No. _____

In The

Supreme Court of the United States

LUIS BONILLA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHAT STANDARDS OTHER THAN THE KNOWING AND VOLUNTARY WAIVER STANDARD OF *BRADY V. UNITED STATES* SHOULD GOVERN THE ENFORCEMENT OF APPEAL WAIVERS IN PLEA AGREEMENTS?

II. IS A CRIMINAL DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL ENFORCEABLE WHERE THE SENTENCING COURT USES AN IMPROPER SENTENCING GUIDELINE THAT INCREASES A SENTENCE BY 21 MONTHS AND THE DEFENDANT RECEIVED NO SUBSTANTIAL BENEFIT FROM THE PLEA BARGAIN?

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OPINION BELOW

The order of the Fourth Circuit dismissing the appeal, issued on August 16, 2018, is unpublished. The order is reprinted as Appendix A to this Petition. (Appendix A, infra).

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on August 16, 2018.

STATUTORY PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Criminal Procedures provides:

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> (1) Advising and Questioning the Defendant.
>
> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands the following:
>
> ….
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . "

STATEMENT OF THE CASE

On April 24, 2017, the United States Attorney filed an indictment in the Eastern District of North Carolina against Luis Bonilla, Jr. and Darwin Dial, Jr. containing nine counts. Luis Bonilla, Jr. was charged with Darwin Dial in Count 1 with conspiracy to manufacture, distribute, dispense, and possess with intent to distribute a mixture and substance containing a cocaine base between March 2016 and June 2016 in violation of 21 U.S.C. § 841(a)(1) and 846. Counts 2, 3, 4, 5, 8 and 9 charged Mr. Bonilla with distributing cocaine base in violation of 21 U.S.C. § 841(a)(1) on March 24, 2016, April 7, 2016, April 20, 2016, and April 29, 2016, May 17, 2016 and June 15, 2016, respectively. Count 6 charged Mr. Bonilla with possession of a firearm by a convicted felon and Count 7 charged Mr. Bonilla with possession of the firearm in furtherance of drug trafficking.

Mr. Bonilla pled guilty to Count 1 and Count 7 by plea agreement on September 11, 2017. The presentence report ("PSR") was filed on December 15, 2017. Through counsel Mr. Bonilla filed objections to the PSR's offense level determination. His first objection was to the drug quantity determination based in part upon the amount of cash seized in the search of his trailer at 169 Vernie. His second objection was to a two offense level increase under U.S.S.G. § 2D1.1(b)(12) for maintaining a premise at 149 Vernie Road for distributing controlled substances.

The district court denied the objections and used the enhancement for maintaining a place to sell drugs to establish the guideline range. The only facts

referred to by the district court to support the enhancement for Defendant Bonilla maintaining a premise to distribute drugs were the seven drug sales to the confidential informant. The district court then sentenced Mr. Bonilla to 108 months for the drug conspiracy in Count 1and to a consecutive 60 months for the gun charge in Count 7 and to a combined term of 5 years supervised release. This was a sentence at the low end of the guideline range established by the court. This appeal followed.

> Mr. Bonilla's plea agreement included the following provision: To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post conviction proceeding, including one pursuant to 28 U.S.C. § 2255; excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

Instead of informing the defendant Bonilla of the terms of this appeal waiver, the magistrate judge conducting the plea hearing simply told Mr. Bonilla the following:

> THE COURT: And do you understand that by entering into this plea agreement and by entering a plea of guilty, 13 that you may be giving up your right to appeal or to collaterally attack all or part of your conviction and your sentence?[1]

[1] The Government in its Motion to Dismiss incorrectly claimed that the district court informed the Defendant that the plea agreement would give up Defendant's right to appeal. Instead the magistrate judge informed the defendant only that the agreement MAY give up the right to appeal.

At no point did the district court inform the defendant of the specific terms of the appeal waiver or determine that defendant Bonilla understood the terms of the appeal waiver.

