NO. _____

In The
Supreme Court of the United States

JUSTIN COLE MILAM,

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. Are appeal waivers presented in federal criminal plea agreements an unconstitutional overreach by the Government preventing review of constitutional questions [raised in the appeal] at the Appellate Division in violation of due process guaranteed by the Fifth and Fourteenth Amendments?

Subpart A: Can a plea containing an appeal waiver ever be knowing and voluntary where the defendant is "bargaining" for prospective sentencing favor of a Government who is not bound to perform (thus illusory), and

Subpart B: Where he is not counseled by a defense pursuing any constitutional protections or mitigation?

II. Should [claims outside the waiver including IAC] be limited to "face of record" standard where that precludes review of failure to act or false inducement not appearing in the record, insulating failure by defense counsel to protect or fully advise, as well as illusory inducements, on direct review?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Justin Cole Milam respectfully petitions this Court for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINION AND ORDER BELOW

The Fourth Circuit Court of Appeals' opinion (Pet. App. 1a-4a) is unpublished. The District Court's Judgment (Pet. App. 6a - 12a) is unpublished.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on January 4, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendment [applicable to the States] to the U.S. Constitution provide that "No person ... shall be deprived of life, liberty, or property, without due process of law...". The Fourteenth Amendment directs no State "shall...deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

The Supreme Court has applied the Fifth and Fourteenth Amendments' due process clause to protect a defendant's statutory right to appeal a criminal conviction. The Court has held that unreasonable deterrents or impediments placed upon the right to appeal violate the defendant's constitutional right to due process. The Supreme Court has not reached the question of whether bargaining away a defendant's right to appeal constitutes an unreasonable impediment to appellate review.

Defendant contends waiver of the right to appeal made during the plea bargaining process constitutes an unconstitutional impediment to the appellate process in violation of the Fifth and Fourteenth Amendment and equal protection of the laws.

Since the 1990s, appeal waivers have become official government policy in Justice Department federal criminal plea agreements. This Court has not expressly held plea agreements to be a contract; however, in all respects this is a contract and as such defenses, including illusory terms, should apply and be an avenue of relief where the agreement with appeal waiver is unconscionable, terms illusory, there is undue influence, duress, or circumstances giving rise to results adverse to public policy considerations. The "epidemic" of appeal waivers joins an arsenal of non-negotiable items attendant to resolving criminal prosecutions with which prosecutors can easily overreach, to include acceptance of responsibility points, promises to consider without obligation 5k1.1 and Rule 35 sentence reduction motions, dismissal

of charges [often resulting from "stacking", Andrew Dean, "Challenging Appeal Waivers", 61 Buffalo Law Review 1191, 1210] in exchange for "timely" pleas, and threats to seek maximums upon refusal to plead.

Courts in the country apply different standards in deciding on motions to dismiss appeal whether to uphold appeal waivers.

To prevail on a procedural due process violation claim, a criminal defendant must satisfy the Court that 1) there was a deprivation; 2) of life, liberty or property; and 3) in violation of procedural safeguards. This Court has recognized that the right to appeal, once established, constitutes due process and the *unfettered* right to open and equal access to the Courts shall not be impeded. See, *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Id.* at 708; Accord, *Hurtado v. California*, 110 U.S. 516, 537 (1884).

Any impediment of the custom of appeal is violation of that process due. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (Justice Stewart, concluding, "...A defendant's exercise of a right to appeal must be free and unfettered.") Quoting from

its decision in *Rinaldi v. Yeager*, 384 U.S. 305, 310-11 (1966), the Court emphasized that while "[t]his Court has never held that the States are required to establish avenues of appellate review, ... it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." 395 U.S. at 724.[1]

Here, because a young, naive and unwary defendant misled by underperforming [or coercive] counsel and the illusory promise of a sentencing consideration by the Government signed a plea agreement containing waiver of appeal, he was deprived of liberty [26 years] without regular due process of law. Despite matters outside the appeal waiver, including ineffective assistance of counsel and prosecutorial misconduct, as well as whether the plea was knowing and voluntary based thereon, the circuit court declined review of complete failure of process below.

Courts acknowledge uniformly plea waivers; however, the *reasoning* is in conflict as to the underpinnings for such approval, creating disparity.

