APPENDIX

TAB A: FIFTH CIRCUIT'S OPINION IN
UNITED STATES V. DAMIEN ANTIONE JONES,
No. 21-11185 (5th Cir. 2025) (unpublished)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 4, 2025
Lyle W. Cayce
Clerk

No. 21-11185

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAMIEN ANTIONE JONES,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-1150

Before DENNIS, RICHMAN, and HO, *Circuit Judges*.[*]
PRISCILLA RICHMAN, *Circuit Judge*:[**]

Damien Antione 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

[*] JUDGE DENNIS dissents for the reasons stated in *United States v. Jones*, 134 F.4th 831, 842–46 (5th Cir. 2025) (DENNIS, J., dissenting).

[**] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

his plea agreement, Jones waived his rights to challenge his convictions and sentences on direct appeal or through a collateral attack. Several years later, in *United States v. Davis*,[1] the Supreme Court struck down the residual clause as unconstitutionally vague.

Relying on *Davis*, Jones collaterally attacked his conviction and sentence under 28 U.S.C. § 2255, the federal habeas statute. The district court denied his motion, finding it was barred by the collateral-review waiver in Jones's plea agreement. As in *United States v. Jones*,[2] the appeal of one of Jones's codefendants, we affirm.

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 robberies. The Government charged Jones with conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count 1); using and brandishing a firearm during and in relation to that conspiracy in violation of 18 U.S.C. § 924(c) (Count 2); three counts of Hobbs Act robbery in violation of § 1951(a) and 18 U.S.C. § 2 (Counts 3, 5, and 7); and three counts of using and brandishing a firearm during and in relation to those robberies in violation of 18 U.S.C. § 924(c) (Counts 4, 6, and 8).

Jones pleaded guilty, pursuant to a plea agreement, to Counts 1, 2, 3, 5, 7, and 8. The other firearms charges relating to the robbery counts were dropped. His plea agreement included the following appeal-waiver provision:

> 11. **Waiver of right to appeal or otherwise challenge sentence**: Jones waives his rights, conferred by 28 U.S.C.

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

[2] 134 F.4th 831 (5th Cir. 2025).

> § 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.

At rearraignment, the district court explained that "by agreeing to waive [his] right to appeal, [Jones has] basically given up [his] rights to complain about [his] plea agreement, to complain about [his] sentence, even if [he] think[s] it's unfair." Jones acknowledged that he understood the effect of the appeal and collateral-review waiver provision.

The district court sentenced Jones to 324 months of imprisonment for the conspiracy and robbery counts; a consecutive 84 months of imprisonment for Count 2; and a consecutive 300 months of imprisonment for Count 8. This is a total aggregate sentence of 708 months. During the sentencing hearing, the district court reminded Jones that he had "a right to appeal this sentence within the areas that [he] reserved in [his] plea agreement."

Jones appealed, challenging the district court's denial of his motion to withdraw his guilty plea.[3] He also argued that the district court erred in finding that there were sufficient facts supporting the application of the guideline enhancements, that he received ineffective assistance of counsel, and that the district court made an arithmetic error at sentencing.[4] We

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[3] *United States v. Jones*, 733 F. App'x 198, 199-200 (5th Cir. 2018) (per curiam).

[4] *Id.*

affirmed the denial of the motion to withdraw the guilty plea.[5] We did not consider the claim of ineffective assistance of counsel because the record was insufficiently developed.[6] We held that the appeal waiver in his plea agreement barred consideration of his other two arguments.[7]

Jones then collaterally attacked his sentence. In a pro se § 2255 motion, he claimed that trial counsel rendered ineffective assistance with regard to his guilty plea and that the district court's oral pronouncement of the sentence should control. He also stated that he "would like to preserve [his] rights to use the *Davis* case (5th circuit) in light of Supreme Courts decesion [sic]." He later amended his § 2255 motion to add a claim of actual innocence. The Government construed this motion to state a claim challenging the conviction on Count 2 based on *Davis*. Jones also filed a supplemental motion under § 2255 "To Vacate, Set Aside, or Correct Sentence."

The magistrate judge recommended that Jones's motions be denied but that a certificate of appealability be granted. The magistrate judge found that Jones was barred from raising his *Davis* claim because it did not fall within the exceptions to the collateral-review waiver in the plea agreement. Jones filed objections to the magistrate judge's findings, conclusions, and recommendation. The district court adopted the recommendation of the magistrate judge. It denied the § 2255 motion and granted a certificate of

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[5] *Id.*

[6] *Id.*

[7] *Id.* As to the claim of arithmetic error, we explained that the actual issue was the district court misstating the sentence at the sentencing hearing. *Id.* As to Counts 1, 3, 5, and 7, the district court orally pronounced a combined sentence to equal 294 months, which conflicted with the combined sentence of 324 months that was later imposed. Because this misstatement did not amount to an arithmetic error, the appeal waiver barred its review. *Id.*

appealability "on the following issues: (1) whether the appellate-review waiver in his plea agreement bars his *Davis* claim; and (2) whether his appellate-review waiver is unenforceable under the miscarriage-of-justice exception." Jones is represented by counsel in this appeal.

II

"The right to appeal a conviction and sentence is a statutory right, not a constitutional one, and a defendant may waive it as part of a plea agreement."[8] The "general rule" is that knowing and voluntary collateral-review waivers are enforceable.[9] We have recognized two exceptions to appeal and collateral-review waivers: (1) ineffective assistance of counsel and (2) a sentence exceeding the statutory maximum.[10]

Jones raises two arguments as to why his collateral-review waiver should not apply to his claims for relief based on *Davis*. First, Jones argues that he "could not knowingly waive a habeas claim which did not exist until the *Davis* opinion was issued in 2019." Second, he argues that he received a sentence in excess of the statutory maximum because, under *Davis*, the residual clause offense "is now an invalid offense, and the sentence imposed exceeded a zero month sentence for this now-invalid offense." The *Jones* decision involved an identical appeal waiver and identical charges.[11] The

[8] *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002) (citing *United States v. Dees*, 125 F.3d 261, 269 (5th Cir. 1997)).

[9] *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020).

[10] *Id.* (citing *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002)).

[11] *United States v. Jones*, 134 F.4th 831, 834, 839-41 (5th Cir. 2025).

