No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY M. SLUSSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's waiver of the right to collateral attack in a plea agreement bars a claim that the sentence exceeds the statutory maximum for the offense of conviction.

PARTIES TO THE PROCEEDINGS

The petitioner is Larry M. Slusser. He is presently incarcerated by the United States Bureau of Prisons at FCI Edgefield, located in Edgefield, South Carolina. The named respondent is the United States of America.

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Petitioner Larry M. Slusser respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published as *Slusser v. United States*, 833 F. 3d 437 (6th Cir. 2018), and appears at pages 1a to 3a of the appendix to this petition. The Sixth Circuit denied en banc review without an opinion on August 22, 2018. The district court's unpublished

ruling is available at *Slusser v. United States*, 2016 WL 6892757 (E.D. Tenn. Nov. 22, 2016), and appears at pages 12a to 15a of the appendix to this petition.

JURISDICTION

The judgment of the court of appeals, denying en banc review, was entered on August 22, 2018. Mr. Slusser's petition for writ of certiorari is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

In relevant part, 18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year []
> to . . . possess in or affecting commerce, any firearm or ammunition . . . .

In relevant part, 18 U.S.C. § 924(a)(2) provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

In relevant part, 18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend

> the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

STATEMENT OF THE CASE

Larry Michael Slusser was convicted by a plea of guilty to a violation of 18 U.S.C. § 922(g), having executed a plea agreement that included a waiver of collateral attack on his conviction or sentence under 28 U.S.C. § 2255. The statutory maximum term of imprisonment for that offense is ordinarily 10 years. Mr. Slusser, however, was sentenced to 15 years in prison, the mandatory minimum under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which enhances the penalty for those with at least three qualifying prior convictions. Mr. Slusser later filed a motion to vacate his sentence under 28 U.S.C. § 2255, asserting that his ACCA sentence violates the Constitution in light of this Court's ruling in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and thus exceeds the otherwise applicable 10-year statutory maximum.

The district court denied the claim on the merits, but its conclusion that Mr. Slusser has at least three prior convictions qualifying as ACCA predicates was soon undermined by an ensuing Sixth Circuit decision. The Sixth Circuit granted Mr. Slusser a certificate of appealability, and he appealed the denial of his § 2255 motion. The Sixth Circuit did not reach the merits of his *Johnson* claim, however, instead holding in a published decision that his waiver of collateral attack barred the claim. *Slusser v. United States*, 895 F.3d 437 (6th Cir. 2018). In so holding, the Sixth Circuit created a circuit split. All other courts of appeal agree that such

waivers do not prevent a defendant's claim that the sentence exceeds the statutory maximum—a claim that is rooted in a fundamental error of objective clarity and constitutional gravity.

Factual background

Larry Slusser pled guilty in 2011 to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). His plea agreement contained the following provision, following a waiver of direct appeal:

> In addition, the defendant knowingly and voluntarily waives the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 or to collaterally attack the defendant's conviction(s) and/or resulting sentence. The parties agree that the defendant retains the right to raise, by way of collateral review under § 2255, claims of ineffective assistance of counsel or prosecutorial misconduct not known to the defendant by the time of the entry of judgment.

Plea Agreement at 6, *United States v. Slusser*, No. 3:11-cr-78 (July 18, 2011) (Doc. 12).[1]

Mr. Slusser was sentenced on October 31, 2011 to serve 180 months in prison, followed by four years of supervised release. This sentence exceeds the otherwise applicable statutory maximum of 120 months in prison and a maximum of three years of supervised release. 18 U.S.C. § 924(a)(2); *id.* § 3583(b)(2). The district court based the enhanced sentence on its finding that Mr. Slusser qualifies for the sentencing enhancement under the ACCA, which applies when a defendant has at least three prior convictions for a "violent felony" or "serious drug offense." 18 U.S.C. § 924(e)(1). Specifically, the district court based the

[1] Unless otherwise indicated, all record citations are to the criminal case docketed in the district court, *United States v. Slusser*, No. 3:11-cr-78 (E.D. Tenn.).