Moreover, the Justice Department employs discretion whether to enforce plea waivers, creating disparity. Where, as here, the Government does not perform (nor does it purport to promise to perform the illusory offer of substantial assistance reduction driving the plea bargain), the waiver remains valid, and the Government enforces it at the appellate division, subverting justice.

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[1] Gregory M. Dyer & Brendon Judge, Criminal Defendants' Waiver of the Right to Appeal--An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649 (1990). http://scholarship.law.nd.edu/ndlx/vol65/iss4/3.

Where courts find plea agreements a valid exercise of contract between the parties, they fail to analyze the validity of the waivers under the illusory nature of the bargain for substantial assistance where by statute only the Justice Department can file the reduction motions. Indeed, only the Justice Department can determine the quality of the assistance without explanation or review.

Finally, waivers of the right to appeal precede possible error, forcing a false "knowing and voluntary" requirement on a defendant prior to sentencing. No sound public policy is advanced by such prophylactic procedure.

It is not a valid exercise of this Court's oversight authority to enforce the Constitution on behalf of the individual to decline review in order to slowly minimize the impact on appeal waivers. The right to resort to the appellate division, once established, must remain without exception "unfettered." Appeal waivers are not a valid exercise of Governmental authority and employing that as a condition of negotiated plea in criminal cases invades the solemn oversight of the appellate division with no sound public policy rationale.

There can be no greater miscarriage of justice than a 26 year prison term for a 21 year old with no prior record premised upon an unexamined plea and judgment secured by false, coerced, or futile promises. This result attacks the very foundation upon which criminal justice exists, *to wit*: to ensure adequate deterrence but equal punishment for the same offense within the constitutional guidelines developed through cases and code. Where no robust defense protected an unwary, naive accused from a prosecutor willing to overreach unchecked, it is imperative the appellate

division act as an effective, reliable relief through consistently applied rationale, and not as a toothless milquetoast abandoning its oversight. Appeal waivers as presently employed nationally with inconsistent rationale on appeal upholding them do not serve justice, carry far too much opportunity for abuse outside the record, and all but eliminates a core function of our Constitutional duty to protect the individual. Milam raised below substantial constitutional questions, which remain unexamined because review was barred by the appeal waiver he failed to understand.

He should be heard fully on appeal.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. Defendant was not indicted in the district court; criminal information was filed 21 August 2017 alleging "manufacture of child pornography". On 22 August 2017 the district court set the matter for "plea to criminal information" for 10 October 2017. Defendant entered a plea on 12 October 2017 to that charge. The Memorandum of Plea contained an appeal waiver. Sentencing and judgment was first set for 9 January 2018; however, the district court expressed concern there was no psychological evaluation and continued the matter for that presentation. Sentencing proceeded 5 April 2018, and Defendant was sentenced to 312 months. The Court described in the Statement of Reasons that this 26 year sentence was a "variance" sentence on a guideline of life, statutory cap of 30 years. See, App. 1a.

2. Defendant filed a pro se, handwritten Notice of Appeal from lock-up on 5 April 2018. Defense counsel did not file Notice of Appeal upon request.

3. Defendant's brief was filed in the Fourth Circuit Court of Appeals on 18 October 2018, raising constitutional issues as well as ineffective assistance of counsel and sufficiency of the factual basis to support the offense to which defendant pled.

4. The Government moved to dismiss the appeal without responding to the defendant's brief in reliance upon the appeal waiver.

5. On 4 January 2019 the Circuit Court in an unpublished decision granted the Government's motion on all issues except those it considered outside the appeal waiver, and as to those, the Court declined to hear IAC on direct appeal (including the argument that counsel's performance resulted in failure of knowing and voluntary plea, including the appeal waiver) and summarily announced the facts were sufficient to support the guilty plea without elaboration.

REASONS FOR GRANTING THE PETITION

There is an abiding injustice recurring in the criminal courts of the United States each and every day because a Government who bears enormous and overwhelming power over the outcome in a criminal case forces a plea in which a defendant has no choice – prior to potential error occurring – but to agree to forego all effective appellate review, and to do so prospectively, abandoning confrontation of the evidence against him, challenge of the sufficiency thereof, or correction of any error during the process or at a later sentencing proceeding, all for the most often futile hope of sentence relief which is itself solely at the discretion of the Government pursuant to 5K1.1 and Rule 35, and facilitated often as here by failure of the defense to pursue any protections leading to an unknowing and involuntary -- or indeed coerced -- plea including an appeal waiver.