An appeal followed to the Court of appeals for the Fourth Circuit. Defendant's brief challenged the District Court's determination that the two level sentencing enhancement for maintaining a dwelling to distribute drugs applied to him. He also challenged the district court's use of uncharged conduct to determine his sentencing guideline, arguing that this court's decision in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) vitiates the rule established by the *per curiam* opinion twenty years ago in *Watts v. United States,* 519 U.S. 148 (1997), that at sentencing, federal judges may consider as 'relevant conduct' for purposes of calculating the Guidelines, uncharged conduct or otherwise inadmissible evidence, and even acquitted conduct.

After Defendant Bonilla's brief was filed, the Government moved to dismiss the appeal based on the appeal waiver. On August 16, 2018, the Court of Appeals for the Fourth Circuit dismissed the appeal based upon the waiver in the plea agreement.

REASONS FOR GRANTING THE WRIT

I. THE POLICY FOLLOWED IN THE FOURTH CIRCUIT AND CERTAIN CIRCUITS TO ENFORCE APPEAL WAIVERS EVEN WHERE THE SENTENCING COURT MISINTERPRETS THE GUIDELINES UNDERMINES THE CONGRESSIONAL POLICY OF SENTENCING UNIFORMITY.

II. THE SUPREME COURT SHOULD REVIEW THIS CASE TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS ON WHETHER APPEAL WAIVERS ARE ENFORCEABLE THAT BAR REVIEW OF SENTENCING GUIDELINE APPLICATIONS.

Each circuit upholds appeal waivers in plea agreements.[2]

The standards that govern the enforcement of appeal waivers are of enormous consequence since appeal waivers are used in thousands of federal cases each year. One study of appeal waivers published in the Duke Law Journal in 2005 found that more than 65 percent of 971 federal cases studied utilized some form of appeal waiver.[3] The U.S. Sentencing Commission reported that in 2017 that 48,317 federal defendants were convicted with plea agreements.[4] If 65% of these defendants plea guilty with appeal waiver, appeal waivers were used in more that 31,000 federal cases just last year.

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[2] *See, e.g.*, *United States v. Khattack*, 273 F.3d 557, 560–561 (3d Cir. 2001) (citing *United States v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001); *See also*, *United States v. Fisher*, 232 F.3d 301, 303 (2d Cir. 2000); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Branam*, 231 F.3d 931, 932 (5th Cir. 2000); *United States v. Fleming*, 239 F.3d 761, 763–64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916–18 (7th Cir. 2000); *United States v. Estrada – Bahena*, 201 F.3d 1070, 1071 (8th Cir. 2000); *United States v. Nguyen*, 235 F.3d 1179, 1184 (9th Cir. 2000); *United States v. Rubio*, 231 F.3d 709, 711 (10th Cir. 2000); *United States v. Howle*, 166 F.3d 1166, 1168– 69 (11th Cir. 1999).

[3] Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy,* 55 Duke L.J. 209, 231 (2005).

[4] UNITED STATES SENTENCING COMMISSION, INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, available at https://isb.ussc.gov/api/repos/: USSC:table_xx.xcdf/generated Content?table_num=Table01.

The circuits, however, diverge greatly on the standards used to determine if appeal waivers are enforceable. By using different standards, the circuits differ markedly on when appeal waivers will be enforced in connection with sentencing appeals. This petition presents an opportunity to resolve a split in the circuits over whether appeal waivers that restrict the review of erroneous guideline determinations are enforceable.

Appellate courts have frequently addressed appeal waivers in plea agreements and generally have held them to be enforceable.[5] The general policy enunciated in the decisions upholding appeal waivers is that waivers serve the public interest in finality, efficiency, and the preservation of resources in the criminal justice system. When addressing the constitutionality of express waivers of appellate rights in plea bargains, federal and state courts start with the proposition that these agreements are valid so long as they are knowing and voluntary.[6] As this Court found in *Brady v. United States*, 397 U.S. 742, 752-53 (1970) waivers of constitutional rights in guilty pleas must be "voluntary[,] . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." The various federal circuits differ in the extent they test the enforcement of appeal waivers against additional standards and how they apply *Brady*.

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[5] *See*, *e.g.*, *United States v. Feichtinger,* 105 F.3d 1188, 1190 (7th Cir. 1977); *United v. Melancon*, 972 F.2d. 566, 567-568 (5th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52-53 (4th Cir. 1990).