ACCA enhancement on (1) a 1994 conviction for burglary (Presentence Report ["PSR"] ¶ 36); (2) a 2001 conviction for delivery of cocaine (PSR ¶ 38); and (3) a 1999 conviction for aggravated assault/aggravated burglary, (PSR ¶ 39). Transcript of Sentencing Hearing at 4–5 (Doc. 54).

In 2015, this Court announced a new, retroactive rule invalidating the ACCA's "residual clause" as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Welch v. United States*, 136 S. Ct. 1257 (2016). In the absence of the residual clause, the definition of "violent felony" has been narrowed to its first prong—the "force clause" (also called the "elements clause")—plus the four enumerated offenses in the second prong. *See* 18 U.S.C. § 924(e) (2)(B).

The Sixth Circuit later authorized Mr. Slusser to file a second or subsequent § 2255 motion asserting his claim that the Supreme Court's new rule in *Johnson* applies retroactively in his case, so that he is no longer subject to the ACCA's 15-year mandatory minimum. In his motion, Mr. Slusser argued that in the absence of the unconstitutional residual clause, his aggravated assault conviction and burglary convictions do not count as violent felonies under the ACCA. Motion to Vacate at 6–7 (Doc. 64-1). In authorizing the district court to consider Mr. Slusser's motion, the Sixth Circuit noted that his convictions for aggravated assault, aggravated burglary, and burglary "may have been counted under the residual clause and may no longer qualify as valid predicate offenses for enhancement purposes." Order at 2, *Slusser v. United States*, No. 16-5671 (6th Cir. Aug. 18, 2016).

The district court denied and dismissed with prejudice Mr. Slusser's motion. *Slusser v. United States*, 2016 WL 6892757, at *4 (E.D. Tenn. Nov. 22, 2016). Central to its ruling on the merits was its finding that Mr. Slusser's 1999 aggravated assault conviction qualifies as a violent felony under the force clause at 18 U.S.C. § 924(e)(2)(B)(i), independent of the residual clause invalidated by *Johnson*. *Id.* The district court did not mention the waiver contained in the plea agreement, and declined to issue a certificate of appealability. *Id.*

Mr. Slusser thereafter moved for a certificate of appealability from the Sixth Circuit, challenging the district court's conclusion that he has a sufficient number of prior convictions subjecting him to the ACCA regardless of the absence of the residual clause. While the motion for a certificate of appealability was pending, the Sixth Circuit issued its decision in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), holding that Tennessee aggravated burglary is not a violent felony in light of the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The decision in *Stitt* undercut the merits of the district court's rejection of Slusser's collateral attack.

Two weeks later, the Sixth Circuit granted Mr. Slusser a certificate of appealability on the question whether his 1999 aggravated assault conviction qualifies as an ACCA predicate. App. 5a–11a. If that conviction does not qualify, and in light of *Stitt*, Mr. Slusser does not have three qualifying ACCA predicates.[2]

[2] This Court subsequently granted the government's petition for certiorari in *Stitt* to decide the question whether Tennessee aggravated burglary qualifies as "burglary"

On appeal, Mr. Slusser argued that his 1999 aggravated assault conviction does not qualify as an ACCA predicate, and that he is therefore entitled to relief from an unconstitutional sentence in excess of the applicable 10-year statutory maximum. The government did not dispute that the available record of that conviction fails to establish that Mr. Slusser was convicted of an ACCA-qualifying variant of the Tennessee aggravated assault statute. It instead urged the court to enforce the § 2255 waiver in his plea agreement.