This unequal – or no – bargaining power results in denial of due process where, as here, the defendant appeals an unjust (possibly illegal and unconstitutionally imposed) sentence for which he had no challenge conducted at the trial court level by the defense (therefore no "ineffectiveness appearing of record"), and the appellate division on motion by the Government takes the position it is bound by the waiver and declines the appellate review, dismissing the appeal, and otherwise not reviewing IAC on that "of record" standard.

It is not sufficient to hold that the defendant retains some issues on appeal where, as here, the appellate division summarily and routinely refuses to address IAC (leading directly to failure of knowing and voluntariness) on direct appeal,

referring defendant (at this point *pro se*) back to the trial court, and then otherwise the court, as here, assumes the sufficiency of the factual basis without elaboration evading further review.

Denial of review at the appellate level is no different than denial of appeal by refusing to file the notice at the trial court level. While in this case defense counsel failed to file the notice of appeal, the defendant offered to his jailer a hand-written notice of appeal on the date of the judgment, evidencing his lack of comprehension of the appeal waiver and distrust of his defense.

Due process does not require efficient justice; it does require effective justice. Injecting an additional layer of review, *to wit*: motion to dismiss the appeal for appeal waiver, prior to the appellate division reviewing the merits on direct appeal upon unwary defendants at the demand of a Government enforcing an unconscionable contract with illusory promises is efficient prosecution, eliminating due process at the direct detriment to individual liberty, something due process is specifically designed to avoid. To aver the bargaining power is equal in this process is a legal fiction designed to do nothing more than move cases at the cost of individual protections. This the Constitutional guarantee of due process and equal protection of law does not allow.

No just result can issue from this process, evidenced by the many appeals nonetheless filed in the United States courts where waivers are contained in the plea agreement. Although an exact figure would be impossible to determine, appeal

waivers have become standard fare in plea agreements.[2] As early as 2003, a USSG study revealed that nearly two-thirds of plea agreements that year contained appeal waivers.[3] In the 9th Circuit, 90% of plea agreements contain an appeal waiver; in the 2nd, 76%.[4] Their use continues to increase, yet appeals have not declined. U.S. Sentencing Commission and U.S. Courts statistical reports show that as a percentage of cases sentenced, appeals between 2012 and 2017 varied from 14.9% to 18.1% per year, with the highest percentage occurring in 2017.[5]

If anything, efficiency is benefitted by eliminating this preliminary motion to dismiss, and banning appeal waivers. The Government should not be in the position of foreclosing appellate review as an interested party. It is precisely because most criminal cases in federal court resolve by plea, and of those the vast majority contain by boilerplate inclusion an appeal waiver, that this practice eroding due process must cease. Citizens before the Court deserve the careful, unencumbered review of an objective appellate division, without interference by the very Government pursuing the conviction and incarceration of the defendant. This is particularly so when the Government coerces the plea with the thin enticement of favor at sentencing, and is the only party who can actually request the favor or decline to do so without criticism. With an acquiescent [or coercive] defense counsel who both fails to test the evidence

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[2] Holly P. Pratesi, Waive Goodbye to Appellate Review of Plea Bargaining: Specific Performance of Appellate Waiver Provisions Should be Limited to Extraordinary Circumstances, 81 Brooklyn L. Rev. (2016).

[3] Nancy J. King and Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L. Journal 209, 212 (2005)

[4] Andrew Dean, Challenging Appeal Waivers, 61 Buffalo L. Journal 1191, 1197 (2013)

[5] USSC.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2012; 2013; 2014; 2015; 2016; 2017 and www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2012; 2013; 2014; 2015; 2016 2017

and, as here, coerces the defendant into an unwarned plea, the defendant is left without remedy in this process, despite matters outside the waiver. This represents a grossly unbalanced bargaining position, and an inappropriate process all but eliminating the appellate division's solemn role of oversight, as occurred at the Circuit level in this case.

