No. 19-407

In the
Supreme Court of the United States

ALEXANDER CHRISTIAN MILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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September 23, 2019

QUESTIONS PRESENTED

1. Whether the abuse of the writ doctrine or the AEDPA precludes a successive petition for post-conviction relief when the government, years after a defendant's conviction, amends its criminal charges to keep him convicted of a completely different crime than what he originally pleaded guilty to?

2. Whether plea bargaining criminal defendants deserve the same degree of protection under contract law as civil litigants who are parties to commercial contracts?

RELATED PROCEEDINGS

United States Court of Appeals for the Tenth Circuit

- *United States v. Miles*, No. 18-6119, 923 F.3d 798 (10th Cir. 2019)(Published Opinion and Judgment affirming the district court's denial of Dr. Miles' second petition for a writ of error coram nobis).
- *United States v. Miles*, No. 13-6110, 553 Fed. Appx. 846 (10th Cir. 2014)(Order and Judgment affirming the district court's denial of Dr. Miles' first petition for a writ of error coram nobis).
- *United States v. Miles*, No. 12-6011, 546 Fed. Appx. 730 (10th Cir. 2012)(Order and Judgment denying Dr. Miles' application for a certificate of appealability).

United States District Court for the Western District of Oklahoma

- *United States v. Miles*, Case No. 5:06-CR-096-HE-1 [Doc. #236](W.D.O.K. June 20, 2018)(Order denying Dr. Miles' second petition for a writ of error coram nobis).
- *United States v. Miles*, Case No. 5:06-CR-096-HE-1 [Doc. #147](W.D.O.K. December 22, 2011)(Order denying the petitioner's initial habeas motion under 28 U.S.C. §2255).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Dr. Alexander C. Miles, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published opinion denying Dr. Miles' second petition for a writ of error coram nobis is reported as *United States v. Miles*, 923 F.3d 798 (10th Cir. 2019), and reproduced in Appendix A. The two preceding, unpublished Tenth Circuit orders denying Dr. Miles' application for a certificate of appealability (COA) and first coram nobis petition are reported as *United States v. Miles*, 546 Fed. Appx. 730 (10th Cir. 2012), and *United States v. Miles*, 553 Fed. Appx. 846 (10th Cir. 2014).

JURISDICTION

The Tenth Circuit rendered its judgment and opinion on May 3, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1). Justice Sotomayor has extended the filing deadline until September 30, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const., amend. V and VI, Fed.R.Crim.P., Rule 7(e), and 28 U.S.C. §2255(a), (e) and (h). These provisions are reproduced in the Constitutional and Statutory Addendum in Appendix B.

INTRODUCTION

Following the AEDPA's[1] codification of the abuse of the writ doctrine, a 4-way circuit split has evolved regarding the availability of second and successive habeas petitions by prisoners, despite the filing constraints imposed by 28 U.S.C. §2255(h).

Nine federal circuits have in various ways interpreted the *'savings clause'* of 28 U.S.C. §2255(e) as an alternate avenue for relief if the remedy by the initial §2255 motion "is inadequate or ineffective to test the legality of [the prisoner's] detention." *Id.*[2]

The Second and Third Circuits provide that §2255(e) may provide relief when constitutional issues would arise because a prisoner would have no other recourse to bring a claim of actual innocence.

Other circuits use an *erroneous circuit foreclosure* test, which allows for a second or successive collateral challenge when the petitioner has not had an *unobstructed procedural shot* at presenting his actual innocence claim.

The Ninth Circuit, has adopted a *novelty* test when assessing whether a defendant was afforded an *unobstructed procedural shot,* which takes into account (1) whether the legal basis of a petitioner's claim arose only after he had exhausted his direct appeal and first §2255 motion, and (2) whether the law

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1. The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§2241-55, Pub.L.No 104-132, 110 Stat. 1241.

2. *See generally,* Bryan Florendo, *Prost v. Anderson and the Enigmatic Savings Clause of §2255: When is a Remedy by Motion "Inadequate or Ineffective?"* Denver U. Law Review, Vol. 89:2, 435 (2012).

changed in any way relevant to the defendant's claim after that first §2255 motion.

The Tenth[3] and Eleventh Circuits[4] have assumed the most extreme position by maintaining that Congress expressly intended to limit second or successive motions for post-conviction relief exclusively to the circumstances enumerated in §2255(h).

In *Prost v. Anderson,* 636 F.3d 578 (10th Cir. 2011), the Tenth Circuit provided that the remedy of an initial §2255 petition is "inadequate or ineffective to test the legality of [a prisoner's] detention"[5] only in rare cases, such as when the original sentencing court has ceased to exist due to the dissolution of a court martial. *Id.* at 588.

In its published opinion in this case, and in prior, unpublished decisions,[6] the Tenth Circuit has expanded *Prost* to incorporate coram nobis petitioners at liberty, not otherwise subject to the AEDPA. This amounts to a judicial abrogation of the All Writ's Act, 28 U.S.C. §1651, since, absent seismic events or court martials, U.S. courts seldom cease to exist.

However, while the Tenth Circuit in *Prost* rejects the rationales employed by the nine pro-access circuits to justify circumventing §2255(h), it at the same time invites the Supreme Court and Congress to

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3. *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011).

4. *McCarthan v. Dir. of Goodwill Industries-Suncoast*, 851 F.3d 1076 (11th Cir. 2017).

5. 28 U.S.C. §2255(e).

6. *See e.g. United States v. Perceval*, 563 F.App'x 592, 594 (10th Cir. 2014); *United States v. Vasquez*, 515 F.App'x 757, 758 (10th Cir. 2013); *United States v Ricketts*, 494 F.App'x 876, 877 (10th Cir. 2012).

weigh in on what kinds of constitutional violations possibly could render the initial §2255 remedy *inadequate or ineffective* so as to permit a successive motion for habeas relief.

In this case, the government's ignorance of its own immigration laws caused the petitioner, Dr. Miles, to be charged with, and plead guilty to non-criminalized conduct in June of 2009. Consequently, he pursued habeas relief under 28 U.S.C. §2255 in 2011, more than two years after his conviction, when already released from prison.