Mr. Slusser, in arguing that his § 2255 waiver does not bar his claim, relied on the Sixth Circuit's decision in *United States v. Caruthers*, 458 F. 3d 459, 472 (6th Cir. 2006), *abrogated on other grounds by Cradler v. United States*, 891 F. 3d 659 (6th Cir. 2018). In *Caruthers*, the Sixth Circuit surveyed the law of the other circuits, expressly endorsed their uniform view, and said that an otherwise valid appeal waiver "does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded." *Id.* Combining that statement with the Sixth Circuit's holding that waivers of appeal and collateral attack are indistinguishable, *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999), Mr. Slusser relied on the Sixth Circuit's established caselaw to show that his waiver does not bar his claim that his sentence exceeds the statutory maximum for his § 922(g) conviction in light of *Johnson*.

Its endorsement of this waiver exception in *Caruthers* notwithstanding, the Sixth Circuit affirmed the denial of his motion solely on the basis of the waiver in

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for ACCA purposes. *United States v. Stitt*, 138 S. Ct. 1592 (2018) (No. 17-765). The case was argued on October 8, 2018, and remains pending.

his plea agreement. *Slusser v. United States*, 895 F.3d 437 (6th Cir. 2018). The court dismissed its earlier statement in *Caruthers* as dicta, relying instead on the holding in an unpublished decision, *Cox v. United States*, 695 F. App'x 851 (6th Cir. 2017). In *Cox*, the petitioner also sought to raise a *Johnson* claim on collateral review, and was barred due to a plea waiver similar to the one executed by Mr. Slusser. *Id.* at 853–54. The court in *Cox* did not mention *Caruthers* or the petitioner's claim based on *Caruthers* that his sentence exceeded the statutory maximum.

Mr. Slusser petitioned for a rehearing en banc, which the Sixth Circuit denied. App. 4a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Now Split on the Question Whether a Waiver of Collateral Attack Bars a Claim That the Sentence Exceeds the Statutory Maximum.

With the decision below, the Sixth Circuit created a circuit split. Until now, federal courts of appeals universally recognized that claims exempted from an otherwise valid waiver include those for which which denying review would work a "miscarriage of justice" or result in fundamental unfairness.[3] While the scope and rationale of this exception vary, it has been uniform and constant that a defendant's waiver of appeal does not bar a claim that the sentence exceeds the statutory maximum for the offense of conviction. *See*, *e.g.*, *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) ("[A] defendant does not waive his right to appeal a sentence that is unlawful because it exceeds the statutory maximum," as to let such a sentence stand would be a "miscarriage of justice."); *United States v. Hahn*, 359

[3] *See United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) (waiver not controlling where it "would work a miscarriage of justice"); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011) (waiver may be voided for fundamental unfairness); *United States v. Khattak*, 273 F.3d 557, 559 (3d Cir. 2001) (waiver unenforceable where it would result in "miscarriage of justice"); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) ("We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice."); *United States v. Hollins*, 97 F. App'x 477, 479 (5th Cir. 2004) (particular grounds for declining to enforce waiver); *United States v. Bownes*, 405 F.3d 634, 637–38 (7th Cir. 2005) (appeal waivers are scrutinized for violations of due process); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) ("[W]e will not enforce a waiver where to do so would result in a miscarriage of justice."); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (listing circumstances which qualify for "miscarriage of justice" exception); *United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008) (recognizing exception to waiver); *United States v. Adams*, 780 F.3d 1182, 1183–84 (D.C. Cir. 2015) (recognizing exception where "sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice").