Jones decision rejected identical arguments.[12] For the same reasons, Damien Jones's arguments fail.

III

Last, Jones argues that we should recognize and apply a miscarriage-of-justice exception to his collateral-review waiver. This court has "declined explicitly to adopt or to reject" a miscarriage-of-justice exception in previous cases.[13] We have held that a defendant waived arguments as to a miscarriage of justice exception because he did not "(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 his case."[14]

Jones focuses on how and why the exception should apply to his case. He argues that retaining the § 924(c) conviction would work a miscarriage of justice because it "would result in [Jones] serving an additional 84 months for a now non-existent offense . . . plus the additional 25 year consecutive sentence for [Count 8], which should be remanded for resentencing at the range of a consecutive sentence of 7 years to life."

The Government argues that there is no miscarriage of justice here because Jones knowingly and voluntarily exchanged his appellate rights for a more favorable sentence. According to the Government, Jones traded his

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[12] *Id.* at 837-39 (rejecting the argument that Damien Jones's codefendant "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"); *id.* at 840-41 (rejecting argument by Damien Jones's codefendant that he received a sentence in excess of the statutory maximum because "the maximum term of years the court could impose based on the invalid residual clause of Section 924(c) is zero").

[13] *Barnes*, 953 F.3d at 389.

[14] *Id.*

right to attack his conviction and sentence for dismissal of other counts that would have resulted in another 50 years of imprisonment.

Ultimately, Jones does not make a strong case for recognizing the miscarriage-of-justice exception and applying it here. He does not explain the scope of the exception, cite any cases purporting to apply the exception in the *Davis* context, or show how his circumstances in particular work a miscarriage of justice, especially given this court's decision in *Caldwell*.[15] As in *Jones*,[16] we decline to recognize and apply a miscarriage-of-justice exception here.

* * *

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

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

[16] 134 F.4th at 841-42.

TAB B: FIFTH CIRCUIT'S OPINION IN
UNITED STATES V. CEDRIC RAY JONES,
134 F. 4th 831 (5th Cir. 2025)
(Westlaw version)

134 F.4th 831
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,
v.
Cedric Ray JONES, Defendant—Appellant.

No. 21-10117
|
FILED April 21, 2025

Synopsis

Background: Defendant, who pled guilty to conspiracy to commit Hobbs Act robbery and using and brandishing a firearm during a crime of violence, filed motion to vacate his conviction alleging ineffective assistance of counsel. While motion was pending and proceeding stayed, the Supreme Court in *United States v. Davis*, 588 U.S. 445, 139 S.Ct. 2319, struck down the residual clause of the using and brandishing a firearm statute as unconstitutionally vague. In response, defendant moved to lift the stay and requested vacatur of his conviction for using and brandishing a firearm. The United States District Court for the Northern District of Texas, Jane J. Boyle, J., 2020 WL 7711910, adopted the report and recommendation of, Rebecca Rutherford, United States Magistrate Judge, 2020 WL 7753718, and denied the motion to vacate as a collateral attack that was barred by defendant's appeal waiver. Defendant appealed.

Holdings: The Court of Appeals, Richman, Circuit Judge, held that:

defendant's appeal waiver pursuant to his plea agreement was not too broad and applied to encompass allegedly fundamental right not to be invalidly convicted for conduct that did not violate a criminal statute;

appeal-waiver provision of defendant's plea agreement and provision of plea agreement that ensured defendant understood that actual sentence imposed were solely in discretion of the district court so long as they were within statutory maximum did not render appeal-waiver provision in plea agreement inapplicable;

defendant's collateral-review waiver in plea agreement was knowing and voluntary;

Court of Appeals would decline to recognize broad exception to collateral-review waivers for all illegal convictions or sentences or construe statutory-maximum exception as encompassing all illegal convictions or sentences;

statutory-maximum exception did not apply to defendant's collateral-review waiver, and thus, defendant's waiver was enforceable; and

Court of Appeals would decline to recognize and apply a miscarriage-of-justice exception to defendant's collateral-review waiver, and thus, waiver was enforceable.

Affirmed.

Dennis, Circuit Judge, dissented with opinion.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

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

Attorneys and Law Firms

Stephen S. Gilstrap, Amy Jeannine Mitchell (argued), U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff-Appellee.

Brian Wolfman, Georgetown Law Appellate Courts Immersion Clinic, Washington, DC, for Defendant-Appellant.

Before Dennis, Richman, and Ho, Circuit Judges.

Opinion

Priscilla Richman, Circuit Judge:

***834** 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 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 ***835** 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 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 ***836** 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 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 ***837** "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 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 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 ***838** "needn't have understood all the possible eventualities that could, 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 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]

***839** 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 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]

In explaining the exception as it applies in our circuit, we have phrased it narrowly as applying to sentences that exceed the ***840** 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 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-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 ***841** 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 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]

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 particular, Jones cites an unpublished case out of the Fourth Circuit in which the court applied ***842** 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]

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.

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, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019). Relevant to this appeal, Jones, relying on *Davis*, moved to vacate his § 924(c) conviction and sentence.

***843** 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); 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, 87 S.Ct. 1396, 18 L.Ed.2d 493 (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 ***844** 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, 139 S.Ct. 2319, 204 L.Ed.2d 757 (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, 139 S.Ct. 2319, 204 L.Ed.2d 757 (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, 139 S.Ct. 2319, 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; ***845** *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 836 (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 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*, —— U.S. ——, 142 S. Ct. 2580, 213 L.Ed.2d 1128 (2022) (KAVANAUGH, J., statement respecting the denial of certiorari)). Like *Barnes*, however, the defendant in *Caldwell* did not 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] ***846** 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, 70 S.Ct. 252, 94 L.Ed. 562 (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, 93 S.Ct. 647, 34 L.Ed.2d 577 (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.

All Citations

134 F.4th 831

Footnotes

1 588 U.S. 445, 470, 139 S.Ct. 2319, 204 L.Ed.2d 757 (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).

7 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015).

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

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*, 258 F.3d at 380.

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.

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.

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).

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))).

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, 125 S.Ct. 738, 160 L.Ed.2d 621 (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 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*, —— U.S. ——, 142 S. Ct. 2580, 2580, 213 L.Ed.2d 1128 (2022) (KAVANAUGH, J., respecting the denial of certiorari)).