[6] *Brady v. United States*, 397 U.S. 742, 752-53 (1970); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992). *See also*, *United States v. Fleming*, 239 F.3d 761, 763–764 (6th Cir. 2001) (citing *Town of Newton v. Rumery*, 489 U.S. 386, 393 (1987)), *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995).

A. The Simplified Application of *Brady's* Knowing and Voluntary Standard.

The analysis followed in the Fourth and Ninth Circuits focuses almost exclusively on whether the appeal waiver passes a simplified version of *Brady's* knowing and voluntary standard. For example, the Fourth Circuit routinely enforces appeal waivers, so long as there is any indication that the defendant understood the waiver was included in his or her plea agreement.[7] The primary rationale expressed in the Fourth Circuit's decisions is the idea that any plea bargain struck by a defendant provides his with the benefit of having some control over his sentence, which he typically would not have in trial. This benefit prevents a bargain from being "inequitable," according to the Fourth Circuit. *Brown*, 232 F.3d at 406. Beyond this requirement, however, there are few limits placed on the enforcement of such waivers in the Fourth Circuit.

Similarly, in allowing the broad enforcement of appeal waivers, the Ninth Circuit has noted that knowingly requirement does not necessarily mean that the defendant "foresees the specific issue that he now seeks to appeal." *United States v. Johnson*, 67 F.3d 200, 203-203 (9th Cir. 1995) (holding " [the defendant] knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be").

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[7] *See, e.g., United States v. General,* 278 F.3d 389, 399–401 (4th Cir. 2002); *United States v. Brown,* 232 F.3d 399, 402–06 (4th Cir. 2000); *United States v. Brock,* 211 F.3d 88, 92 n. 6 (4th Cir. 2000); *United States v. Lambey,* 974 F.2d 1389, 1393 (4th Cir. 1992) (en banc); *United States v. Marin,* 961 F.2d 493, 495–96 (4th Cir. 1992); *see also United States v. Davis,* 954 F.2d 182, 185–86 (4th Cir. 1992) (enforcing a waiver that precluded the defendant from appealing certain convictions); *cf. United States v. Williams,* 29 F.3d 172, 174–75 (4th Cir. 1994) (holding that a defendant who stipulated his drug amounts prior to sentencing waived his right to appeal on the issue of the drug amounts).

Brady's knowing and voluntary test included the requirement that waivers be "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." 397 U.S. at 752-53. The Fourth and Ninth Circuit read this to mean that the defendant understand only that there is an appeal waiver in the plea agreement. This simplified approach to the "voluntary and knowing" test permits appeal waivers to be enforced in a wide set of circumstances. Use of this simplified approach insulates from review many types of mistakes by the sentencing courts including those made in determining the applicable guideline sentencing range.

B. The Second Circuit's Knowing and Voluntary Approach Restricts Enforcement of Appeal Waivers Where Its Effects That Are Unlikely to Be Understood By Defendants.

The Second Circuit has the most developed case law addressing where a defendant can waive the defendant's right to appeal a mistaken determination of sentencing guideline ranges. In its cases, the Second Circuit has fleshed out *Brady's* language that a defendant's waiver be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." The end result is that the Second Circuit typically upholds only those waivers that "waive the right to appeal a sentence within (or below) an agreed guideline range." *United States v. Chen,* 127 F.3d 286, 288 (2d Cir. 1997).[8]

The Second Circuit balks at enforcing broader waivers that purport to waive the right to appeal "a sentence within (or below) whatever guideline range the

[8] *See e.g., United States v. Maher*, 108 F.3d 1513 (2d Cir. 1997); *United States v. Ready,* 82 F.3d 551, 555 (2d Cir. 1996); *United States v. Yemitan,* 70 F.3d 746, 747 (2d Cir. 1995).

sentencing judge determines is applicable." *United States v. Goodman,* 165 F.3d 169, 174 (2d Cir. 1999). The Second Circuit invalidated such an agreement in *United States v. Martinez-Rios,* 143 F.3d 662, 668-69 (2d Cir. 1998). The Second Circuit's hesitancy in upholding these waivers stems from the view that this "form of waiver leaves a defendant free to appeal an upward departure but denies him the opportunity to challenge the correctness of the sentencing judge's determination as to the applicable guideline range." *Goodman*, 165 F.3d at 174. Furthermore, while the Second Circuit routinely upholds appeal waivers that prevent a defendant from appealing a sentence that falls within a range "explicitly stipulated within the agreement itself,"[9] the defendant "retains the right of appeal if the ultimate sentence exceeds the prediction."