Rather than addressing the merits of his §2255 petition, the district court and the government, acting in consort, *orally* amended the original charging terms in order to "correct" a purported unilateral or mutual mistake, and to prevent him from capitalizing on the government's "inconsequential" drafting errors. They did not rescind the existing plea agreement or procure a new indictment where the alleged errors had been corrected. Nor was a new Fed.R.Crim.P. Rule 11 plea colloquy ever conducted. Instead, they claimed that Dr. Miles, at his one and only June 2009, Rule 11 colloquy, should have known that the government, with the benefit of hindsight, intended to charge him two years later with a completely different crime, perpetrated 7 months earlier than initially charged.[7]

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7. Even as amended post hoc, the government's accusatory instruments still fail to charge an offense, because Dr. Miles' wife remained eligible for K-1 visa classification pursuant to controlling Board of Immigration Appeals precedent, despite her minority. *See* n.19, *infra*; Appx. I (USCIS Policy Alert re Marriages to Minors); Appx. J (New York Law Governing Validity of Marriages to Minors); *United States v. Maslenjak,* 137 S. Ct. 1918,

The district court then proceeded to deny relief by enforcing the plea agreement's waiver provision, since it would not result in a miscarriage of justice as Dr. Miles was not factually innocent of the new, modified charges.

The Tenth Circuit likewise relied on the limited collateral attack waiver to procedurally bar relief and deny Dr. Miles' application for a COA, and first petition for a writ of error coram nobis.

In his second coram nobis petition, Dr. Miles advised the Tenth Circuit that the plea agreement's limited waiver provision conferred a contractual right to collaterally challenge his conviction, because the district court's sentence exceeded the applicable guideline range. Undeterred, the Tenth Circuit, this time around, invoked the abuse of the writ doctrine to yet again deny relief on procedural grounds. Citing *Prost v. Anderson,* the Tenth Circuit contended that Dr. Miles' arguments already had been addressed and disposed of by prior circuit panels, no matter how erroneously, or should have been raised in his initial §2255 petition.

Hence, the district court and Tenth Circuit railroaded a defendant, who they admitted was factually innocent under the original, albeit "inadvertently" "mistaken" charges, by procedurally whipsawing him: *First* by the unwarranted application of an invalidated collateral attack waiver, and *second*, by using the abuse of the writ doctrine as a subterfuge.

1928 (2017)(eligibility for the relevant immigration benefit negates materiality of a false statement rendered in the immigration context).

The procedural impediments imposed by the courts below rendered the remedy under §2255(a) and the first coram nobis petition all but illusory. The question presented for review has thus been crystallized to whether the post-conviction amendment of a defendant's criminal charges renders the remedy of an initial §2255 petition *inadequate or ineffective* under the AEDPA, as expanded by the Tenth Circuit's published opinion in this case to incorporate former defendants at liberty.

Equally worthy of clarification, even if relegated to dicta, is the interrelated question whether contract law principles should govern the enforcement of plea agreements by criminal defendants to the same extent as contracts in the commercial arena. The Supreme Court has never directly addressed whether contract law should govern plea agreements, but merely suggested that it may be applied by analogy.

Since more than 95% of federal indictments are resolved by guilty pleas, only a consistent application of contract law doctrine to plea agreement disputes can safeguard the integrity of the plea bargaining process and ensure its continued vitality.

Under contract law principles, any unilateral or mutual mistake, necessitating the post hoc amendment of the crime originally charged, would entitle defendants like Dr. Miles to rescind their plea agreement and vacate their conviction. The frustration of purpose doctrine would compel the same result; as would the material breach of a fully integrated plea agreement by the post hoc amendment of the original criminal charges, in blatant violation of the parol evidence rule. Any objections by the government would be waylaid by its unclean hands, due to its complicity

in the post hoc "correction" of its conceded charging errors.

Since this case exclusively revolves around criminal procedure, it represents a clean and ideal vehicle for addressing the current circuit split regarding successive habeas petitions by federal defendants. Moreover, this case is emblematic of the pervasive disinclination by the federal judiciary to apply contract law principles to plea agreement disputes when it would favor criminal defendants. It therefore also presents a propitious opportunity to settle, once and for all, whether plea bargaining criminal defendants deserve the same degree of protection under contract law as civil litigants who are parties to commercial government contracts.

STATEMENT OF THE CASE

On June 24, 2009, Dr. Miles pleaded guilty to having misrepresented his wife's age in an immigration form, in violation of 18 U.S.C. §1001(a)(3), pursuant to the particulars contained in a Superseding Information, dated June 19, 2009, and a Plea Agreement, executed June 24, 2009.

At the June 24, 2009 Rule 11 Plea Colloquy, the government stipulated to the factual basis for Dr. Miles' offense, and clarified the extent of the Plea Agreement's limited appellate waiver.

At the Rule 11 Colloquy, the District court accepted the guilty plea and found Dr. Miles guilty as charged.[8]

On September 24, 2009, the District court sentenced Dr. Miles to 60 months of imprisonment, in excess of the applicable 0-6 month advisory sentencing guideline range.[9]

The 'Superceding Information,'[10] charged that Dr. Miles' offense consisted of "[i]n or about February of 2002" falsely stating to the INS, **"on an affidavit in support of an application for a K1 Visa,"** that his wife "was 18 years of age when he knew she was under 18 years of age."

The Plea Agreement specified that the making or using of **"a false Affidavit of Support for an Alien**

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8. Transcript of Plea of Guilty (hereinafter "R.11.Colloquy"), Case No. 06-CR-096-HE [Doc. #90], p.16. ll.18-23.

9. In the Tenth Circuit, jeopardy attaches when a defendant is sentenced pursuant to a guilty plea.

10. Superseding Information, Case No. 06-CR-096-HE [Doc. #63], Appx. C. [Emphasis added].

Fiance Visa application" which contained **"a materially false and fictitious statement * * * that the age of** [Dr. Miles' wife] **was eighteen"**[11] constituted the factual basis for the guilty plea.

The Plea Agreement was fully integrated pursuant to an *integration clause,* which provided that the written Plea Agreement represented the entire understanding between the parties, and that any additional agreement or modification would be rejected unless in writing and ratified by both parties:

> **This document contains the entire plea agreement between defendant, Alexander C. Miles, and the United States through its undersigned attorney. No other agreement or promise exists, nor may any additional agreement be entered into unless in writing and signed by all parties. Any unilateral modification of this agreement is hereby rejected by the United States. This agreement applies only to the criminal violations described** and does not apply to any civil matter or any civil forfeiture proceeding except as specifically set forth. * * * [12]

The Plea Agreement waived the 5-year statute of limitations, and proper venue for the February 2002 false statement offense perpetrated in the Southern District of New York:

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11. Plea Agreement, Case No. 06-CR-096-HE [Doc. #68], par. 2, Appx. D. [Emphasis added].