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

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

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."); *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.").

39 *See Class v. United States*, 583 U.S. 174, 181-82, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018); *Menna v. New York*, 423 U.S. 61, 62 n.2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21, 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628 (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).

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.*

46 *Id.* at 1162 (second alteration in original) (first quoting *Grzegorczyk v. United States*, —— U.S. ——, 142 S. Ct. 2580, 2580, 213 L.Ed.2d 1128 (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).

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 (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.*

58 *See Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

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

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.

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.").

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").

TAB C: FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (OCT. 22, 2021)

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

DAMIEN ANTIONE JONES,	§	
	§	
Movant,	§	
	§	No. 3:19-cv-1150-B (BT)
v.	§	No. 3:14-cr-0300-B-2
	§	
UNITED STATES OF AMERICA,	§	
	§	
Respondent.	§	

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

Movant Damien Antione Jones, a federal prisoner, filed a *pro se* motion to vacate, set-aside, or correct his sentence under 28 U.S.C. § 2255. The District Court referred the resulting 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 and grant a certificate of appealability.

Background

During the late spring and early summer of 2014, Jones participated in a string of armed robberies at several AutoZone stores and Cash Pawn Plus pawnshops in Dallas, Texas. In November 2015, Jones pleaded guilty to six felony offenses charged in a second superseding indictment: (1) conspiracy to interfere with commerce by robbery in violation of 18 U.S.C. § 1951(a) (count one); (2) 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); (3) interference with commerce by robbery and aiding and abetting in violation of 18 U.S.C. §§ 1951(a) and 2 (counts three, five, and seven); and (4) 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). The District Court sentenced Jones to 708 months' imprisonment—240 months' imprisonment on each of counts one, three, five and seven, to run consecutively to each other, but only to the extent necessary to produce a combined sentence equal to a total of 324 months' imprisonment; 84 months' imprisonment on count two, to run consecutively to all counts; and 300 months' imprisonment on count eight, also to run consecutively to all counts. The District Court also ordered Jones to pay restitution in the amount of $10,622.98.

Jones appealed to the Fifth Circuit Court of Appeals. But the Fifth Circuit affirmed this Court's judgment. *See United States v. Jones*, 733 F. App'x 198, 200 (5th Cir. 2018) (per curiam). Jones did not petition the Supreme Court for a writ of certiorari. Instead, Jones filed the pending § 2255 motion (CV ECF No. 2) in which he argues: (1) his attorney provided ineffective assistance of counsel in connection with his guilty plea because, among other things, his counsel believed he was actually innocent; and (2) the District Court made a misstatement, an "arithmetic error," at sentencing. Mot. 4 (CV ECF No. 2). Jones also argued, "I would like to preserve my rights to use the *Davis* case (5th circuit) in light of the Supreme Courts [sic] decision[.]" *Id.* 5. Jones was apparently anticipating the

Supreme Court's favorable outcome in *United States v. Davis*, 139 S. Ct. 2319 (2019), handed down more than a month later, on June 24, 2019. *Davis* held that the residual clause of § 924(c)—§ 924(c)(3)(B)—is unconstitutionally vague. *Davis*, 139 S. Ct. at 2319; *see also United States v. Dixon*, 799 F. App'x 308, 308 (5th Cir. 2020) (per curiam). Jones also filed a motion for leave to amend his § 2255 motion (CV ECF No. 10), which the Court granted (CV ECF No. 12).

In its initial response, (CV ECF No. 11), the Government argued: (1) Jones's ineffective assistance of counsel claim fails because it is conclusory, and it fails on the merits because he cannot demonstrate prejudice; (2) Jones's claim relating to the pronouncement of his sentence is barred by the law-of-the-case doctrine; (3) Jones's liberally-construed claim under *Davis* is barred by the appellate-rights waiver in his plea agreement; and (4) Jones's "actual innocence" claim is not cognizable, barred by the statute of limitations in 28 U.S.C. § 2255(f), and fails on the merits because he has not established his innocence. Jones filed a reply.

Jones subsequently filed an "Amendment to 2255" (CV ECF No. 15), in which he referenced the First Step Act of 2018 (FSA) and argued that he was entitled to a "sentence reduction" on counts two and eight, his § 924(c) convictions.[1] *(Id.* 1.) Jones further argued that "Congress has done away with 'Enhanced sentences in the second or subsequent of first time offenders in

[1] Jones argues that the FSA entitles him to a "sentence reduction" on counts six and eight, his § 924(c) convictions. (CV ECF No. 15 at 1.) Jones is mistaken. His § 924(c) convictions are counts two and eight.

violation of 18 U.S.C. § 924(c).” (*Id.*) Jones also filed a “Supplement Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody” (CV ECF No. 17), citing to *United States v. Reece*, 938 F.3d 630 (5th Cir. 2019) and *Davis*, 139 S. Ct. at 2319, and arguing that his sentence should be vacated, set aside, or corrected. (CV ECF No. 17 at 1.) Jones further argued that at a minimum, the Court should grant him an evidentiary hearing. (*Id.*)

Following the Government’s concession that Jones’s § 924(c) convictions were “problematic,” the Court appointed counsel to represent him. (CV ECF No. 18, 19.) And Jones’s attorney filed an opposed motion for leave to file his *pro se* supplemental § 2255 motion. (CV ECF No. 20.) The Court denied the motion on the basis that hybrid representation is not allowed, (CV ECF No. 21), and gave Jones’s attorney thirty days to file a supplemental pleading. (*Id.*)

Thereafter, Jones, through counsel, filed a “Supplemental Pleading,” (CV ECF No. 22), in which he augmented his ineffective assistance of counsel claims with additional facts and legal argument. Jones also requested that his *pro se* pleadings (CV ECF Nos. 15, 17) be considered. Jones argued that in the Government’s response, it incorrectly calculated the time for filing his *pro se* “Motion to Amend § 2255.” Jones claimed that his conviction and sentence became final on October 28, 2019, and he timely filed his actual innocence claim on August 6, 2019.