The Second Circuit also scrutinizes plea agreements that waive a defendant's rights to appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range *as determined by the Court*." *Id.* at 99 (emphasis added). In the view of the Second Circuit, this type of waiver effectively "provides no protection to the defendant" because the guideline range is up to the discretion of the court and could "bear little to no resemblance to the predicted range." *Id.* Such a waiver, in the view of the Second Circuit, leaves the defendant "to the mercy of the sentencing court" because the defendant "assumes a virtually unbounded risk of error or abuse by the sentencing court." *Id.*

[9] *See, e.g., United States v. Rosa,* 123 F.3d 94, 97-102 (2d Cir. 1997).

Normally, the standard plea agreement allows a defendant to weigh the predicted range and determine if he or she is willing to take the risk that they will receive a sentence in the upper part of the range and then be unable to appeal. *Id*. The predicted range provides some form or protection for the defendant because, if that sentence exceeds the range, he would still have the right to appeal. These broader waivers take that protection away because the guideline is left to the discretion of the sentencing court. Under such a waiver, a sentencing court could theoretically "sentence to a life term a defendant who had signed a plea which anticipated only a few months of imprisonment, and that defendant, under the terms of [these] agreement[s], would have no right to appeal even if the sentence were made erroneously." *Id*. at 100.

In addition, the Second Circuit has voiced concern that broad waivers are ambiguous and confusing to a defendant, thereby implicating the "knowing and voluntary" inquiry "to an even greater extent than a standard plea." *Id*. The Court noted that, to have an understanding of precisely what he is waiving, the defendant must grasp the distinction between 1) the court's upward departure from a sentence range which the court has already determined to be the proper application of the Guidelines, a result which *is* appealable; and 2) the court's application of the Guidelines to establish a sentence above the predicted range, a result which *is not* appealable. In the Court's view the distinction between upward departures and relevant conduct enhancements –which remove one from a predicted range – are difficult even for attorneys and judges to grasp. Finally the Court noted a defendant could easily misunderstand the plea to mean that he would retain the right of appeal if

the court were to sentence him more harshly than the predicted sentence range. *Id.* at 100-101.

Because of these concerns, the Second Circuit has held that appeals under broader appeal waivers should not be summarily dismissed. Instead, the Court will examine "carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it" should be upheld. *Id.* at 101. The Second Circuit formulated what it has called a "closer look" standard that it now applies to these broad waivers. *Goodman*, 165 F.3d at 174-75. The Court looks for specific factors, such as "the extent to which the defendant actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range, and the extent of actual discrepancy between the predicted range and the ultimate sentence," but in practice the Court subjects the appeal waiver and containing plea agreement to a fairness analysis. *Rosa*, 123 F.3d at 101. This fairness analysis has been applied on several occasions.

In *United States v. Rosa*, *supra,* the appeal waiver stated "[t]he defendant agrees not to file an appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range as determined by the Court." *Id.* at 99. In examining the agreements fairness, the Court noted that, in exchange for his waiver of appeal, Rosa was permitted to plead guilty to a lower offense that carried no minimum sentence. This agreement allowed him to escape a ten-year minimum connected with the other charge in the indictment. At sentencing the defendant also received a three-

level reduction. The Court viewed these acts as substantial benefits and stated that "[w]hile receipt of the expected benefits of a plea is, of course, not in and of itself a reason to hold a defendant to a plea agreement which is otherwise invalid, we mention it as it goes to the overall fairness, and thereby the validity, of that agreement." *Id.* at 101-02. The Court also noted that the sentence imposed on Rosa, 27 months, was only six months higher than the upper limit set in the plea agreement. While higher discrepancies between predicted sentence and actual sentence may be cause for remand, *Rosa* was not such a case. *Id.* at 102.