F.3d 1315, 1327 (10th Cir. 2004) (en banc) (holding that "miscarriage of justice" exception includes "'where the sentence exceeds the statutory maximum'") (internal citation omitted)).[4] The courts likewise apply this miscarriage-of-justice exception to a defendant's waiver of collateral attack, *see, e.g.*, *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001) ("Of course, the same exceptions to the waiver of the right to appeal, if they arise, would be available to the waiver of the right to collateral attack."),[5] including when the defendant collaterally attacks his ACCA

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[4] *See also Sotirion v. United States*, 617 F.3d 27, 36 (1st Cir. 2010) (reaffirming *Teeter*'s holding that a "miscarriage of justice[] includ[es] where the defendant claims that the sentence imposed exceeded the maximum penalty permitted by law") (citing *Teeter*, 257 F.3d at 25 & n.10)); *United States v. Rosa*, 123 F.3d 94, 100 & n.5, 101 (2d Cir. 1997) (recognizing that "no circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined" and noting that government agreed that sentence above the statutory maximum "would be appealable despite the waiver"); *United States v. Zander*, 319 F. App'x 146, 150 (3d Cir. 2009) (describing the "miscarriage of justice" exception as permitting relief from otherwise valid waiver for "a sentence eclipsing the statutory maximum") (citing *Khattak*, 273 F.3d at 562; *Teeter*, 257 F.3d at 25); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) ("[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute . . . ."); *Hollins*, 97 F. App'x at 479 ("[A] § 2255 waiver does not preclude review of a sentence that exceeds the statutory maximum."); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014) ("[A]n appeal waiver will not prevent a defendant from challenging [] a sentence that exceeds the statutory maximum for the defendant's particular crime . . . ."); *Andis*, 333 F.3d at 891–92 ("[I]n this Circuit a defendant has the right to appeal [an illegal sentence in excess of statutory maximum], even though there exists an otherwise valid waiver."); *Bibler*, 495 F.3d at 624 ("An appeal waiver will not apply if . . . the sentence violates the law. . . . A sentence is illegal if it exceeds the permissible statutory penalty for the crime[.]"); *United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993) ("[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute . . . .") (internal citation and quotation marks omitted)).

[5] *See also United States v. Ciampi*, 419 F.3d 20, 25 (1st Cir. 2005); *United States v. Santos*, 604 F. App'x 83, 85 (2d Cir. 2015); *United States v. Mabry*, 536 F.3d 231, 242–43 (3d Cir. 2008); *United States v. Crain*, 877 F.3d 637, 645 (5th Cir. 2017);

sentence as illegal and thus in excess of the applicable 10-year statutory maximum, *e.g.*, *DeRoo v. United States*, 223 F.3d 919, 923, 926 (8th Cir. 2000).

Before reversing course in this case, the Sixth Circuit likewise endorsed the principle that there must exist some exceptions to an otherwise valid appeal waiver, and that one of the necessary exceptions is an appeal raising a claim that the sentence exceeds the statutory maximum. *United States v. Caruthers*, 458 F. 3d 459, 472 (6th Cir. 2006) (agreeing that whatever the scope and rationale of the exception, "an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded"), *abrogated on other grounds by Cradler v. United States*, 891 F. 3d 659 (6th Cir. 2018). Also like the other circuits, the Sixth Circuit "'find[s] no principled means of distinguishing' between a waiver of the right to file a § 2255 motion and the waiver of a right to appeal." *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999) (quoting *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994)).

Even the Department of Justice recognizes this uniform exception. In its Criminal Resource Manual, it states that "[a] sentencing appeal waiver provision does not waive *all* claims on appeal." U.S. Dep't of Justice, Criminal Resource Manual § 626(1) (emphasis added).[6] Among other things, "a defendant's claim that . . . *the sentence exceeded the statutory maximum* [] will be reviewed on the merits by

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Ackerland v. United States, 633 F.3d 698, 701 (8th Cir. 2011); *United States v. Felder*, 786 F. Supp. 2d 320, 322 (D.D.C. 2011).

[6] This Manual is available at https://www.justice.gov/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law.

a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement." *Id.* (emphasis added) (citing *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)).[7] Reflecting this general rule, the Department of Justice provides suggested waiver language:

> The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

Id.