The Government filed a supplemental response (CV ECF No. 27), in which it acknowledges the error in its initial response regarding the timeliness of Jones’s

actual innocence claim. It argued that Jones failed to demonstrate that ineffective assistance of counsel rendered his guilty plea unknowing or involuntary, and his *Davis* claim is barred by the appellate-rights waiver in his plea agreement. In his reply (CV ECF No. 28), Jones cites two opinions from this District, *Thompson v. United States*, No. 3:18-cv-2840-K (N.D. Tex.), and *Pearson v. United States*, No. 3:18-cv-1677-K (N.D. Tex.), in which the Court recognized a miscarriage of justice exception under similar circumstances, granted habeas relief, vacated the movant's § 924(c) convictions, and ordered a re-sentencing. Jones argues that his case is comparable to *Thompson* and *Pearson* because his convictions were predicated on a conspiracy to commit Hobbs Act robbery, which is no longer a crime of violence under *Davis*. Jones's § 2255 motion is ripe for determination.

Legal Standards and Analysis

I. Jones's ineffective assistance of counsel claim fails.

Jones argues that his attorney provided ineffective assistance of counsel "leading up to the guilty plea" because, "[b]y counsels own admission, his client pleaded guilty before he understood the evidence against him." Mot. 4 (CV ECF No. 2). Jones further argues that the claim by his attorney at the hearing on the motion to withdraw his guilty plea "essentially suggest[ed]" that his attorney allowed him to plead guilty despite his belief that the evidence established he was innocent. *Id.* Jones contends that his attorney's deficient performance deprived him of adequate assistance of counsel in violation of the Sixth Amendment and rendered his guilty plea unknowing and involuntary. *Id.* Jones concludes that his

guilty plea was not knowing and voluntary because his attorney failed to explain the evidence to him before he entered his guilty plea and his attorney encouraged him to waive the reading of his indictment, which caused him not to understand the charges against him. Supp. Mot. 4-11 (ECF No. 22).

"This Court has made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding." *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)). "[M]ere conclusory allegations on critical issues are insufficient to raise a constitutional issue." *United States v. Pineda*, 988 F.2d 22, 23 (5th Cir. 1993) (per curiam) (quoting *United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989)). Where a habeas petitioner fails to brief an argument adequately, it is considered waived. *Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) (citing *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998)). "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

When a litigant is proceeding *pro se*, the court must liberally construe his pleadings. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (recognizing that *pro se* pleadings are "to be liberally construed" and "held to less stringent standards than pleadings drafted by lawyers"); *see also Pena v. United States*, 122 F.3d 3, 4 (5th Cir. 1997) ("Because [the party] is *pro se*, we construe his pleadings liberally.") (citing *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 & n.16 (5th Cir. 1996));

Hernandez v. Maxwell, 905 F.2d 94, 96 (5th Cir. 1990) (citing *Haines v. Kerner*, 404 U.S. 519 (1972), and noting that it calls for an expansive reading of *pro se* pleadings).

Jones was proceeding *pro se* when he filed his initial § 2255 motion. Therefore, the Court will liberally construe his ineffective assistance of counsel claims. *See Erickson*, 551 U.S. at 94. And although Jones's ineffective assistance of counsel claims are short and conclusory, they are legally sufficient to state a claim. The Court thus proceeds to the merits of Jones's ineffective assistance of counsel claims.

To sustain a claim of ineffective assistance of counsel, a movant must show: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense so gravely as to deprive the movant 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." *Strickland*, 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 counsel is proven deficient, a movant must prove prejudice. To prove such prejudice, the 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)).

Jones argues that his attorney did not provide adequate assistance of counsel "leading up to the guilty plea." Mot. 4 (ECF No. 2). "A plea of guilty admits all the elements of a formal criminal charge and waives all non-jurisdictional defects in the proceedings leading to conviction." *United States v. Cothran*, 302 F.3d 279, 285-86 (5th Cir. 2002) (quoting *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir. 1991)); *see also United States v. Palacios*, 928 F.3d 450, 455 (5th Cir. 2019); *United States v. Cavitt*, 550 F.3d 430, 441 (5th Cir. 2008); *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982). Additionally, this waiver includes all claims of ineffective assistance of counsel, except those relating to the defendant's entry of a guilty plea. *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983); *see also United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000) (noting that the voluntary guilty plea waiver includes all claims of ineffective assistance of counsel unless the ineffective assistance is alleged to have rendered the guilty plea involuntary); *Pena v. United States*, 2021 WL 2920616, at *3 (N.D. Tex. July 12, 2021) (same). When the movant's claims relate to the entry of his guilty plea, he must show that he would not have pleaded guilty but for his counsel's deficient performance and would have instead insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Cavitt*, 550 F.3d at 441 ("In order '[t]o prove

prejudice for an ineffective assistance of counsel claim in the context of a guilty plea, the habeas petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'") (quoting *Bond v. Dretke*, 384 F.3d 166, 167-68 (5th Cir. 2004)).

Jones pleaded guilty on November 30, 2015. (CR ECF No. 81.) His ineffective assistance of counsel claim thus relates to allegedly deficient conduct by Jones's attorney occurring prior to the date of his guilty plea. However, Jones has not shown that but for his attorney's deficient performance he would have insisted on going to trial, and it is his burden to make this showing. *See Hill*, 474 U.S. at 59; *see also Cavitt*, 550 F.3d at 441; *Bond*, 384 F.3d at 167-68. Jones entered into a favorable plea agreement with the Government, pursuant to which he pleaded guilty to counts one, two, three, five, seven, and eight of the second superseding indictment, and the Government dismissed counts four and six. (CR ECF No. 154.)

Jones also argues that his attorney provided ineffective assistance of counsel when, "[b]y counsels own admission, his client pleaded guilty before he understood the evidence against him." Mot. 4 (CV ECF No. 2). Jones contends that the claim by his attorney at the hearing on his motion to withdraw his guilty plea "essentially suggest[ed]" that his attorney allowed him to plead guilty despite his belief that the evidence established he was innocent. (*Id.*) Jones alleges that at his Rule 11 hearing his attorney advised him to waive the reading his indictment and the plea agreement, and this caused him to not understand what essential elements the Government would need to prove, as opposed to the essential elements stated in

the factual resume. Supp. Mot. 7 (ECF No. 22). Jones concludes that his attorney's deficient performance deprived him of adequate assistance in violation of the Sixth Amendment and rendered his guilty plea unknowing and involuntary. Mot. 4 (ECF No. 2).