The Second Circuit also applied this fairness standard in *United States v. Goodman, supra.* The appeal waiver in that case read that the defendant "knowingly and voluntarily waive[d her] right to appeal any sentence ... imposed by the Court and the manner in which the sentence is determined so long as [the] sentence is within the statutory maximum specified above." *Goodman*, 165 F.3d at 172. The Court first noted that, because she pleaded guilty to the only charge brought against her, "Goodman received very little benefit in exchange for her plea of guilty." *Id.* at 174. The Court also concluded that the sentencing court did not adequately insure Goodman understood the appeal waiver because the statements made to the defendant were inconsistent with those in the appeal waiver. *Id.* Finally, the Court noted "the discrepancy between the sentence imposed – thirty months in prison – and the predicted sentencing range-ten to sixteen months-is substantial." *Id.* As a result of the above issues, the Court viewed the appeal waiver to be unfair and refused to enforce the waiver against Goodman. *Id.* at 175.

C. The Miscarriage of Justice Standard.

The First[10], Third[11], Eighth[12], and Tenth[13] Circuits judge the enforcement of appeal waivers using a miscarriage of justice standard.[14] A "miscarriage of justice" has been found where the sentence exceeds the statutory maximum, where an impermissible factor such as race has been used or where there has been ineffective assistance of counsel. A miscarriage of justice has also been found in these circuits where a sentence was entered that was not authorized by statute, or when the defendant was not informed of the statutory maximum he faced. The cases have not found that erroneous application of a sentencing factor is a miscarriage of justice. This type of mistake is unreviewable where there is an appeal waiver in these circuits.

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[10] The First Circuit holds that the relevant factors of a defendant's unenforceable waiver claim are "the clarity of the alleged error, its character and gravity, its impact on the defendant, any possible prejudice to the government, and the extent to which the defendant acquiesced in the result." *United States v. Gonzales-Colon*, 582 F.3d 124, 128 (1st Cir. 2009)(citing *United States v. Gil-Quezada*, 445 F.3d 33, 37 (1st Cir. 2006). In *Ortiz-Garcia*, the First Circuit found that the waiver of appeal was a miscarriage of justice because the sentencing court failed to disclose in taking the waiver that the maximum penalty for the crime was life imprisonment. 665 F.3d 279 (1st Cir 2011). In this case, the lower court stated only that the minimum penalty was "imprisonment of not less than ten (10) years." *Id.* Because the defendant was not fully informed of the rights he was waiving, the Court held that enforcing the appeal waiver would be a miscarriage of justice. The rationale behind this decision was a defendant did not know what right he waived until his sentence was imposed. Therefore, under this logic, a defendant's waiver does not pass the "knowing and voluntary" requirement if the court taking the waiver has stated an incorrect sentence range.

[11] Instead of identifying a list of specific circumstances that fall into the miscarriage of justice exception, the Third Circuit holds that the "underlying facts [of the case] determine whether a miscarriage of justice would be worked by enforcing the waiver." *United States v. Mabry,* 536 F.3d 231, 242 – 243 (3d Cir. 2008). In *Khattak*, 273 F.3d 557 (3d Cir 2001), the Third Circuit held that the defendant received a sentence "well within the terms of his plea agreement," and, additionally, the defendant's counsel presented no additional argument proving a miscarriage of justice. *Id.* at 563. Therefore, the waiver of his right to appeal was upheld. *Id.*

[12] The Eighth Circuit also upheld this approach in *United States v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002). The defendant in this case pled guilty to first-degree murder and later sought to withdraw this plea, claiming his attorney coerced him into taking the deal. *Id.* at 728. The district

D. The Ad Hoc Approach Used in Other Circuits.

Without enunciating a broad general standard, the Seventh and Eleventh Circuits each use their own *ad hoc* approaches to judge the validity of a defendant's waiver of the right to appeal. These circuits hold there are specific instances in which the defendant's waiver is unenforceable. For example, without enunciating a general standard, the Seventh Circuit has enforced appeal waivers to reject challenges made to guideline determinations and to reject claims of ineffective assistance of counsel but has also ruled that an appeal waiver does not preclude review of a sentence exceeds the statutory maximum. *See United States v. Joiner*,