To be very clear: In this case an extraordinarily naïve 20 year old raised in a fundamentalist Christian family secluded from outside influences socially, with no prior criminal record, who used his cell phone to view and trade child pornography in secret with no evidence of any actual victim in the judgment subject of any abuse by him, who was misled by his defense attorney - who failed on this empty record to pursue any defense or mitigation - telling him his parents wanted him to plead guilty to a *manufacturing* cp plea including an appeal waiver on the counsel that if not he would go to prison for life and if he did he would get "5-7 years" for substantial assistance for which he had no hope to pursue or receive, received 26 years in federal custody. Indeed, the only facts in any way supportive of the appeal in the record came from the prosecution and the judge, not the defense. He is the only child of a couple who are lawful citizens from a nice home. He was in college at Liberty University at the time of his arrest. The evidence all existed on his cell phone. No competent psychological mitigation was developed for the District Court to aid in her judgment. Because of that *lack* of any competent defense or mitigation in the record, the Circuit Court refused to review this matter for IAC; it summarily deemed the [unchallenged] "facts" sufficient without illumination of what those compelling facts were; and

otherwise it held the [thus coerced involuntary and unknowing] waiver precluded further review of constitutional error raised below.

This obscene process violates all Constitutional protections to which this individual was entitled. To say this is a unique case is not to understand what occurs in district courts all across this Nation. A cooperative, overworked or lazy defense combined with a prosecution which seeks to eliminate all avenues to impede finality of the judgment, enforced by a district court taking a hands-off approach to such and finally approved by an appellate division unguided by consistent rationale facilitates the process, all for the purpose of efficiency. For efficiency, this child will spend more time in prison than he has been alive. He deserves better than we have given him. The Constitution promises him effective justice, not efficient prosecution. This Court must enforce that promise.

I. The Question Presented Is The Subject Of An Acknowledged Split Regarding the Rationale and Standards of Review for Approving Appeal Waivers.

This Court in *Garza v. Idaho* recently opined on the Sixth Amendment right to counsel for the defense and failure to file a notice of appeal in a case in which defendant entered into a plea agreement containing an appeal waiver. This Court said matters outside the waiver are viable, and failure to file the notice of appeal when requested was violation of the duty of counsel.

No Circuit Court published has decided that appeal waivers are an unconstitutional overreach by the Government in an unbalanced bargaining relationship. However, 83 of 94 federal districts have boilerplate plea agreements

containing appeal waivers[6]; thus in almost 90% of our federal courts, the United States Department of Justice seeks to foreclose appeal by waiver, while promising *to consider* favors to which by statute they are not bound (Rule 35 and 5k1.1), and as such are illusory to entice defendants being threatened with harsh punishments to enter into pleas. The rational for same differs by Circuit. The incidents of reduction for substantial assistance in cp cases vary across all circuits, creating gross disparity. Reduction for substantial assistance in these cases is statistically rare in EDNC.

This process is defective, rift with abuse, facilitated by ineffective counsel who are unlikely to be reprimanded (as here) because of the standard on direct review ("of record" ineffectiveness), and unnecessary to effect efficient justice. Indeed, in light of the fact that the Justice Department while retaining the option whether to enforce the appeal waivers after defendant's brief is filed in individual cases (dependent upon argument) nevertheless recently more routinely does so, there is compelling argument that efficiency has suffered, and the time it takes to review the case below is longer. U.S. Sentencing Commission and U.S. Courts statistical reports show that as a percentage of cases sentenced, appeals between 2012 and 2017 varied from 14.9% to 18.1% per year, with the highest percentage occurring in 2017.[7]

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[6] Susan R. Klein Waiving the Criminal Justice System: An Empirical and Constitutional Analysis, University of Texas School of Law Public Law and Legal Theory Research Paper Series Number 556 (http://ssrn.com/abstract=2422545).

[7] USSC.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2012; 2013; 2014; 2015; 2016; 2017 and www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2012; 2013; 2014; 2015; 2016 2017

As such, there is no just, consistent or reasonable rationale for appeal waivers. They do not facilitate efficiency; they only facilitate efficient prosecution without appellate review.