Jones's attorney attempted to demonstrate that Jones was innocent after Jones decided to withdraw his guilty plea. (CR ECF No. 92 at 3). Jones's attorney argued that the Government's evidence against Jones consisted primarily of cell phone records the Government attributed to Jones's cell phone number. (*Id.*) Jones's attorney further argued that the cell phone records demonstrate that the cell phone number was "recorded" several miles away from two robberies on June 2, 2014 and June 17, 2014, around the time of the robberies. *Id.* Jones's attorney concluded that the cell phone records undercut the Government's claim that Jones was present at those two robberies. (*Id.*) However, Jones's attorney's attempts to show that Jones was innocent were unsuccessful because the cell phone evidence relied upon was entirely incriminating. Jones cannot show that his attorney provided deficient performance because ultimately his attorney was not successful in demonstrating Jones's innocence. *See Youngblood v. Maggio*, 696 F.2d 407, 410 (5th Cir. 1983) ("The fact that trial counsel was unsuccessful in his efforts does not constitute, in light of the entire record, a basis for habeas corpus relief."); *Thomas v. United States*, 2021 WL 2690094, at *4 (N.D. Tex. June 1, 2021) (same). Jones claims that his attorney's deficient performance led to his conviction, and he argues the evidence shows he is innocent. Jones is mistaken, and he cannot show that his

attorney's performance prejudiced him when his attorney failed to show that he was innocent. Therefore, Jones cannot demonstrate prejudice under *Strickland*, and this ineffective assistance of counsel claim must fail. *See Amos v. Scott*, 61 F.3d 333, 348 (5th Cir. 1995) ("[A] court need not address both prongs of the conjunctive *Strickland* standard, but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test."); *see also Okechuku v. United States*, 2021 WL 2690091, at *9 (N.D. Tex. June 14, 2021), *rec. adopted* 2021 WL 2685283 (N.D. Tex. June 30, 2021).

Jones also admitted on more than one occasion that he was guilty. Formal declarations in open court carry a strong presumption of truth. *See Blackledge*, 431 U.S. at 74; *see also United States v. Arbuckle*, 390 F. App'x 412, 416 (5th Cir. 2010) (citing *United State v. McKnight*, 570 F.3d 641, 649 (5th Cir. 2009)). And "a defendant ordinarily will not be heard to refute [his] testimony given at a plea hearing while under oath." *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998) (citing *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985)); *see also United States v. Gonzalez-Archuleta*, 507 F. App'x 441, 442 (5th Cir. 2013) (per curiam) (citing *McKnight*, 570 F.3d at 649; *Cervantes*, 132 F.3d at 1110). On November 13, 2015, Jones signed a factual resume in which he admitted to committing the offenses charged in counts one, two, three, five, seven, and eight of the second superseding indictment. (CR ECF No. 69.) Later, Jones stated under oath that the factual resume was true and correct. (CR ECF No. 86 at 23-27.) Jones also admitted under oath that he was guilty of the crimes to which he pleaded

guilty. (*Id.*) Jones's factual resume and his sworn statements at his Rule 11 hearing belie his later claims that he was innocent and felt pressure or intimidation to plead guilty.

Jones argues that his attorney provided ineffective assistance at his Rule 11 hearing when he advised Jones to waive the reading of his second superseding indictment and plea agreement. Supp. Mot. 7 (ECF No. 22). According to Jones, this "erroneous advise [sic]" detrimentally impacted the outcome of his Rule 11 hearing because he failed to understand that the Government would need to prove the essential elements of the second superseding indictment, as opposed to the essential elements of the charges as set forth in the factual resume. (*Id.*) Jones concludes that his "trial counsel never advised [him] of the legal standards involved with the offenses charged in the [second superseding] indictment." (*Id.*)

This argument fails for several reasons. Initially, Jones does not suggest how he was prejudiced by his attorney encouraging him to waive the reading of the second superseding indictment and plea agreement. Specifically, Jones does not explain how the essential elements set forth in the second superseding indictment and factual resume differed. For this reason, he has failed to demonstrate prejudice under *Strickland*. Also, Jones argues that he did not understand the charges against him, but the proceedings at his Rule 11 hearing belie that claim. At Jones's Rule 11 hearing, the District Court ensured that Jones understood the charges to which he was pleading guilty, the essential elements of each those offenses, and the penalties he faced at sentencing. *See* (ECF No. 86). In fact, nothing in the Rule 11

record suggests that Jones was not fully aware of the charges against him. Jones waived the reading of the second superseding indictment, plea agreement, and plea agreement supplement, but the District Court ensured he was properly advised with respect to each. (*Id.* at 5, 6.) Near the start of the Rule 11 hearing, the District Court advised Jones that as the hearing progressed, if he had any questions, he was to ask them, and he should also feel free to speak with his attorney. (*Id.* at 3.) The District Court stated, "I want to make sure you don't have any doubts when you leave here. All right?" (*Id.*) When Jones was asked if he had a chance to review the applicable indictment, the second superseding indictment, with his attorney, Jones responded affirmatively. (*Id.* at 5.) Jones also stated that he had the charges read to him, and he fully understood what he was charged with. (*Id.*) The District Court asked, "[D]o you fully understand all of the charges? No questions about the charges?" (*Id.*) Jones stated that he had no questions and understood. (*Id.*) Jones also advised the District Court that he was fully satisfied with his attorney's representation. (*Id.* at 5-6.) Jones represented that there he had a plea agreement with the Government and a plea agreement supplement, he carefully reviewed both with his attorney, and he signed the last page of both documents. (*Id.* at 6.) The District Court advised Jones that if he had proceeded to trial, the Government would bear the burden of proof, he would be presumed to be innocent, and he would not have to offer any evidence or testify unless he chose to do so. (*Id.* at 11-13.) The District Court informed Jones of the maximum and minimum penalties he faced because of his guilty plea. (*Id.* at 14-22.) Finally, the Government advised

Jones of the essential elements of each offense to which he pleaded guilty. (*Id.* at 24-27.) Jones responded that he understood the essential elements for each charge to which he pleaded guilty, he had no questions regarding the essential elements, he did not need to discuss the essential elements any further, and he committed each of the essential elements. (*Id.* at 27-28.)