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court denied his motion and imposed the agreed upon sentence of thirty-five years. *Id.* The appellate court reversed and remanded this decision stating, "There can be no plea bargain to an illegal sentence." *Id.* (citing *Baker v. Barbo*, 177 F.3d 149, 155 (3d Cir.), cert. denied, 528 U.S. 911, 145 L. Ed. 2d 219, 120 S. Ct. 261 (1999); *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)). The Court described an illegal sentence as a decision "not authorized by the judgment or conviction or when it is greater or less than the permissible statutory penalty for the crime." *Id.* The Court further held that "even when a defendant, prosecutor, and court agree on a sentence, the Court cannot give the sentence effect if it is not authorized by law. Thus, when a defendant has entered a plea bargain contemplating an illegal sentence, the defendant is generally entitled to withdraw the guilty plea." *Id* at 730. To hold otherwise would be considered a miscarriage of justice; therefore, the appeal waiver was considered invalid.

[13] Finally, the Tenth Circuit found persuasive the Eighth Circuit's treatment of these principles and created a three-prong analysis. In reviewing appeals brought after a defendant has entered into an appeal waiver, the Tenth Circuit's analysis calls for the court of appeals to determine: (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would not result in a miscarriage of justice. *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (citing *United States v. Andis,* 333 F.3d 886, 890 – 892 (8th Cir. 2003)).

In Hahn, the Tenth Circuit defined four situations that would qualify as a miscarriage of justice and would result in the invalidation of the waiver: "[1] where the district court relied on an impermissible factor such as a race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver render the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Id.* at 1328. The Court held that Hahn's request for an appeal based on the lower court's sentencing error was within scope of the waiver of his right to appeal, and, therefore, the waiver was upheld. *Id.*

[14] *United States v. Ortiz-Garcia*, 665 F.3d 279 (1st Cir. 2011); *See also, United States v. Khattak,* 273 F.3d 557, 563; *United States v. Jennings*, 662 F.3d 988, 990 (8th Cir. 2011); *United States v. Lonjose*, 663 F.3d 1292 (10th Cir. 2011) (citing *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004).

183 F.3d 635 (7th Cir. 1999).[15] The Eleventh Circuit instead focuses on procedural protections in connection with appeal waivers. If a defendant has been questioned about the appeal waiver and has understood its full significance, the Eleventh Circuit will uphold appeal waivers even in the face of "blatant errors" committed by the sentencing court.[16]

E. The Differing Approaches Used by the Circuits to Judge Appeal Waivers Lead to Markedly Different Results When Applied to Sentencing Appeals.

All circuits seem to allow challenges to sentences that are unauthorized, exceed statutory maximum or are based on impermissible factors such as race. While most circuits enforce waivers that preclude challenges to the correctness of guideline determinations, the Second Circuit does not if the plea agreement does not otherwise benefit the defendant.

The circuits that broadly enforce appeal waivers insulate great numbers of sentences from appellate review and thereby allow greater disparity in sentencing

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[15] In Joiner, the Seventh Circuit held that a waiver of the right to appeal "does not completely foreclose review, because the right to appeal survives where the agreement to waive is involuntary or where the sentence exceeds the statutory maximum." *Id.* at 644 – 645 (citing *Jones v. United States,* 167 F.3d 1142 (7th Cir. 1998)). In this case, the defendant's claims of ineffective assistance of counsel did not fall into one of the narrowly defined categories of the exception to make the appeal invalid. *Id.* Therefore, the waiver of appeal was upheld.

The Seventh Circuit also rejected the claim in *Jones*, 167 F.3d 1142, that the court's sentence exceeded the statutory maximum because the plea agreement proposed a range rather than an exact number. *Id.* at 1145. The Seventh Circuit only recognizes that a "right to appeal survives where the agreement is involuntary, or the trial court relied on a constitutionally impermissible factor (such as race)." *Jones*, 167 F.3d at 1144.