12. Plea Agreement, par. 1, Appx. D. [Emphasis added].

> The defendant waives any claim that venue is not proper in the Western District of Oklahoma. Defendant also **waives all defenses based on the statute of limitation with respect to Count 1 of the Information referenced in paragraph 2** of this agreement.[13]

Paragraph 8(b) of the parties' Plea Agreement contained a limited appellate waiver, whereby Dr. Miles obligated himself not to:

> Appeal, collaterally challenge, or move to modify * * * his sentence as imposed by the Court and the manner in which the sentence is determined, **provided the sentence is within or below the advisory guideline range determined by the Court to apply to this case.**[14]

At the Rule 11 Plea Colloquy, the government stipulated to the factual basis for Dr. Miles' guilty plea:

> THE COURT: All right. Mr. Sengel, if you would, please, question the defendant to determine whether there's a factual basis for the plea.
> MR. SENGEL: Yes, your Honor. **In or about February of 2002, in New York**, did you make a **false affidavit in support of an application for a K-1 visa** by SK?

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13. Plea Agreement, par. 12, Appx. D. [Emphasis added].

14. Plea Agreement, par. 8(b), Appx. D. [Emphasis added].

THE DEFENDANT: Yes, I did.
MR. SENGEL: Did you know at the time you made the affidavit that it **falsely stated SK was 18 years of age when you knew she was under 18 years of age?**
THE DEFENDANT: Yes.
MR. SENGEL: Did you make the affidavit voluntarily and intentionally?
THE DEFENDANT: Yes.
MR. SENGEL: And do you admit that the affidavit was **material to the Immigration and Naturalization Service** in that it was **capable of influencing a decision of the Service?**
THE DEFENDANT: Yes.
MR. SENGEL: And do you admit that the Immigration and Naturalization Service is part of the executive branch of the United States government?
THE DEFENDANT: I do.
MR. SENGEL: I have no further questions, your Honor.
THE COURT: I think that sufficiently makes out the factual basis for the offense.
* * *
THE COURT: Well, the bottom line, Dr. Miles, is did you in fact do what you're charged with in this superseding information?
THE DEFENDANT: Yes, sir.[15]

At the Rule 11 Colloquy, the government, under the direction of the district court, further clarified the

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15. R.11.Colloquy, p.13-14. [Emphasis added].

extent of the Plea Agreement's collateral attack waiver and the waivers of venue and the statute of limitations:

> THE COURT: I understand there is a plea agreement with the government in this case. Mr. Sengel, if you would, please, describe for the record the principal terms of that plea agreement, please.
> MR. SENGEL: Yes, your Honor.
> Pursuant to the plea agreement, the defendant agrees to enter a plea of guilty to the superseding information charging a violation of Title 18 United States Code, Section 1001(a)(3).
> Further, he has agreed to waive any claim that venue as to that offense is improper in the Western District of Oklahoma, and further waive any defense based on the statute of limitations.
> The defendant has also agreed to **waive his right to appeal or collaterally challenge the conviction and the sentence** imposed by the court **provided the court does not impose a sentence above the advisory guideline** range determined to apply.[16, 17]

On September 2, 2009, in objections to the Presentence Investigation Report prepared by the U.S. Probation Office, Dr. Miles' counsel confirmed the parties'

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16. R.11.Colloquy, p.11, ll. 3-18. [Emphasis added].

17. *See United States v. Wilken*, 498 F.3d 1160, 1168 (10th Cir. 2007)(oral pronouncements by the court or the government at the Rule 11 colloquy supersede the written provisions of a plea agreement).

mutual understanding that Dr. Miles' offense consisted of having misstated his wife's age in a Form I-864 'Affidavit of Support' in support of his wife's I-485 'Application for Adjustment of Status' from K-1 fiancée to conditional lawful permanent resident (CLPR), in February of 2002.[18]

By failing to object, the government tacitly agreed that this represented the factual basis for Dr. Miles' offense until 2011, when he sought relief under 28 U.S.C. §2255.

The initial §2255 petition & district court enforcement of the limited collateral attack waiver

In February 2011, after release from prison, Dr. Miles, sought habeas relief under 28 U.S.C. §2255. He claimed that he had pleaded guilty to non-criminalized conduct because the age of his spouse was immaterial under 18 U.S.C. §1001(a)(3). His claim was based on that controlling Board of Immigration Appeals (BIA) precedent[19] recognizes the validity of

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18. *See* Dr. Miles' counsel's *'Observations and Objections to Pre-Sentence Investigation Report,'* dated September 2, 2009, par. 3, 23, and 24, Appx. E.

19. *Matter of G----*, 9 I.&N. Dec. 89 (BIA 1960)(Voidable state law marriages of minors are recognized as valid for purposes of adjustment of K-1 visa status); *Matter of Agoudemos,* 10 I.&N. Dec. 444 (BIA 1964)(same). *See also Matter of Manjoukis*, 13 I.&N. Dec. 705 (Dist.Dir. 1971)(Minor parties are eligible for a K-1 visa if *state statutory law* recognizes the intended marriage as voidable, not void); *Matter of Balodis,* 17 I.&N. Dec. 428 (BIA 1980)(Even if an intended marriage would be void under *state statutory law,* a party will nevertheless qualify for a K-1 visa as long as *state case law* would recognize the intended marriage as voidable); 8 C.F.R. §1003.1(g) & §103.10(b)("Decisions of the Board of Immigration Appeals, and decisions of the Attorney General, shall be binding on all officers and employees of the

voidable state law marriages of minors for purposes of adjustment of K-1 visa status. Furthermore, the INS requires only one, single affidavit of support, to be executed by the U.S. sponsor when the K-1 fiancée applies for adjustment of status following the parties' U.S. marriage. While the U.S. sponsor of an affidavit of support must be 18 years or older, no age limit exists for K-1 visa beneficiaries.[20, 21]

Instead of addressing the §2255 claim on the merits, the district court and government, over Dr. Miles' timely objections, ***orally*** altered the original charging terms, contained in the Superseding Information and Plea Agreement, and stipulated to by the government at the Rule 11 Colloquy. This violated the Plea Agreement's integration clause, which required any subsequent modifications to be in writing and ratified by both parties. It also caused Dr. Miles to stand con-

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Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States).