Although he attempts to do so, Jones cannot refute his Rule 11 testimony now. "[A] defendant ordinarily will not be heard to refute [his] testimony given at a plea hearing while under oath." *Cervantes*, 132 F.3d at 1110 (citing *Fuller*, 769 F.2d at 1099). Therefore, Jones has failed to overcome the statements he made under oath at his Rule 11 hearing.

Last, Jones relies on the Government's cell phone evidence to support his actual innocence claim, but the evidence supports the conclusion that he was guilty as charged. (CR ECF No. 85 at 2; CR ECF No. 92 at 3.) At the hearing on Jones's motion to withdraw his guilty plea, Jones claimed that the cell phone tower information showed that he could not possibly have committed the robberies on June 2, 2014 and June 17, 2014. (CR ECF No. 184 at 5-7.) However, the Government's evidence supported Jones's guilt, and his post-guilty plea claims to the contrary are based on a misunderstanding, or a misreading, of the Government's evidence against him. The evidence at issue was introduced through Mark W. Sedwick, a special agent with the Federal Bureau of Investigations (FBI), and a series of PowerPoint slides. (CR ECF No. 184 at 27-47.) The evidence showed

that Jones's cell phone was using towers in the vicinity of the robberies both before and after the robberies. (*Id.*)

a. June 2, 2014 robbery

Jones was charged and pleaded guilty to robbing an AutoZone store located at 2842 South Buckner Boulevard in Dallas, Texas, on June 2, 2014. (CR ECF No. 69 at 3.) The Government's exhibits depicted the store's location with Jones's phone calls before and after the robbery. The robbery happened around 9:54 p.m., and cell tower records obtained by the Government showed that Jones made calls nearby at 9:34 p.m. and 9:35 p.m. (CR ECF No. 172-2 at 9.) Agent Sedwick's testimony and the prosecutor's proffer demonstrated that Jones's cell phone was within the tower's area of coverage just 20 minutes before the robbery occurred. (CR ECF No. 184 at 15-16, 29-30, 36, 38-40.) The Government's evidence showed that during the pre-robbery calls, Jones's cell phone was using a tower whose coverage began approximately 0.5 miles from the AutoZone. During the minutes following the robbery, a call was made from Jones's cell phone, and it connected to a tower whose coverage extended up to three miles away. (CR ECF No. 172-2 at 10.) The phone call went to the cell phone of Jones's girlfriend, and her cell phone connected to its own tower. (CR ECF No. 184 at 31, 39-40.) The Government's cell phone evidence showed that Jones's residence, located at 1615 John West Boulevard in Dallas, Texas, is 3.5 to 4 miles away. (*Id.* at 39.) The Government's evidence also shows that Jones's cell phone made a post-robbery call to his girlfriend's phone, and at that time, Jones's cell phone was using a cell tower

toward the east and in the direction of his residence, and his girlfriend's phone takes the call from the west also in the direction of his residence. (CR ECF No. 172-2 at 11; CR ECF No. 184 at 40-41.)

At Jones's plea-withdrawal hearing, he insisted that this evidence demonstrated his innocence because, according to him, he could not have possibly made the 10:00 p.m. call if he had committed the robbery at 9:54 p.m. (CR ECF No. 184 at 7.) However, it was certainly possible, as Agent Sedwick explained, for Jones's cell phone to have made a call within that tower's range after he robbed the AutoZone. (*Id.* at 42-43.)

On appeal, Jones speculated that minutes after the robbery he could not have made the 10:00 p.m. call so far away. (*United States v. Jones*, No. 16-11371 (5th Cir.), Appellant's Br. at 15-16). In support of this argument, Jones cited to Agent Sedwick's statement that "he could not surmise from the cell-tower records 'where he was because there were no phone calls.'" (*Jones*, No. 16-11371, Appellant's Br. at 16.) However, in making his argument, Jones took Agent Sedwick's testimony out of context. When Agent Sedwick's testimony, as provided at the hearing, is reviewed in context, it shows he was explaining that when the calls between 9:34 p.m. and 9:35 p.m. are evaluated vis-a-vis the 9:54 p.m. robbery, he could not say exactly where Jones was at that time because his phone did not make many any calls during that period. (CR ECF No. 184 at 38-40; *Compare* CR ECF No. 172-2 at 9 *with* CR ECF No. 172 at 10.) At the conclusion of the plea-withdrawal hearing, the District Court concluded that, at a minimum, there is

"strong circumstantial evidence" Jones was "in the area and did commit the crime," and he had simply changed his mind about pleading guilty. (CR ECF No. 184 at 50-51.) The Fifth Circuit found no abuse of discretion with this ruling. *See Jones*, 733 F. App'x at 199 (citing *United States v. McKnight*, 570 F.3d 641, 645 (5th Cir. 2009)).

b. June 17, 2014 robbery

Jones was charged and pleaded guilty to robbing an AutoZone store at 9711 Plano Road in Dallas, Texas, on June 17, 2014. (CR ECF No. 41 at 13.) The Government's evidence showed that during the minutes prior to and after robbery, there were a series of four phone calls between Jones's cell phone and co-conspirator Savalas Love's cell phone. The calls connected through cell phone towers that had terminal points within one mile of the AutoZone store. (CR ECF No. 172-1 at 78; CR ECF No. 184 at 31, 33, 35-36.) This is consistent with Love's role in scouting the store to ensure there was no security present. (CR ECF No. 111 at 7.) During the minutes after the robbery, Jones's cell phone called his girlfriend's cell phone, and at the time of that call, Jones's cell phone connected via a cell tower with a terminal point about 2.5 miles from AutoZone but with a range that extends closer to the store. Jones's girlfriend's cell phone takes the call, but it connected to a tower that had a terminal point within 1.5 miles of the location where Jones and the others ditched the getaway car after a high-speed chase with police. (CR ECF No. 172-1 at 70; CR ECF No. 184 at 36-37.) The site where the vehicle was abandoned in Mesquite, Texas is about 2.5 miles away from Jones's residence at

1815 John West Boulevard in Dallas, Texas. Just minutes before the getaway car was recovered, Jones's cell phone made calls to co-conspirator Love, and the call connected via two cell phone towers in the vicinity of the recovery site. (CR ECF No. 172-1 at 80-81; CR ECF No. 184 at 37-38.)