The distinctions given for impeding appellate review based upon the presence of an appeal waiver are "unreasoned". As an initial matter, it is not for the Government to decide what due process requires, it is for courts in interpreting it. *Vitek v. Jones*, 445 U.S. 480, 489 (1980). This Court - it is asserted - approved appeal waivers expressly in *Brady v. U.S.*, 397 U.S. 742 (1970). However, *Brady* concerned "the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or a judge." The Court elaborated: "Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 749. The Court assumed competent counsel. In that case, the defendant argued that possibility of death precluded the voluntariness of his decision not to go to trial; however, in *Brady* the co-defendant pled and stood ready to testify against him, and it was that impetus the Court found compelling for the plea forgoing trial by jury with the possibility of death sentence. Reduced exposure of outcomes does not invalidate the plea, according to the Court. *Id.* at 752: "We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending

from acquittal to conviction and a higher penalty authorized by law for the crime charged."

Appeal waivers are not so well aligned with the rationale in *Brady*, that is to "preclude the possibility of the maximum penalty authorized by law", *Id.* at 753. One can engage in negotiated plea to affect the concerns addressed by the Court in *Brady*, without going that step too far to preclude all objective review of the proceedings by the appellate division, which has no rational relationship to trial by jury and the sentencing.

Moreover, finality of the judgment is simply not a valid rationale when juxtaposed against the range of possible errors which could occur warranting review. Where an appeal might ensue, now we have an appeal, and motion to dismiss litigation requiring review of the appellate division, prior to appeal, if any. As Justice Stewart observed, the courts should ensure the avenue to correct injustices remains unfettered, which greatly outweighs any perceived efficiency of a system permitting waiver of review of the appellate division of constitutional or other error affecting the quality of our system of justice.

Other courts approving appeal waivers include the following rationale: *Defendant knowingly and voluntarily entered into the waiver*, *Barnes v. Lynaugh*, 817 F.2d 336 (5th Cir. 1987); *State v. McKinney*, 406 So.2d 160 (La. 1981); *People v. Williams*, 143 A.D.2d 162, 531 N.Y.S.2d 807 (1988); *People v. Smith*, 141 A.D.2d 988, 531 N.Y.S.2d 38 (1988); *People v. Juliano*, 74 A.D.2d 881, 426 N.Y.S.2d 23 (1980); *People v. Jasper*, 107 Misc. 2d 992, 436 N.Y.S.2d 18 (Sup. Ct. 1981). *See*, N.D.L.W.

Vol. 65, page 652. These courts do not address whether the appeal waivers should be allowed at all.

Courts holding waivers invalid cite public policy reasons, that it is an important state interest to afford appeal and no legitimate state interest is furthered by its waiver. *People v. Ventura*, 139 A.D.2d 196, 531 N.Y.S.2d 526 (1988). Appeal is an important right to be preserved as a necessary safeguard. *People v. Ramos*, 30 A.D.2d 848, 292 N.Y.S.2d 938 (1968). Public policy forbids prosecutors from insulating themselves from review by bargaining away defendant's rights to appeal. *State v. Ethington*, 121 Ariz. 572, 592 P.2d 768 (1979); *People v. Stevenson*, 60 Mich. App. 614, 231 N.W.2d 476 (1975).

In *United States v. Melancon*, 972 F.2d 556 (1992), the Fifth Circuit court recognized the district court's discretion whether to accept appeal waivers, and that there may be sound policy reasons for refusing to accept such waivers. The Sixth and D.C. Circuits will not enforce waiver if result of IAC. *United States v. Ataya*, __ F.3d __ (6th Cir. 16-2611) (Decided 3-2-2018) (Enforceability of appellate waiver stands or falls with validity of the agreement, whether knowing and voluntary as a whole); *United States v. Guillen*, 561 F.3d 527 (D.C. 2009) (Where defendant makes colorable claim of IAC in agreeing to the waiver, waiver is not enforceable). The *Guillen* Court said: "By waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court. Rather, the defendant waives his right to contest only a sentence within the statutory range and imposed under fair

procedures; his waiver relieves neither his attorney nor the district court of their obligations to satisfy applicable constitutional requirements." *Id*. at 530.