20. *No age limit* exists for *alien beneficiaries* of I-864 and I-134 Affidavits of Support: Only the U.S. sponsor must be 18 years or older. *See* 8 C.F.R. §213a.2(c)(1)(i)(A). The purpose of an Affidavit of Support is to prove that the U.S. sponsor's income and assets exceed the federal poverty guidelines to prevent the beneficiary from becoming a public charge, not to provide biographic information. Biographic information about a K-1 fiancée is instead submitted in a Form G-325A, which is executed by the alien beneficiary, not the U.S. petitioner. *See generally* Appx. H (USCIS Instructions re Affidavits of Support).

21. Some U.S. Consulates abroad, such as in Phnom Penh, Cambodia, also require the U.S. sponsor to file an I-134 Affidavit of Support when the alien fiancée applies for the K-1 Visa. U.S. consulates are however under the jurisdiction of the Department of State, not the INS or Department of Justice.

victed of a different offense, for double jeopardy purposes, than what he had been convicted of 2 years earlier.

When orally modifying the criminal charges, the government did not bother with procuring a new indictment, or rescinding the existing Plea Agreement in favor of a new one. Nor was a new Rule 11 Colloquy ever conducted. Instead, the government and the district court contended that Dr. Miles knew, or should have known, at the original June 24, 2009, Rule 11 Colloquy that, despite the conceded charging errors, the government actually had intended to charge him with a completely different crime more than two years later.

However, when the district court, at the behest of the government, orally amended the purportedly mistaken date of the offense, from February 2002 to July 2001, it also automatically changed the immigration form in which the false statement allegedly had been submitted: From an I-864 'Affidavit of Support' in support of an I-485 'Application for Adjustment of Status' to an I-129F 'Petition for Alien Fiancée.' Hence, the district court changed not only the date, but also the factual basis for Dr. Miles' offense by conflating the preliminary Form I-129F Petition (which sought permission to apply for a K-1 visa and had to be filed with the INS in the U.S.), with the K-1 visa application itself (which had to be filed abroad, at the U.S. Consulate in Cambodia).

Falsely claiming that the actual K-1 visa application had been filed with the INS in July of 2001,[22] the

22. The actual DS-156K 'Nonimmigrant Fiancée Visa Application' and the I-134 'Affidavit of Support' had been filed with the

district court insisted that the date of the offense was undisputed, and that the post-conviction alteration of the original charges, at most, resulted in a "non-prejudicial" "variance," undertaken to prevent Dr. Miles from capitalizing on an "inconsequential mistake" without impacting his "substantial rights."[23] The district court then discounted Dr. Miles' statute of limitations objections: "The defendant waived the statute of limitations **with respect to the charge that he made a false statement** concerning S.K's age **on the affidavit submitted in support of a K1 fiancée visa**. He ***did not waive*** the commission of the offense restricted to a particular date."[24]

Ultimately, the district court denied the §2255 petition by enforcing the Plea Agreement's collateral attack waiver, since it would not result in a "miscarriage of justice" as Dr. Miles was not factually innocent of the orally modified, new charges.[25]

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consulate of the U.S. Embassy to Cambodia, in November 2001, and not with the INS Service Center in Vermont in July of 2001. The INS document filed in July 2001 was an I-129F 'Petition for Alien Fiancée' seeking an I-797 'Notice of Action' (not a K-1 visa) granting approval to apply for a K-1 visa at the U.S. Consulate in Cambodia at a later date. The I-797 Notice of Approval was issued on August 15, 2001, and transferred jurisdiction to the Department of State and the U.S. Consulate in Cambodia. It was the U.S. Consulate in Cambodia, that issued the K-1 Visa on November 30, 2001, not the INS. *See* USCIS Advisory *Visas for Fiancé(e)s of U..S. Citizens*, Appx. F, a29, par.4; Unclassified State 00140650, *Using DS-160 for K Visa Applications*, Appx. G.

23. Order, Dec. 22, 2011, *United States v. Miles*, Case No. 06-CR-096-HE [Doc. #147] (hereinafter "Order").

24. Order, p.6. [Emphasis added].

25. Order, p.7 & p.9.

The Tenth Circuit's denial of a COA & enforcement of the limited collateral attack waiver

Relying on the district court's false factual premise that the K-1 visa application had been filed with the INS Service Center in Vermont, in July of 2001, instead of at the U.S. Consulate in Cambodia, in November 2001, the Tenth Circuit in 2012 denied Dr. Miles' *pro se* application for a COA by affirming the District court's enforcement of the collateral attack waiver. *United States v. Miles*, 546 Fed. Appx. 730, 732-34 (10th Cir. 2012).

The circuit panel did however concede that the government had mistakenly conflated the K-1 visa application with the application for adjustment of status when drafting the charging terms of the Superseding Information and the Plea Agreement. *Id.* at 731-32.

The panel further acknowledged that, with respect to the original, mistaken charges, to which Dr. Miles had pleaded guilty and been convicted of, the INS, pursuant to controlling BIA precedent, in fact recognized voidable marriages to minors for purposes of adjustment of K-1 fiancée visa status. *Id.* at 732.

But, since Dr. Miles had lied in multiple documents submitted in conjunction with his wife's efforts to legalize as a K-1 fiancée, the panel contended that the district and appellate court should be at liberty to pick and choose what offense he ought to stand convicted of, even several years after his conviction, in order to correct the government's original charging errors and salvage the conviction. *Id.* at 731-32.

Nevertheless, the panel expressed reservations about the district court's amendment of the date of the offense by 7 months (from February 2002 to July of 2001), because it substantially exceeded any temporal

amendment heretofore deemed permissible under Tenth Circuit precedent. *Id.* at 733.