At the guilty plea-withdrawal hearing, Jones argued that the evidence indicated the robbery occurred at 9:08 p.m., but the Government's evidence showed that it occurred at 9:02 p.m. (CR ECF No. 184 at 5-6, 15.) Assuming the robbery took place at 9:08 p.m., as Jones argued, and in the absence of surveillance video showing a robber making a phone call, Jones claims that he could not have been in the store robbing it while also making a call at 9:09 p.m. Jones's attorney argued, "Briefly, if I may, Your Honor. I did not bring with me the police report, but my recollection is on the one . . . according to the police report, the report alleges that 9:08 the suspects came in, not at not 9:02." (*Id.* at 23.) The District Court stated that it took defense counsel's word for that but pointed out its understanding of the evidence-within a ten-minute stretch-Jones's cell phone was within just a few miles of the store. (*Id.* at 23-24.) The source of the discrepancy appears to be the difference between the time of the 911 call and the time stamps on the AutoZone's security camera. (*Jones*, No. 16-11371, Attach. to Feb. 14, 2018 Mot.). The time stamps on the security camera show a time of 9:08 p.m., but the prosecutor explained at the hearing that the 911 call time was used as the most accurate time, and the agent testified to the time as being 9:02 p.m. (CR ECF No. 184 at 27-28, 34.)

In any event, the District Court noted its conclusion that the evidence did not demonstrate innocence based on the presence of Jones's cell phone nearby the robbery, and it showed his presence in the area in the time periods before and after the robbery. (*Id.* at 45-50.) The District Court concluded that Jones had simply reconsidered his guilty plea. (*Id.* at 48.) As noted, the Fifth Circuit determined that this finding was not an abuse of discretion. *See Jones*, 733 F. App'x at 199 (citing *McKnight*, 570 F.3d at 645).

Jones has now attempted to re-state his claims under the guise of a claim of ineffective assistance of counsel because, at most, his attorney was not successful in showing his innocence. Jones alleges that his attorney did not understand the evidence, and if that is the case, he can show deficient performance, but he cannot demonstrate prejudice. After all, the District Court found that Jones merely changed his mind about his plea agreement after the fact. (CR ECF No. 184 at 48.)

II. Jones's actual innocence claim is not cognizable and fails on the merits.

Jones claims that he is actually innocent of the crimes to which he pleaded guilty, based on cell phone tower information. (CV ECF No. 10 at 1.) He argues that the "(government's evidence is in clear error relating to those facts)." (*Id.*) He further argues that the Government "inflate[d] the credibility of the evidence by using a 'Pie/triangle' to place appeallant [sic] were [sic] they wanted him to be, when in fact the government agent acknowledged that he could not surmise from cell tower records 'where appeallant [sic] was because there were no phone calls.'"

(*Id.*) Jones concludes that the Government's agent did not know, and he "could only speculate." (*Id.*)

Jones's stand-alone claim of actual innocence fails because it is not a ground for habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *see also Reed v. Stephens*, 739 F.3d 753, 766-68 (5th Cir. 2014); *Foster v. Quarterman*, 466 F.3d 359, 367-68 (5th Cir. 2006); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000). Rather, an actual innocence claim is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404. Moreover, the burden of demonstrating actual innocence is extraordinary. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In fact, "in the vast majority of cases, claims of actual innocence are rarely successful." *Id.* at 324. Jones's constitutional claim of ineffective assistance of counsel claim is not otherwise procedurally barred, and for this reason, the Court need not address his "actual innocence" arguments. Accordingly, Jones's actual innocence claim is not cognizable.

Jones's actual innocence claim also fails on the merits. As discussed at length above, the Government's cell phone tower evidence, which Jones relies on, does not support his claim that he is actually innocent. Rather, the Government's evidence is incriminating.

For these reasons, Jones's actual innocence claim is not cognizable in this federal habeas action, and it fails on the merits. Therefore, the Court should deny Jones's actual innocence claim.

III. Jones's claim that an arithmetic error occurred at sentencing is barred by the law-of-the-case doctrine.

Jones argues that an error occurred at his sentencing hearing. Mot. 4 (ECF No. 2.) Specifically, contends that there was a "Misstatement by Judge," an "arithmetic error." (*Id.*)

A claim "raised and rejected on direct appeal" cannot not be raised in a § 2255 motion on collateral review. *See United States v. Webster*, 392 F.3d 787, 791 (5th Cir. 2004); *see also United States v. Kalish*, 780 F.2d 506, 508 (5th Cir. 1986) ("It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 motions."); *United States v. Goudeau*, 512 F. App'x 390, 393 (5th Cir. 2013) (affirming denial of § 2255 motion under law-of-the-case doctrine after the appellate court dismissed defendant's direct appeal as barred by an appeal waiver). The law-of-the-case doctrine generally precludes reexamination of issues of law or fact decided on appeal. *USPPS, Ltd. v. Dennison Corp.*, 647 F.3d 274, 282 (5th Cir. 2011).

Jones's claim that the District Judge made an arithmetic error at sentencing was raised on direct appeal. *Jones*, 733 F. App'x at 199-200. *See also* (Mot. 4 (ECF No. 2) (Jones concedes the issue was raised and addressed on direct appeal)). The Fifth Circuit concluded: the misstatement at Jones's sentencing hearing was not an

arithmetic error; Jones's argument was barred by the appeal waiver in his plea agreement; and Jones's argument did not fall within the arithmetic error exception to the waiver. Jones, 733 F. App'x at 200. Jones's claim is barred for re-litigation by the law-of-the-case doctrine, and it should therefore be dismissed.

IV. Jones's *Davis* claim is waived.

Jones asserted a *Davis* claim for the first time in his § 2255 motion when he argued, "I would like to preserve any rights to use the *Davis* case (5th circuit) in light of the Supreme Courts [sic] decision[.]" Mot. 5 (CV ECF No. 2). After *Davis*, Jones's § 924(c) conviction, count two, which is predicated on his conviction for conspiracy to commit Hobbs Act robbery, is "problematic" because conspiracy to commit Hobbs Act robbery does not satisfy § 924(c)(3)(A), and § 924(c)(3)(B) can no longer support it. *See United States v. Lewis*, 907 F.3d 891, 894-95 (5th Cir. 2018); *see also Reece*, 938 F.3d at 635 (holding that *Davis* applies retroactively to cases on collateral review). However, Jones's *Davis* claim is waived by the appellate-rights waiver provision in his plea agreement.