Given this long-settled law and practice, district courts have declined to enforce § 2255 waivers in cases involving *Johnson* claims on collateral review, regardless of whether the plea agreement specifies such an exception. For example, in *United States v. Cloud*, 197 F. Supp. 3d 1263 (E.D. Wash. 2016), the defendant was, like Mr. Slusser, convicted under 18 U.S.C. § 922(g) and sentenced to 15 years under the ACCA. The petitioner had, again like Mr. Slusser, agreed to waive his right to collateral attack under 28 U.S.C. § 2255. The district court declined to enforce the waiver because "'[a]n appellate waiver will not apply if . . . the sentence

[7] The Department of Justice's reference to "sentencing appeal waiver" includes waiver of collateral attack: "A broad sentencing appeal waiver requires the defendant to waive any and all sentencing issues on appeal and through collateral attack." U.S. Dep't of Justice, Criminal Resource Manual § 626(1).

violates the law," and "[a] sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Cloud*, 197 F. Supp. 3d at 1269 (relying on *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007)).[8]

Yet, despite the agreement of the circuits, the guidance of the Department of Justice, and the routine application of the exception in *Johnson* cases elsewhere, the U.S. Attorney here urged the Sixth Circuit to enforce Mr. Slusser's § 2255 waiver, resulting in a stark conflict where none previously existed. The split is also intractable, unlike when this Court denied *certiorari* in *Cox v. United States*, 695 F. App'x 851 (6th Cir. 2017), the unpublished decision upon which the Sixth Circuit relied. Back then, *Cox* could have been an anomaly. The Court in *Cox* enforced the waiver to bar a *Johnson* claim (not mentioning *Caruthers*), *id.* at 853–54, but in other cases it continued to rely on *Caruthers* for the rule that a waiver is unenforceable when the sentence exceeds or potentially exceeds the statutory maximum, *see Curtis v. United States*, 699 F. App'x 546, 547 (6th Cir. 2017); *United States v. Page*, 662 F. App'x 337, 339 (6th Cir. 2016), or to acknowledge that a waiver would not be enforceable in such circumstances, *United States v. Milton*, No.

[8] In the Ninth and Seventh Circuits, Mr. Slusser's waiver would be unenforceable for the additional reason that he claims that his sentence is based on the unconstitutional residual clause. *See Bibler*, 495 F.3d at 624 (holding that an otherwise valid appeal waiver does not bar a claim that a sentence is unconstitutional); *Cross v. United States*, 892 F.3d 288, 298–99 (7th Cir. 2018) (holding that § 2255 waiver excepting challenge to "the court's reliance on any constitutionally impermissible factor" may be reasonably interpreted to include "*any* unconstitutional input" in sentencing, which includes the unconstitutional residual clause) (emphasis added)). Mr. Slusser made this alternative argument in the Sixth Circuit, *see* Reply Br. at 5–11; Pet. for En Banc R'hg at 11–15, but the court did not address it.

17-5681, 2018 U.S. App. LEXIS 2347, at *2 (6th Cir. Jan. 30, 2018); *Johnson v. United States*, No. 17-3556, 2018 U.S. App. LEXIS 14824, at *6 (6th Cir. June 1, 2018).

Now, with the published decision below, the Sixth Circuit not only diverged from other circuits but formally repudiated its endorsement of the exception in *Caruthers*. *Slusser*, 895 F.3d at 440 ("The indication in *Caruthers* that appellate waiver does not preclude a collateral attack on an above-statutory-maximum sentence was dicta, not the holding of the Court."). By denying en banc review, the Sixth Circuit signaled that its solitary path is set in stone, so that the conflict will persist until resolved by this Court. Meanwhile, courts of appeals continue to rule on the many *Johnson* claims and their progeny still working their way through the system. A quick resolution of the disagreement will prevent further confusion, conflict, and divergent outcomes.