Courts critical of the appeal waiver are: *United States v. Mutschler*, 152 F. Supp. 3d 1331 (W.D. Washington) (2016) ("This Matter has prompted the Court to question the now nationwide practice of routinely approving plea agreements containing unilateral waivers of the right to appeal...Yet, in perhaps no other context involving such unequal bargaining positions have the courts so fully abdicated their responsibility for evaluating the conscionability of the parties' agreement. Federal prosecutors in virtually every district have been permitted to demand that defendants entering guilty pleas waive almost the entire panoply of rights, including the right to appeal.....Guilty pleas are generally negotiated outside the courtroom, between just the lawyers, without the defendant, and in the absence of any witnesses or recording mechanism. This "scandalously casual" process of "horse trading," which determine who goes to prison and for how long, is not some adjunct to the criminal justice system; it is the criminal justice system." *citing* Robert E. Scott & William J. Stuntz Plea Bargaining as a Contract 101 Yale L.J. 1909 (1992) (unilateral appeal waiver, government free to appeal). In *United States v. Vanderwerff*, 2012 WL 2514933, at 1 (D. Colo. June 28, 2012) the defendant was indicted on three charges relating to the possession of child pornography. In a proposed plea agreement, the prosecution agreed to dismiss two of the charges if the defendant pled guilty and waived his right to appeal "any matter in connection with [the] prosecution." This would reduce the potential sentence to probation to ten years of imprisonment.

District Judge John Kane rejected the plea agreement, reasoning that "[i]ndiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions." In August of 2012, Judge Kane accepted a new plea agreement with a recommended sentence of no more than twelve years. The new agreement did not contain an appeal waiver. In *United States v. Johnson*, 999 F. Supp. 437 (D.D.C. 1997) District Judge rejected a plea agreement with an appeal waiver, stating that waiver of right to appeal was inherently uninformed and unintelligent. In *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) District Judge Paul Friedmand rejected a plea agreement with an appeal waiver on "knowing and voluntary" grounds, saying in his opinion a defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed.

Some courts provide an "escape hatch" for miscarriage of justice; North Carolina does not. First Circuit: "We caution, however, that because such waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases. When all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable). Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. As a subset of this

premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing." *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001); Eighth Circuit: "Even when these conditions are met, however, we will not enforce a waiver where to do so would result in a miscarriage of justice." *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); Tenth Circuit: "This analysis calls for the court of appeals, in reviewing appeals brought after a defendant has entered into an appeal waiver, 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 result in a miscarriage of justice as we define herein. Court then defines miscarriage of justice: Appellate waivers are subject to certain exceptions, including [1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *United States v. Elliott*, 264 F.3d 1171, 1173 (10th Cir. 2001) (citing *United States v. Cockerham*, 237 F.3d 1179, 1182 (10th Cir. 2001)). *United States v. Hahn*, 359 F.3d 1315 (2004).

Second Circuit seems to be retreating from sanctioning appeal waivers. *United States v. Lutchman*, __ F.3d __ (2d Cir. 6 Dec. 2018) (17-291) (On direct appeal, plea agreement with appeal waiver was not supported by consideration, declining to enforce it. However, arguments meritless, affirming the district court.)

The rationale for upholding waiver of fundamental constitutional rights does not support waiving the right to appeal. See, *Patton v. United States*, 281 U.S. 276 (1929) (Defendants may waive right to jury trial, a right established to protect the accused); *Johnson v. Zerbst*, 304 U.S. 458 (1937) (Defendants may waive Sixth Amendment right to counsel, designed to protect accused from his own ignorance of law and rights); *Smith v. United States*, 360 U.S. 1 (1958) (Defendants may waive prosecution by indictment, adopting *United States v. Gill*, 55 F.2d 399 (D. N.M. 1931) (applying *Patton*). *See*, N.D.L.R., vol 65, page 662. As such, the rationale for waiving these rights is that the rights were "guaranteed for the protection of defendants". *Id.*

