriage of justice) (citing *United States v. Riley*, 381 F. App'x 315, 316 (5th Cir. 2010)). For these reasons, Jones's *Davis* claim is waived.

Certificate of Appealability

A certificate of appealability (COA) will be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003); *accord Foster v. Quarterman*, 466 F.3d 359, 364 (5th Cir. 2006). The applicant makes a substantial showing if he demonstrates "that jurists of reason could debate the propriety of the district court's assessment of his constitutional claims or conclude that his claims are 'adequate to deserve encouragement to proceed further.'" *United States v. Wainwright*, 237 F. App'x 913, 914 (5th Cir. 2007)

(per curiam) (quoting *Miller- El*, 537 U.S. at 327); *see Foster*, 466 F.3d at 364.

Considering the Supreme Court's decision in *Davis* and the specific facts of this case, "jurists of reason could debate the propriety" of the recommendations contained herein and conclude "that [the] claims are adequate to deserve encouragement to proceed further." Therefore, Jones should be granted a COA on the following issues: (1) whether the collateral-review waiver in his plea agreement bars his *Davis* claim; and (2) whether the collateral-review waiver is unenforceable under the miscarriage of justice exception.

III.

For the foregoing reasons, the Court should DENY the motion to vacate, set-aside, or correct sentence under 28 U.S.C. § 2255, as amended, and deny any pending motions as moot. A certificate of appealability should be GRANTED.

Signed December 10, 2020.

REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

United States Court ofAppeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 29, 2025
Lyle W. Cayce
Clerk

No. 21-10117

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CEDRIC RAY JONES,

Defendant—Appellant.

Appeal from the United States District Court for the
Northern District of Texas
USDC No. 3:18-CV-584

ON PETITION FOR REHEARING EN BANC

Before DENNIS, RICHMAN, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR R.40 I.O.P.), the

petition for panel rehearing is **DENIED.** Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is **DENIED.**