II. The Sixth Circuit Is Wrong.

Plea agreements are "unique contracts 'in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.'" *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996) (internal citation omitted). While the courts of appeals generally agree that a defendant may validly waive his right to appeal as part of a plea agreement, they also have concluded that enforceability of such a waiver is subject to exception. *See id.* at 555 (noting that "no circuit has held that these contractual waivers are enforceable on a basis that is unlimited and unexamined"); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en

banc) (examining plea agreements under "contract analysis tempered by public policy"). The purpose of allowing review of some claims despite a valid waiver is to protect the public interests in fundamental fairness, legality, and judicial integrity. *See United States v. Riggi*, 649 F.3d 143, 148 (2d Cir. 2011); *Ready*, 82 F.3d at 555, 558–59; *United States v. Bownes*, 405 F.3d 634, 637–38 (7th Cir. 2005) (describing "the limitations on waiver of the right of appeal in a criminal case" as "imposed by judicial interpretations of the due process clause").

Applying a common strain of the exception, courts refuse to enforce an otherwise valid waiver if doing so would result in a "miscarriage of justice." *E.g.*, *United States v. Guillen*, 561 F.3d 527, 529–30 (D.C. Cir. 2009) (en banc); *Hahn*, 359 F.3d at 1327. This category of exemption is narrow and applied sparingly, *see United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001), and includes such claims as the defendant received ineffective assistance of counsel in agreeing to the waiver, *see Guillen*, 561 F.3d at 529, or that the sentence was based on a constitutionally impermissible factor (such as race), *see Andis*, 333 F.3d at 891. But whatever its scope, the miscarriage-of-justice exception invariably includes a claim that the sentence exceeds the statutory maximum for the offense of conviction. As shown by the cases collected above, every circuit except the Sixth expressly reserves for review a defendant's claim that the sentence exceeds the statutory maximum, regardless of the existence of an otherwise valid waiver of appeal or collateral attack.

This reservation makes sense. A sentence exceeding the statutory maximum

is an error of objective clarity and constitutional gravity. It violates a "constitutional protection[] of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000) (quoting Fourteenth Amendment). As the Eleventh Circuit has explained, "there are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers. . . . It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute." *United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993).

Until now, the government agreed. For example, in *United States v. Rosa*, 123 F.3d 94 (2d Cir. 1997), the government readily acknowledged that "some limits upon the applicability of the waiver provision must inherently survive," and that these limits must include the case in which a defendant "wants to appeal a sentence of 11 years' imprisonment for a crime that statutorily carries a maximum of 10 years." *Id.* at 100 n.5. The government recognized "that the sentencing range was limited by the maximum sentence provided for by the offense statute," and "that this sentence would be appealable despite the waiver." *Id.* After *Johnson*, the Department of Justice conveyed to prosecutors its policy not to rely on appeal waivers in ACCA cases in which 'the defendant is, post *Johnson*, ineligible for the 15-year minimum sentence created by the [Act].'" *See United States v. Munoz-Navarro*, 803 F.3d 765, 766 (5th Cir. 2015) (quoting Gov't Letter to Clerk, *United States v. Munoz-Navarro*, 803 F.3d 765 (5th Cir. 2015) (No. 13-10441) (filed Aug. 18,

2015)).

The Sixth Circuit, in repudiating *Caruthers* and this well-settled exception, reasoned that Mr. Slusser "assume[d] the risk that a shift in the legal landscape may engender buyer's remorse." *Slusser*, 895 F.3d at 440 (internal quotation marks omitted). But the case the court relied on, *United States v. Morrison*, 852 F.3d 488, 490–91 (6th Cir. 2017), did not involve a claim that the sentence exceeded the statutory maximum, but rather a claim that the advisory guideline range was miscalculated in light of *Johnson*—which does not implicate statutory penalty limits. *Id.* at 489–90. Moreover, the very premise of the exception is that a sentence imposed in excess of the statutory maximum violates the fundamental right to due process and therefore overrides any assumption of risk considered under a contract analysis. *Hahn*, 359 F.3d at 1325, 1327. The Sixth Circuit erred in holding otherwise.