Although the defendant may waive these rights, query as to how this Court [and the appropriate state Bar] would view a prosecutor's inclusion of a waiver of right to counsel in a plea agreement. The plea agreement is a contract, but certain provisions are so one-sided that they shock the conscience and would render the agreement unconscionable and void. It is submitted that the right to appeal is just such a right. Yet in many cases, the defendant is faced with "pay to play." "The benefit is very real; in some cases, the government without such a waiver might not be willing to plea-bargain at all." *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001). Nancy Gertner, a former U.S. federal judge and law professor at Harvard Law School suggested in an op-ed in the New York Times (Feb. 4, 2016) that, "You can't bargain away your right to counsel; you shouldn't be allowed to bargain away your right to appeal...The right to appeal should not be in the marketplace." She quoted from one of her own cases, "the idea of maximizing a defendant's power by allowing him to sell

whatever he has, the market for plea bargains, like every other market, should not be so deregulated that the conditions essential to assuring basic fairness are undermined." She went on to point out that having a lawyer is not enough. The lawyer may not have communicated or not have mentioned the consequences of the plea or who simply cut corners. In many respects, waiver of the right to appeal looks very much like the retainer agreement of a lawyer who seeks to have his client waive future malpractice or the informed consent of a surgeon who seeks the same.

Not only does the appeal protect defendants, of more universal importance it protects the very common law upon which our system of justice, *stare decisis*, depends and relies. *See*, R. Martineau, Fundamentals of Modern Appellate Advocacy 2 (1985). It facilitates the maintenance of judicial integrity. *Citing to*, P. Carrington, Meador and Rosenburg, Justice on Appeal 2 (1976) ("...[A]ppellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts..."). Abdication of the right to review and to correct errors below thus would erode the very fabric of our justice system and the integrity of our trial courts. Justice Brandeis wrote in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), (Brandeis, J., and Holmes, J., dissenting):

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself it invites anarchy. To declare that in the administration of the criminal law end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

As observed by Bryer and Judge, *McNabb v. United States*, 318 U.S. 332 (1943) adopted the *Olmstead* dissent's views on judicial integrity, saying "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law." The authors opine, "[b]y allowing prosecutors to secure from defendants a waiver of their rights to appeal, courts are becoming accomplices to police violations and trial court errors. Injustice taints the entire court system when alleged police violations and trial court errors are rendered permanently isolated from review." N.D.L.R., Vol.65, page 664.

Of no minor consideration, appeal waivers are not necessary to the plea negotiation in resolving many criminal cases.

II. The Decision Below Is "*Wrong And Deeply Troubling*".

Allowing the federal district and circuit courts to engage in the legal fiction that a defendant has some bargaining power in plea negotiations to enable justice to turn a blind eye to due process on appellate review without restraint is disingenuous and deeply troubling. The result is slamming the door of any just review on worthy causes, and allows the Government to avoid a check on its overreach. This is particularly so when, as in each and every case in the United States when a criminal defendant pleads guilty, the defendant entering these agreements must waive appellate review of errors *before* they occur, and in reliance upon *no* promise that the Government will in fact file any sentencing relief because that discretion is solely and

exclusively up to them. This is a fundamental absurdity which is well past its expiration date.

There is no rational reason for waiving prospectively errors to preclude appellate review. To do so threatens justice's body of work and credibility. It is precisely because errors are unforeseen that appellate review is the cornerstone of liberty and justice. This process is flat out bad public policy. Some courts have reasoned that public policy forbids prosecutors from insulating themselves from review by bargaining away defendants' rights to appeal. *See*, *Ethington*, 121 Ariz. 572, 592 P.2d 768 (1979); *Stevenson*, 60 Mich. App. 614, 231 N.W. 2d 476 (1975), allowing the remedy of an appeal. Courts in at least one jurisdiction invalidated the waiver based on a state constitutional right to appeal. *People v. Harrison*, 386 Mich. 269, 191 N.W.2d 371 (1971); *People v. Ledrow*, 53 Mich. App. 511, 220 N.W.2d 336 (1974); *People v. Butler*, 43 Mich. App. 270, 204 N.W.2d 325. *See also* Mich. Const. art. I, sec. 20. (Cited by, N.D.L.R. Vol. 54, page 654.) Those courts said "...permitting the prosecution to induce a defendant to waive appellate rights in exchange for a plea agreement would be constitutionally impermissible because it chills the exercise of the defendant's constitutional right to appeal a criminal conviction." *Citing*, *Harrison*, 386 Mich. 269, 191 N.W.2d 371; *Butler*, 43 Mich. App. 270, 204 N.W.2d 325." *Id*.