The panel further explicitly found that the Plea Agreement's contractual waiver of the statute of limitations pertained only to a false statement made in February 2002, and therefore failed to encompass any earlier false statements made in July 2001. *Id.* at 733. Despite these findings, the panel ruled that the Plea Agreement's waiver provision obviated any need for consideration of the otherwise prohibited amendment of the date of the offense and the bar imposed by the expiration of the statute of limitations. *Id.* at 733.[26]

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26. The time of the offense was in fact of the essence under Tenth Circuit precedent, because the statute of limitations had expired for both the original offense, charged in June 2009, and the new offense, charged post hoc in December 2011. *See United States v. Gammill,* 421 F.2d 185, 186 (10th Cir. 1970). *See also United States v. McIntosh,* 580 F.3d 1222, 1228 (11th Cir. 2009)(the date of an offense is an essential element of the offense if the offense occurred outside the statute of limitations).

The first coram nobis petition & the Tenth Circuit's continued enforcement of the limited collateral attack waiver

The Tenth Circuit denied Dr. Miles' first *pro se* coram nobis petition by yet again enforcing the Plea Agreement's collateral attack waiver, based on the false factual assumption that the K-1 visa application had been submitted to the INS in July of 2001, instead of the U.S. Consulate in Cambodia in November of 2001. *See United States v. Miles*, 553 Fed. Appx. 846, 848 (10th Cir. 2014).

The circuit panel disingenuously claimed that "Miles himself affirmed both the alleged date and document in his colloquy with the court establishing the factual basis for his plea at the plea hearing," *id.* at 848, *quoting United States v. Miles*, 546 Fed. Appx. at 731. However, as obvious from the record, Dr. Miles, at the June 2009, Rule 11 Colloquy, in fact affirmed the date as "[i]n or about February of 2002" (and not July 2001) and the document as a "false affidavit in support of an application for a K-1 visa"[27] (and not an I-129F 'Petition for Alien Fiancée').

27. See R.11 Colloquy, supra pp. 10-11.

The second coram nobis petition & Tenth Circuit invocation of the abuse of the writ doctrine (exeunt the invalidated limited collateral attack waiver)

In his second coram nobis petition, Dr. Miles confronted the Tenth Circuit with its own precedent[28] which invalidated the Plea Agreement's waiver provision, because the district court's sentence exceeded the applicable guideline range. In response, the Tenth Circuit instead invoked the *abuse of the writ* doctrine to yet again deny relief on procedural grounds. *See United States v. Miles,* 923 F.3d 798 (10th Cir. 2019). In its editorialized opinion, the Tenth Circuit selectively compiled suitable parts of the rulings by the two prior appellate panels to reinforce its contention that all of Dr. Miles' claims had either already been considered and disposed of, no matter how erroneously, or should have been raised in his first §2255 petition. According to the Tenth Circuit, the relevant metric under its precedent in *Prost v. Anderson* was whether the initial remedy of a §2255 petition had been available at all, not whether relief had been rendered inadequate or ineffective due to legal or factual errors.

In the wake of the '*metrics*' employed by the Tenth Circuit in *Prost* and the instant case, this petition follows.

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28. *United States v. Wilken,* 498 F.3d 1168, *see* n. 17, *supra.*

I. REASONS FOR GRANTING THE PETITION

A. The current 4-way federal circuit split concerning the permissibility of second or successive habeas petitions by federal defendants merits Supreme Court review.

In 1996 Congress codified the common law abuse of the writ doctrine under the AEDPA. Following this codification, a 4-way circuit split has evolved regarding the availability of post-conviction relief for prisoners through second and successive collateral challenges, notwithstanding the filing limitations imposed by Congress under 28 U.S.C. §2255(h).

Consequently, nine out of eleven circuit courts have interpreted subsection §2255(e) as an alternate avenue for relief for a prisoner if the remedy by the initial §2255 motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. §2255(e). This has ultimately led to the current federal circuit split, ripe for Supreme Court review.[29]

The Second and Third Circuits provide that the savings clause under §2255(e) might be available when constitutional issues would arise because a prisoner would have no other recourse to bring a claim of actual innocence.

Other circuits use an *'erroneous circuit foreclosure'* test based on actual innocence and retroactivity, and allow a second or successive collateral challenge when

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29. *See generally*, Bryan Florendo, *Prost v. Anderson and the Enigmatic Savings Clause of §2255*, n.2 *supra*.

the petitioner has not had an *'unobstructed procedural shot'* at presenting his claim.

The Ninth Circuit has adopted the most liberal *'novelty'* test when considering whether a defendant was previously afforded an *unobstructed procedural shot* and will consider (1) whether the legal basis of a petitioner's claim did not arise until he had exhausted his direct appeal and first §2255 motion, and (2) whether the law changed in any way relevant to the defendant's claim after that first §2255 motion.

The Tenth[30] and Eleventh Circuits[31] insist that textual fidelity requires courts to abide by the congressional intent expressed in §2255(h), which eliminates any meaningful access to the *'savings clause'* of §2255(e) by federal defendants.

To promote uniformity among federal circuits, it is therefore essential that this Court find the time to clarify whether the views of the nine pro-access circuits, or the Tenth and Eleventh Circuits henceforth should inform the balancing of the societal interest in procuring accurate judgments against the need for finality.

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30. *Prost v. Anderson, supra.*

31. *McCarthan v. Dir. of Goodwill Industries-Suncoast, supra.*

B. The Supreme Court's guidance is needed to elucidate what circumstances may render the remedy of an initial §2255 motion inadequate or ineffective.

In *Prost v. Anderson*, 636 F.3d 578, the Tenth Circuit ruled that the appropriate metric was whether the prisoner's arguments could have been raised in his initial §2255 motion. As long as a prisoner was given a single opportunity to test the lawfulness of his detention, absent new evidence, or new constitutional rulings, nothing rendered relief under §2255 inadequate or ineffective. *Id.* at 585. According to *Prost*, one of the rare instances where an initial §2255 petition would be "*inadequate or ineffective to test the legality of the [prisoner's] detention*"[32] would occur when the original sentencing court had been abolished, such as following the dissolution of a court martial. *Id.* at 588.

The *Prost* majority further held that "[f]ederal prisoners seeking to take advantage of new rulings of constitutional magnitude that would render their convictions null and void are not always allowed to do so in second or successive motions." *Id.* at 587.

The majority went on to provide that:

> Whether a statutory interpretation argument is rejected on the basis of a newly crafted but deficient test, or by application of an old but equally bad test found in circuit precedent makes no difference. Legal error has occurred. And, whenever legal error occurs it may very well mean circuit law is inadequate or deficient. But that does not mean the §2255

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32. 28 U.S.C. §2255(e).

> remedial vehicle is inadequate or ineffective to the task of testing the argument.

Id. at 590.

While declining to adopt the "*novelty*" and "*erroneous circuit foreclosure*" tests employed by sister circuits, the *Prost* majority nevertheless noted that the savings clause may be available when the application of §2255(h)'s bar against a second or successive motion for collateral review *would seriously threaten to render the §2255 remedial process unconstitutional:* "Were no other avenue of judicial review available for a party who claims that s/he is factually or legally innocent as a result of a previously unavailable statutory interpretation, we would be faced with a thorny constitutional issue." *Id.* at 593, quoting *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997).

The Tenth Circuit further acknowledged the importance of considerations of "*whether, when, and how the application of §2255(h)'s limits on second or successive motions might (ever) raise a serious constitutional question.*" *Id.* at 594. Thus, *Prost* only foreclosed two avenues through the savings clause, "*novelty*" and "*erroneous circuit foreclosure*," leaving at least a third open for future litigants, to wit "*constitutional avoidance.*" *Id.* at 596.

But, *Prost* left unanswered the question what forms of interference by the executive branch or judiciary might render relief under §2255 *inadequate or ineffective*, so as to permit access to this third avenue of "*constitutional avoidance.*"

Nor did *Prost* address the constitutional concerns implicated when a prisoner is incarcerated for conduct

that never was criminalized in the first place, as opposed to subsequently decriminalized pursuant to a novel interpretation of, or change in statutory law. A person imprisoned under the former circumstances could conceivably allege violations of the Due Process Clause, the Eight Amendment, and even the Suspension Clause.

Presumably a consistent interpretation of the *savings clause* in a manner that bars judicial review of factual innocence claims would ultimately raise serious questions about the constitutionality of the AEDPA amendments to §2255. *Prost,* actually hints at the potential for challenging the constitutionality of §2255: "[U]nless and until Congress's currently expressed balance can be said to violate the Constitution," the courts must interpret the statute as it currently reads. *Id.* at 597. Thus, by its construction and application of §2255 in *Prost* and in this case, the Tenth Circuit appears to have intended to incentivize the Supreme Court and Congress to address whether any post-conviction relief should be available to federal defendants outside the confines of §2255(h).[33]

33. *See generally* Lauren Staley, *Inadequate and Ineffective? Factual Innocence and the Savings Clause of §2255,* 81 U.Cin.L.Rev. 1149, 1165-67 (2013).

C. Nothing in *Prost v. Anderson* or the language of the AEDPA suggests that Congress intended to impose the AEDPA's filing restrictions on coram nobis petitioners at liberty.

In this published case, as well as in unpublished decisions,[34] the Tenth Circuit has expanded *Prost* to encompass coram nobis petitioners at liberty, not otherwise subject to the constraints of the AEDPA. This amounts to nothing less than a judicial abrogation of the All Writ's Act, since, according to *Prost*, instances where the initial §2255 motion was *inadequate or ineffective* to test the legality of a defendant's detention are limited to cases where the original sentencing court has ceased to exist. *Id.* at 588.

However, *Prost* involved an incarcerated defendant, subject to the filing restrictions of the AEDPA and §2255(h), and not a coram nobis petitioner at liberty. Prost attempted to use the savings clause of §2255(e) to file a second, successive §2255 petition to advance a claim of factual innocence based on a novel Supreme Court interpretation of statutory law.[35] Neither the *Prost* majority, nor the dissent, mentioned the writ of error coram nobis, or referenced alternate forms of collateral relief under the All Writ's Act, 28 U.S.C. §1651.

The plain statutory language of 28 U.S.C. §2255 (a) and (e) excludes coram nobis petitioners at liberty from the ambit of *Prost:* §2255(a) limits the

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34. *See e.g. United States v. Perceval; United States v. Vasquez; United States v Ricketts*, n.6, *supra.*

35. *United States v. Santos*, 553 U.S. 507 (2008).

applicability of §2255 to "*prisoner[s] in custody* under sentence of a court established by Act of Congress," and the savings clause of §2255(e) expressly refers to *"a prisoner who is authorized to apply for relief"* to "test the *legality of his detention.*" None of these circumstances pertain to coram nobis petitioners at liberty who seek to clear their names from the stigma of an erroneous felony conviction, rather than challenging a sentence which they currently are serving.

Other sections of the AEDPA are similarly devoid of references to alternate forms of relief, such as under the All Writ's Act, since the purpose of the AEDPA is to limit abusive habeas writs by prisoners challenging their detention and custody:[36] "The Supreme Court has made it pellucid that section 2255 does not preempt the entire array of common-law writs authorized under the All Writs Act, 28 U.S.C. § 1651." *Trenkler v. United States*, 536 F.3d 85, 97 (1st Cir. 2008), relying on *United States v. Morgan*, 346 U.S. 502, 510 (1954). Consequently, the AEDPA's "gatekeeping requirements are not necessary in legitimate coram nobis cases," as "few defendants who have already completely served their sentences continue to have reasons to challenge their conviction or sentence." *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005).

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36. Melissa L. Tarab: Case Comment, Suffolk Law Review, Vol. XLII:361, 365 (2009).

D. A post hoc amendment of a criminal charge for which a defendant already has served out his sentence should excuse any neglect under the abuse of the writ doctrine.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the Supreme Court addressed the extent to which the common law abuse of the writ doctrine limits availability of second or successive petitions for habeas relief: To excuse his failure to raise a claim earlier, a defendant must show cause for this failure, e.g. that he was impeded by some objective factor external to the defense, such as (1) interference by government officials rendering compliance with procedural rules impracticable, (2) that the factual or legal basis for a claim was not reasonably available to counsel, or (3) constitutionally ineffective assistance of counsel. *Id.* at 493-94. Once the defendant has established cause, he must also show 'actual prejudice' resulting from the errors of which he complains. *Id.* at 494. If the defendant cannot show cause, his failure to raise the claim earlier may nonetheless be excused if he can show that a fundamental miscarriage of justice would result from the failure to entertain the claim, such as the conviction of a factually innocent person. *Id.* at 494-95.

The *abuse of the writ doctrine* is derived from its common law progenitor *res judicata*. *See id.* 479-90 (analyzing the genealogy of the abuse of the writ doctrine under common law). While res judicata generally is harsher in terms of finality of judgments, the presence of interparty *extrinsic fraud*, and *fraud on the court* nevertheless allows a party to attack an otherwise final judgment.

In *United States v. Throckmorton,* 98 U.S. 61 (1878), the Supreme Court provided that extrinsic fraud could undermine a judgment "where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case * * * " *Id.* at 65. Hence, where "there has never been a real contest in the trial or hearing of the case because of fraud, the fraud is extrinsic and relief will lie." *Id.* at 66.

The distinction between extrinsic and intrinsic fraud as grounds for post-judgment relief has become blurred over the years, rendering the distinction obsolete:[37] Thus, in egregious cases, the Supreme Court has used the *fraud on the court* doctrine to remedy *intrinsic* fraud. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250-51 (1944), *overruled on other grounds by Standard Oil of Cal. v. United States*, 429 U.S. 17 (1976). The fraud on the court doctrine has been applied to misconduct both by judges and attorneys to overcome the bar otherwise imposed by res judicata. *Id.* at 250.

Applying the doctrines of *extrinsic fraud* and *fraud [by] the court* by analogy to this case, the integrity of the judgments of both the district court and the Tenth Circuit has been nullified by the post hoc amendment of the criminal charge Dr. Miles originally had pleaded guilty to and been convicted of. Therefore, any neglect in raising his claims earlier should be excused by these post hoc amendments, which represent interference by government officials

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37. *See generally* Dustin B. Benham, *Twombly and Iqbal Should (Finally) Put the Distinction between Intrinsic and Extrinsic Fraud out of Its Misery*, 64 SMU L. Rev. 649 (2011).

that rendered the factual and legal basis for his claim unavailable in his initial §2255 petition, as contemplated by this Court in *McCleskey*. *Id.* at 493-94.

Here, rather than restoring the parties to their original bargaining positions by vacating the conviction, rescinding the plea agreement and obtaining a new indictment where the charging errors had been corrected, the district court and government cut procedural corners to safeguard their conviction. Thus they claimed that Dr. Miles, at his June 2009, Rule 11 Colloquy, despite the conceded charging errors, knew all along that the government had meant to charge him with a completely different crime, two years in the future.

E. Contract law principles should be consistently applied to render plea agreements on par with commercial contracts.

In *Santobello v. New York*, 404 U.S. 257, 260 (1971), this Court recognized that plea bargaining "is an essential component of the administration of justice." In *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012), this Court acknowledged that the U.S. version of criminal justice for the most part is a system of pleas, not a system of trials.

Justice Brennan, in his dissent in *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987), advocated the idea of plea agreements as constitutional contracts:

> This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some

> cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. * * * The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution. * * * [38]

Federal courts of lower instance have likewise, occasionally found that plea agreements are governed or strongly influenced by contract law, with the Due Process Clause sometimes providing added protection. Some courts have further applied the commercial contract law doctrines of mutual mistake of fact[39] and frustration of purpose.[40] Other courts have even held the government to a greater degree of responsibility for imprecisions or ambiguities in plea agreements compared to commercial contracts.[41]

Pure contract law, unadulterated by amorphous constitutional doctrines which are incapable of principled and consistent application (as evident from this case), is superior for enforcing the rights of plea

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38. *See generally* Miller, Colin, *Plea Agreements as Constitutional Contracts* (July 5, 2017), ssrn.com/abstract=2997499.

39. *United States v. Bradley*, 381 F.3d 641, 648 (7th Cir. 2004).

40. *United States v. Bunner*, 134 F.3d 1000, 1004-5 (10th Cir. 1998).

41. *United States v. Harvey*, 791 F.2d 294, 295 (4th Cir. 1986).

bargaining defendants: It is broader in scope and offers greater and more predictable protection than the Constitution.[42] But, due to the judiciary's aversion against rendering criminal defendants on par with civil litigants, contract law remains ineffective in enforcing the terms of plea agreements between defendants and the government: Contractual provisions are thus blatantly suspended or ignored whenever antagonistic to the interests of the judiciary or favorable to criminal defendants, as in this case.[43]

In light of this, contract law principles should not simply be selectively applied or used by analogy, but employed consistently as the superior body of law governing the enforcement of plea agreements. There is no reason why an individual who bargains with his liberty and reputation should receive fewer contractual protections than an individual or business in the commercial marketplace that buys products or services.[44]

Had Dr. Miles been convicted following a jury trial, the post hoc amendment of the charging terms would have rendered his conviction reversible per se.[45]

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42. *See generally* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M.L.Rev. 159 (2008).

43. Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U.Colo.L.Rev. 863, 889 (2004).

44. *See generally* David Aram Kaiser, Note, *United States v. Coon: The End of Detrimental Reliance for Plea Agreements?*, 52 Hastings L.J. 579 (2001).

45. In the Tenth Circuit, the standard of review for objected to amendments occurring at trial is *de novo*. *United States v. Sprenger*, 625 F.3d 1305, 1307 (10th Cir. 2010). Constructive

Furthermore, Rule 7(e) of the Federal Rules of Criminal Procedure (disregarded by the district court and Tenth Circuit despite Dr. Miles' timely objections), should have precluded any post-sentencing amendment of the criminal charges, regardless of whether he had been convicted pursuant to a guilty plea or a jury trial. In addition, this Court recently, in *Class v. United States*, 138 S.Ct. 798, 804 (2018), reaffirmed that a guilty plea, by itself, does not vitiate a post-conviction challenge based on that the facts alleged and admitted by a defendant in conjunction with his guilty plea fail to state an offense, as in this case.

Under contract law principles, a purported unilateral or mutual mistake, used as a pretext to justify post-conviction amendments of a criminal charge, would entitle defendants like Dr. Miles' to have their plea agreement rescinded and their conviction reversed. *See Restatement (Second) of Contracts* §152 & §153 (A unilateral or mutual mistake that has a material effect on the agreed exchange of performances renders the contract voidable by the adverseley affected party unless he bears the risk of the mistake). The post hoc *oral* amendments also violated the Plea Agreement's integration clause, and

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amendments at trial are reversible per se. *United States v. Farr*, 536 F.3d 1174, 1185 (10th Cir. 2008). "[T]he language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars." *Id.* at 1181. "[A] constructive amendment occurs when the indictment alleges a violation of the law based on a specific set of facts, but the evidence and instructions then suggest that the jury may find the defendant guilty based on a different, even if related, set of facts." *United States v. Miller*, 891 F.3d 1220, 1234-36 (10th Cir. 2018).

thereby materially breached and voided the Plea Agreement in its entirety.

The frustration of purpose doctrine would have compelled the same result: Dr. Miles' *charge bargain* pertained exclusively to having submitted incorrect biographical information in an INS form *Affidavit of Support* in support of his wife's application for adjustment of status in New York, in February 2002. As readily conceded by the Tenth Circuit, his guilty plea did not encompass a different crime committed 7 months earlier. *See Miles,* 546 Fed. Appx. at 733, *supra,* p.17. He fully performed his obligations under the plea agreement by serving out his sentence. His initial §2255 petition did not violate the terms of the Plea Agreement, because it conferred an express contractual right to collaterally challenge the conviction if the district court's sentence exceeded the applicable sentencing guideline range.

The post hoc oral modifications were also precluded by the parol evidence rule, which prohibits a court from considering evidence of terms outside a fully integrated, written plea agreement. *See United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1199 (10th Cir. 1997). *See also United States v. Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990)(The plain and unambiguous terms of a plea agreement may not be changed by parol evidence). Thus, in the absence of contrary evidence, as in the instant case, a writing that appears integrated will be considered as such. *See Rockwell* at 1200, *quoting Restatement (Second) of Contracts,* §209(3).

Moreover, a court, when interpreting a plea agreement, should construe any ambiguities against the government as the draftsman. *See e.g. United*

States v. Trujillo, 537 F.3d 1195, 1200 (10th Cir. 2008); *United States v. Guzman*, 318 F.3d 1191, 1195 (10th Cir. 2003). Thus, any ambiguity or "inconsequential" drafting error, serendiptously surfacing more than two years *after* Dr. Miles' guilty plea and conviction, should have been interpreted *contra proferentem*, against the government. Instead, the Tenth Circuit permitted the government to take yet another mulligan by interpreting the government's purported drafting errors *against the defendant* in order to salvage the conviction.

II. THIS CASE MERITS SUPREME COURT REVIEW

A. The issues presented are recurring and important because they concern all federal defendants.

Currently the United States incarcerates more than 180,000 federal defendants. Under the AEDPA, a federal defendant has only one year from the date his conviction becomes final to file an initial habeas motion under 28 U.S.C. §2255. Any subsequent motion will be construed as a second or successive habeas petition, subject to the constraints of §2255(h).

Under §2255(h), neither a change in statutory law that decriminalizes an offense, nor a conviction for conduct that never was criminalized in the first place, will entitle a prisoner to file a second or successive habeas petition. Consequently, all federal circuits, except the Tenth (recently joined by the Eleventh), in various ways circumvent §2255(h) by resorting to the *savings clause* of §2255(e) to avoid constitutional issues resulting from the absence of a vehicle to address claims of factual innocence or other grave procedural

errors. This has resulted in the current 4-way circuit split regarding the availability of second or successive habeas petitions.

The Tenth Circuit, in *Prost v. Anderson*, adopts the most extreme position among the circuits by limiting the availability of second or successive petitions to instances where the sentencing court has ceased to exist: The mere circumstance that a defendant was denied relief due to legal or factual errors, no matter how egregious, is irrelevant as long as the defendant, at least theoretically, had access to the remedy of an initial §2255 petition.

In the instant case, the Tenth Circuit, in furtherance of finality, has expanded *Prost* by imposing the filing limitations under §2255(h) on coram nobis petitioners at liberty. This renders the current circuit split relevant to all federal defendants, whether imprisoned or not.

However, both *Prost* and this case invites Congress and the Supreme Court to weigh in on what circumstances, *if any*, might permit a second or successive collateral challenge to a conviction: Upon review, this Court might well affirm the Tenth Circuit's ruling in this case, and limit federal defendants to one, and only one post-conviction challenge of their conviction via an initial §2255 motion, regardless of their custody status. This would, at long last, accomplish the goal of the executive branch to abolish the coram nobis writ in its entirety as an annoying anachronism that subverts the streamlined operation of a totalitarian police state.

Whether contract law principles should govern the enforcement of plea agreements to the same extent as commercial contracts impacts the more than

95% of federal defendants who settle their cases by guilty pleas. Despite the wide-ranging impact on plea bargaining, the Supreme Court has never directly addressed whether plea bargains by criminal defendants should be on par with commercial contracts. Thus, at present, contract law principles are applied inconsistently by the judiciary, particularly when favorable to defendants. But, if plea agreements are merely advisory and non-binding on the government, defendants would be well advised to always go to trial to preserve what limited constitutional rights remain to them as citizens accused. Presumably the resulting pre-trial delays would bankrupt the present American judicial system.

B. Since this case is not fact bound, it represents an ideal vehicle for addressing what circumstances, *if any*, might justify second and successive collateral attacks on convictions.

First, this case is not fact bound because the Tenth Circuit's published opinion is premised on extending *Prost v. Anderson* to former defendants no longer in custody. According to *Prost*, it is irrelevant what legal or factual errors were committed by a court when dismissing the initial §2255 petition, as long as the remedy under §2255 was at least theoretically available because the original sentencing court remained in existence. The case has been fully briefed at the district court and appellate level, and the government has been given a full opportunity to develop the record.

The subsidiary question whether plea bargaining criminal defendants should be afforded the same rights under contract law as civil litigants is similarly

not fact bound and has also been fully briefed below. The contractual rights and obligations of the government and the petitioner are clearly established on the record, as they are contained in the Superceding Information, the Plea Agreement and the government's stipulations at the Rule 11 Colloquy.

Second, this case represents a clean vehicle to address whether the views of the nine pro-access circuits, or the views of the Tenth and Eleventh Circuits should prevail. This will be a policy decision within the exclusive purview of the Supreme Court and Congress that is independent of the substantive law merits unique to this case.

Third, any relief sought by the petitioner will not prejudice the government, since it has received the full benefit of its bargain by the petitioner's perfect performance of all his obligations under the plea agreement. If this Court ultimately favors the views of the pro-access circuits, the petitioner merely asks that his plea agreement be rescinded, his conviction reversed, and the parties restored to their initial bargaining positions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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