III. A Single Rule Will Create Uniformity and Check Disparate Prosecutorial Practices.

The now-reigning division in the circuits not only leads to different (and erroneous) outcomes in equally meritorious *Johnson* cases, but will be exacerbated by uneven practices by prosecutors. Among the districts in the Sixth Circuit, including the district in this case, prosecutors have declined to enforce waivers in some *Johnson* cases, *e.g.*, *United States v. Goodson*, 700 F. App'x 417, 419 n.2 (6th Cir. 2017) (Eastern District of Michigan)—including in cases *after* the decision in this case, *e.g.*, Motion for Remand at 2 n.3, *Frazier v. United States*, No. 17-5585 (6th Cir. Aug. 1, 2018) (Eastern District of Tennessee) ("[T]he United States, in the

interests of justice, expressly waives reliance on [§ 2255] waiver in this case."). This practice comports with the practice in at least some other federal districts, where prosecutors adhere to the Department of Justice's policy of declining to enforce waivers in cases like this one, where a *Johnson* claim imperils the ACCA's enhanced penalty. *See, e.g.*, *Munoz-Navarro*, 803 F.3d at 766.

In many other cases, however, prosecutors have relied on the decision below to enforce a waiver and end any chance of relief from an unconstitutional sentence outside the statutory bounds. *E.g.*, *Gilmer v. United States*, No. 3:16-cv-01563, 2018 U.S. Dist. LEXIS 121706, at *5 (M.D. Tenn. July 20, 2018) ("*Slusser* explicitly held that the Court must enforce waivers even if it results in a petitioner serving longer than the statutory maximum sentence because of a change in the law."). In at least one other Circuit, too, prosecutors have cited *Slusser* in an attempt to enforce a waiver in a *Johnson* case, *see, e.g.*, Gov't Br. at 19, *United States v. Cornette*, No. 18-6041 (4th Cir. Oct. 19, 2018), questioning the settled law in that circuit.

Prosecutorial discretion can have an important role in criminal justice when it is tied to guiding principles, and a dangerous role when it is not. In all of its aspects, including collateral review, "[a] just legal system seeks not only to treat different cases differently but also to treat like cases alike." *Pepper v. United States*, 562 U.S. 476, 510 (2011) (Breyer, J., concurring). Where, as here, prosecutors are empowered to decide for themselves whether to set aside the plea waiver, disparity is inevitable. The only constant is the unchecked power of the prosecutor. So long as the Sixth Circuit's decision stands, defendants in that circuit with meritorious

claims that their sentence exceeds the statutory maximum will be at the mercy of the prosecutor to decide whether they are deserving of relief. Only this Court's intervention can ensure nationwide uniformity consistent with the consensus of the circuits, fundamental fairness, and the continuing legitimacy of the criminal justice system.

IV. This Case Represents an Ideal Vehicle for Addressing This Important Question.

This case squarely presents the question whether a § 2255 waiver bars review of a defendant's claim that his ACCA sentence is unconstitutional and thus exceeds the statutory maximum. The Sixth Circuit has set out on a course of its own, and declined to rehear the issue. The Sixth Circuit's singular approach—and the fundamental public interests at stake—are embodied in this case.

There is also good reason to believe that Mr. Slusser would prevail on his claims should the court of appeals review them. The government did not dispute Mr. Slusser's argument that his 1999 aggravated assault conviction does not qualify as a violent felony, or that he otherwise does not have three qualifying convictions under current binding law. Whether Mr. Slusser's § 2255 waiver means that he must nevertheless serve a sentence in excess of the 10-year maximum is a question of exquisite importance to him, and to all others whose similar waivers may be interpreted to bar a *Johnson* claim. His case presents the ideal opportunity for this Court to avoid a new and divisive line of waiver law—one that threatens to be haphazardly applied and is disjoined from principle, history, and fairness.

CONCLUSION

For the reasons set forth above, Larry M. Slusser requests that the petition for certiorari be granted.

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