This process erodes the very foundation of due process and equal protection of the law, and does not add any benefit on balance, except "finality of judgment" - which is a concept that does not advance *individual* protections guaranteed by the Constitution.

III. The Question Presented Is Important And Recurs Frequently.

The importance of this issue – whether the Government should be prospectively foreclosing appellate review of a criminal judgment as the cost of possible favorable – but illusory sentencing, enforced by the appellate division – is self-evident. *Douglas v. People of State of Cal.*, 372 U.S. 353, 355 (1963) (recognizing that it would be "invidious" to deny criminal defendants the right to a counseled direct appeal.) To respond that the defendant is not denied due process where he received an appeal with an appeal waiver because the notice was filed is to engage in further legal fiction where the denial then is accomplished by the appellate division upon motion to dismiss by the Government enforcing the appeal waiver. To respond that matters outside the waiver are subject to review is also a fallacy where the circuit courts refuse to hear IAC claims on direct appeal – referring a now pro se defendant back to the trial court, and as to other claims the appellate division will summarily dismiss without examination where a waiver exists. As discussed in Nancy J. King & Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 Duke L.J. 209, 231, 232 fig.7 (2005) (observing that 90% of plea agreements in the Ninth Circuit and 65 % of plea agreements across all circuits included appeal waivers), this issue continues to arise with great frequency and will not be *in any way* abated by this Court's ruling in *Garza* that counsel must file the notice of appeal. Indeed, as evidenced by *Milam*, the Circuit Courts on motion by the Government enforcing the waiver will then be the ones allowing the Government, the district court and counsel

for the defense to evade appellate review, all at the expense of individual liberty interests.

Appellate review is a sacrosanct (*Dalton*, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L. J. 62 (1985)) check on an error-prone system of justice. Eliminating that independent and full review at the demand of the Government holding all the power over a most often incarcerated person in any way violates due process of the individual. There are simply too many opportunities for abuse, error, human failing and oversight to fashion any rule to compensate for appellate waivers. The best, and most direct, course is for this Court to opine appeal waivers are an unconstitutional overreach by the Government, banning them in criminal pleas.

IV. The Question Presented Is Squarely Presented.

The question upon which the lower court opined was the only issue resolving the appeal on motion of the Government to dismiss the appeal. While the Circuit Court found two issues outside the appeal waiver (IAC [but not taking up the knowing and voluntary argument contained therein] and insufficiency of evidence), it declined to engage in review of IAC because it did not appear "of record" and summarily dismissed sufficiency of the evidence without elaborating, effectively foreclosing any meaningful appellate review on direct appeal. *See*, Appendix A, Judgment of the Fourth Circuit Court of Appeals.

No reasonable argument could be made that this issue requires further percolation. The result in this case tracks the result in each and every circuit confronting a motion to dismiss an appeal for appeal waiver; in each and every single

case, effective appellate review is foreclosed by a waiver signed *prior to* subsequently alleged error occurring, and enforced by a Government who had all the power in the bargaining process and who had no obligation to deliver what the defendant **hoped** he was bargaining for – albeit on widely varied Circuit rationale as described *supra*. It is time to stop employing this legal fiction against unwary defendants and allow the appellate division to perform their oversight role unhindered by the Government's self-serving, and insulating, motions to dismiss.

The *Garza* case leaves open the question of whether an appeal waiver can ever pass muster with the due process clause and, if so, by what standards its constitutionality shall be determined. Today, whether a particular appeal waiver is enforceable depends largely upon where the defendant lives. Had the defendant in this case lived 50 miles west in the North Carolina Middle District, his plea agreement would have contained no appeal waiver. Appeal waivers are subject to different rules and interpreted differently from jurisdiction to jurisdiction.

The issue is not simply whether defendant engaged in a knowing and voluntary plea [with appeal waiver] -- although he did not -- as that inquiry is far too subjective to be of sufficient reliability. The crucial issue is whether appeal waivers should be condoned as a bargaining tool by the Government. The answer to that question is no.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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