[16] In *United States v. Grinard-Henry,* 399 F.3d 1294, 1296 (11th Cir. 2005), the court enforced waiver of appeal of the application of the sentencing guidelines that within the scope of the waiver after noting that the trial court had specifically explained the scope of the waiver and determined the defendant understood its full significance. The Court noted an appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error, citing *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999).

results. One of Congress' three primary purposes in enacting the Sentencing Reform Act of 1984 was to promote reasonable uniformity in sentencing decisions among similarly situated defendants.[17] Thus tension exists between the policy of sentencing uniformity of the guidelines and the policy of broadly enforcing appeal waivers.

The circuits' different approaches to enforcing appeal waivers bring markedly different results in similar cases. Petitioner Bonilla's case is an example of such a case. The facts of Petitioner Bonilla's case closely parallel
those found in the Second Circuit *Goodman* case. Bonilla's appeal waiver is the broad type carefully scrutinized in the Second Circuit because it effectively subjects Petitioner to a "virtually unbounded risk of error or abuse by the sentencing court." The sentencing court has unfettered authority to sentence Petitioner however it wishes, because the waiver prevents his from contesting any mistake the court makes in establishing the guideline range. If Mr. Bonilla's case were in the Second Circuit, the appeals court would apply its "close look" standard to the facts of this case. In doing so, it would observe that Petitioner received no benefit for his bargain. Although he pled to specific charges against his, the sentence was based on his entire course of conduct. Also, the Court would observe that due to the broad nature of the plea agreement, Petitioner possibly did not fully understand the terms of the agreement, and, therefore, did not knowingly and voluntarily waive his right to appeal. That danger is particularly present in this case where the magistrate

[17] *United States Sentencing Guidelines Manual,* Ch. 1, Pt. A, 1 (3)(2016).

judge taking the change of plea simply asked Mr. Bonilla if he understood that he might be waiving his right to appeal. It did not even read the terms of the agreement to Mr. Bonilla and asked no specific questions to probe Petitioner's understanding of what he was waiving. This omission by the court paired with the lack of sophistication of Petitioner raises a serious question to his understanding of the appeal waiver, an issue that was also present in *Goodman.*

In this case, the Fourth Circuit summarily upheld the Petitioner Bonilla's waiver. The court based its determination solely on whether Petitioner Bonilla understood his plea agreement contained an appeal waiver. It paid no attention to the relative fairness approach of *Goodman,* or examine whether the district court adequately determined whether Mr. Bonilla understood what rights he was waiving.

As a consequence, the Fourth Circuit approach prevents review of a mistake of law that caused Mr. Bonilla to be sentenced to two offense levels higher due to the determination on maintenance of a dwelling. [18] If the correct offense level category had been used and Petitioner sentenced using the appropriate guideline range, Petitioner probably would have been sentenced to 87 months on the first count of conviction, 21 months lower than the sentence he received.

In the *Goodman* case, the sentence imposed was 14 months higher than the predicted sentence. The Second Circuit viewed that discrepancy as substantial and

[18] The sentencing court established the advisory guideline range at 108 to 135 months, for Offense level 29, Criminal History Category 3. Without the erroneous career offender enhancement Mr. Bonilla's guideline would have been Offense Level 27, Criminal History 3 or an advisory guideline range from 87 to 108 months. The Court sentenced Petitioner to a sentence at the low end of the higher guideline range, 108 months.

refused to enforce the appeal waiver because of it. In this case, the difference is 21 months, a larger discrepancy. Because of a mistake made by the sentencing court, Mr. Bonilla will spend almost two more years in prison than he otherwise would have. This case illustrates the significant effects that flow from the different approaches used by the circuits.

Granting review of this case would provide the Supreme Court with an opportunity to establish greater uniformity in how appeal waivers are applied on sentencing appeals. Given the ten of thousands of federal cases in which appeal waivers are used each year, the Court's review the use of appeal waivers and the standards for their enforcement has great importance to federal criminal jurisprudence.

CONCLUSION

Petitioner respectfully requests that the Supreme Court review this case in order to resolve this circuit split as well as to provide further guidance to how and whether appeal waivers should be enforced.

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