On November 30, 2015, Jones pleaded guilty pursuant to a written plea agreement. (CR ECF No. 70.) 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.

(*Id.* at 7.) Jones's *Davis* claim, which challenges his § 924(c) conviction, does not specifically fall within any reservation of rights contained in his appellate-rights waiver provision.

Generally, a collateral review waiver provision is enforced where the waiver "was knowing and voluntary, and if the waiver applies to the circumstances at hand." *United States v. Walters*, 732 F.3d 489, 491 (5th Cir. 2013) (citing *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005)*; see also United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). However, the Fifth Circuit Court of Appeals has recognized exceptions to this general enforcement rule where a movant raises a claim of ineffective assistance of counsel, or the sentence exceeds the statutory maximum. *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020); *see also United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004).

There is no indication from the record that Jones's appellate-rights 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. 70 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." (*Id*. at 7.) Jones then conceded "that he [was] 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).[2] In *Barnes*, the movant pleaded guilty pursuant to a plea agreement and waived his right to challenge his conviction and sentence under the Armed Career Criminal Act (ACCA), directly and collaterally, and he was sentenced under the 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

[2] 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 is not controlling here because it was made in the context of a direct appeal. The decision was also made in an unpublished opinion. *See Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006) ("An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority.").

U.S.C. § 2255, which was based on *Johnson*. *Barnes*, 953 F.3d at 385. The district court dismissed Barnes's motion, 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 the 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 appellate-rights waiver in his plea agreement. *See Love v. United States*, 2021 WL 2879615, at *2-5 (N.D. Tex. May 5, 2021) (Rutherford, M.J.) (holding the movant's *Davis* claim was waived under the collateral remedy waiver in his plea agreement), *rec. adopted,* 2021 WL 2252141 (N.D. Tex. June 2, 2021) (Boyle, J.); *Jones v. United States*, 2020 WL 7753718, at *3-*5 (N.D. Tex. Dec. 10, 2020) (Rutherford, M.J.) (same), *rec. adopted* 2020 WL 7711910 (N.D. Tex. Dec. 29, 2020) (Boyle, J.); *Brooks v. United States*, 2020 WL 1855382, at *3-*4 (N.D. Tex. Mar. 2, 2020) (Toliver, M.J.) (same), *rec. adopted* 2020 WL 1848050 (N.D. Tex. Apr. 13, 2020) (Lynn, C.J.); *see also United States v. Williams*, 2020 WL 7861309, at *2 (E.D. La. Dec. 31, 2020) (same); *Hernandez v. United States*, 2020 WL 4782336, at *2 (E.D. Tex. June 16, 2020) (same), *rec. adopted* 2020 WL 4747720 (E.D. Tex. Aug. 15, 2020); *Kimble v. United States*, 2020 WL 4808608, at *2 (E.D. Tex. June 25, 2020) (same), *rec. adopted*, 2020 WL 4793243 (E.D. Tex. Aug. 17, 2020).

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 Ornelas-Castro v. United States*, 2021 WL 1117172, at *2 (N.D. Tex. Mar. 23, 2021) (Kinkeade, J.) (relying on the miscarriage of justice exception to grant relief on a *Davis* claim under § 2255); *Thompson v. United States*, 2020 WL 1905817, at *1-*2 (N.D. Tex. Apr. 17, 2020) (Kinkeade, J.) (same); *Pearson v. United States*, 2020 WL 1905239, at *3-*4 (N.D. Tex. Apr. 17, 2020) (Kinkeade, J.) (same). The Court should decline to apply the miscarriage of justice exception here 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)).

The Seventh Circuit has recognized a manifest-justice exception, but even there, the Court recently held that two defendants in a virtually identical situation as Jones could not benefit from the exception. *Oliver v. United States*, 951 F.3d 841, 847 (7th Cir. 2020). The Court explained:

> The robbery of pawnshop plainly violated the Hobbs Act, which we and other circuits have held, after *Johnson*, qualifies as a "crime of violence" under § 924(c)'s elements clause. Thus, even overlooking the shootout that occurred, the government could easily have premised the § 924(c) counts on the Hobbs Act robbery of the pawn shop in Indiana. It is not a miscarriage of justice to refuse to put Oliver and Ross in a better position than they would have been in if all relevant actors had foreseen *Davis*.

Id. (internal citations omitted). The same rationale is applicable here; Jones committed three substantive Hobbs Act robberies (counts three, five, and seven), and he admitted he committed those offenses in his factual resume and under oath at his Rule 11 hearing on November 30, 2015. (CR ECF Nos. 69, 86.) Therefore, enforcing Jones's appellate-rights waiver would not result in a miscarriage of justice. Likewise, Jones should not be allowed to benefit from a windfall that neither he nor the Government anticipated or bargained for.

For these reasons, Jones's *Davis* claim is waived. However, as addressed below, the Court will recommend that a certificate of appealability be granted.

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 appellate-review waiver in his plea agreement bars his *Davis* claim; and (2) whether his appellate-review waiver is unenforceable under the miscarriage of justice exception.

Recommendation

For the foregoing reasons, the Court should DENY Jones's § 2255 motion and GRANT a certificate of appealability.

Signed October 22, 2021.

REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

TAB D: DISTRICT COURT'S ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (NOV. 15, 2021)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAMIEN ANTIONE JONES, Movant,	§ § §	
v.	§	No. 3:19-cv-1150-B (BT)
UNITED STATES OF AMERICA, Respondent.	§ § §	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Following a review of this case filed under 28 U.S.C. § 2255 and objections, if any, 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.

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 is granted a COA on the following issues: (1) whether the appellate-review waiver in his plea agreement bars his *Davis* claim; and (2) whether his appellate-review waiver is unenforceable under the miscarriage-of-justice exception.

SO ORDERED this 15th day of November, 2021.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

TAB E: DISTRICT COURT'S JUDGMENT (NOV. 15, 2021)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAMIEN ANTIONE JONES, Movant,	§ § §	
v.	§	No. 3:19-cv-1150-B (BT)
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, 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 15th day of November, 2021.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE