No. 19-_____

In the
Supreme Court of the United States

Nicholas Pagliuca,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In United States v. Vonn, 535 U.S. 55 (2002), the Court held that, when a judge at a guilty plea hearing fails to advise a defendant of warnings required by Federal Rule of Criminal Procedure 11, a defendant who did not object but later seeks to withdraw the guilty plea must satisfy the plain-error standard of Federal Rule of Criminal Procedure 52(b). Id. at 58-59. Later, in "formulat[ing] the standard for determining whether [such] a defendant has shown . . . an effect on his substantial rights," the Court held: "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11," must show a reasonable probability that, "but for the error, he would not have entered the plea." United States v. Dominguez Benitez, 542 U.S. 74, 80, 83 (2004).

Both Dominguez Benitez and Vonn concerned defendants who sought to set aside their guilty pleas. But the circuits are divided on whether the Vonn/Dominguez Benitez standard applies to errors under Rule 11(b)(1)(N), when a defendant raises an omission in the Rule 11 plea colloquy as a basis for the non-enforcement of an appeal waiver, not to attack the underlying conviction. See Fed.R.Crim.P. 11(b)(1)(N) (requiring courts to inform defendants of "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence").

The Second Circuit, recognizing this split, requires a defendant seeking to void an appeal waiver to show that "but for the error" at the guilty plea hearing, the defendant would not have pleaded guilty. Three other circuits, however -- the Third, Sixth, and Ninth -- have expressly declined to extend Vonn/Dominguez Benitez to violations of Fed.R.Crim.P. 11(b)(1)(N) where the defendant does not seek to challenge the conviction.

The question presented is:

Whether the plain error standard of Vonn/Dominguez Benitez applies in the context of violations of Fed.R.Crim.P. 11(b)(1)(N), where the defendant raises an omission in the guilty plea inquiry as a basis for the non-enforcement of an appeal waiver, not to vacate the guilty plea -- an issue that divides the circuits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Second Circuit is unpublished, but is available at 767 Fed. App'x 93. It is reproduced at Pet. App. 1-6.

JURISDICTION

The court of appeals issued its judgment on April 16, 2019, and had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

1. **Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure**, provides:

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

2. **Rule 11(h) of the Federal Rules of Criminal Procedure**, titled "Harmless Error," provides:

> Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

3. **Rule 52 of the Federal Rules of Criminal Procedure**, titled "Harmless Error and Plain Error," provides:

> (a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

This case presents an important and recurring question of federal criminal law on which the federal circuits are in conflict.

Federal Rule of Criminal Procedure 11(b)(1)(N) directs courts to "inform the defendant of, and determine that the defendant understands, ... the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence."[1]

In this case, Petitioner pleaded guilty to a federal offense under a plea agreement the Government drafted, containing a provision waiving his right to appeal any fine of $300,000 or less.

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[1] Rule 11(b)(1) provides that "the court must address the defendant personally in open court" to "inform the defendant of, and determine that the defendant understands" fifteen enumerated items -- see Fed.R.Crim.P 11(b)(1)(A)-(O) -- including "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed.R.Crim.P. 11(b)(1)(N). The commentary to Rule 11 explains that the Advisory Committee drafted the rule largely to ensure that appellate waivers are knowing and voluntary. See Fed.R.Crim.P. 11(b)(1)(N), advisory committee notes to 1999 amendments ("Given the increased use of [waiver] provisions, the Committee believed it was important to insure that ... the waiver was voluntarily and knowingly made by the defendant.").

At the guilty plea allocution, the judge said nothing about his waiving the right to appeal a fine of $300,000 or less. Only a provision waiving the right to appeal a prison sentence below 121 months was mentioned.

At sentencing, the court sentenced Petitioner to 37 months' imprisonment. But it also imposed a $15,000 fine.

Petitioner appealed only the $15,000 fine. The Second Circuit dismissed the appeal, however, because of the appeal waiver. It reasoned that because Petitioner did not object to the alleged Rule 11(b)(1)(N) error, its review was for plain error. And -- relying on its prior published precedent -- the Second Circuit held that Petitioner's "substantial rights" could not have been affected by any such error because, under United States v. Dominguez Benitez, 542 U.S. 74, 80, 83 (2004), he had to "demonstrate that there is a reasonable probability that, but for the error, he would not have entered the plea." United States v. Pagliuca, 767 Fed. App'x 93, 95 (2d Cir. 2019) (quoting Dominguez Benitez, id. at 83) (citing United States v. Burden, 860 F.3d 45, 52-53 (2d Cir. 2017); Tellado v. United States, 745 F.3d 48, 54-55 (2d Cir. 2014); United States v. Cook, 722 F.3d 477, 482-83 (2d Cir. 2013)). And Petitioner never contended he would not have pleaded guilty but for the court's failure to advise him that he had waived the right to appeal any fine up to $300,000.

Therefore, although the Second Circuit agreed with Petitioner that the district court's imposition of the fine was based, in part, on an error -- an erroneous belief that he would continue to receive Social Security payments while he was incarcerated -- it dismissed the appeal. Pagliuca, 767 Fed. App'x at 93, 94-96.

The Second Circuit recognized, however: "[T]here is a circuit split on this question" about whether Dominguez Benitez applies to Rule 11 errors "when defendants have attacked appellate waivers that bar their sentencing appeals." Pagliuca, 767 Fed. App'x at 96 n.2. It noted that three other circuits -- the Third, Sixth, and Ninth -- have declined to extend Dominguez Benitez to appeal waivers. In those circuits, to show that substantial rights were affected by a violation Rule 11(b)(1)(N), the defendant does not have to show that he or she would not have pleaded guilty if advised of the appeal waiver. See United States v. Corso, 549 F.3d 921, 929 (3d Cir. 2008); United States v. Murdock, 398 F.3d 491, 496-97 (6th Cir. 2005); United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004)).

STATEMENT OF THE CASE

1. The guilty plea hearing contains no mention of the waiver of the right to appeal a fine.

In November 2017, Petitioner pleaded guilty pursuant to a plea agreement to one count of possession of child pornography, in violation of 18 U.S.C. § 2252(A)(5)(B) and (b)(2). At the guilty plea hearing, the judge told him that the plea agreement contained

a provision waiving his right to appeal any prison sentence below 121 months, telling him: "[U]nder the plea agreement, you are giving up your right to appeal or otherwise attack or challenge your conviction and sentence . . . as long as I sentence you within or below the stipulated guidelines range of 97 to 121 months' imprisonment." Petitioner said he understood this.

But the plea agreement also contained a provision waiving Petitioner's right to appeal any fine that is "less than or equal to $300,000." The waiver provision concerning fines was not discussed by the judge. The prosecutor also did not mention any waiver of appeal concerning a fine.

2. The Presentence Report does not recommend a fine.

The Probation Office's Presentence Investigation Report recommended against a fine. Also, Petitioner was represented by appointed counsel of the local federal public defender's office, whose indigent clients are not usually fined. Neither counsel nor the Government mentioned a fine in their sentencing memoranda.

3. The district court imposes a $15,000 fine.

At sentencing (in April 2018), the judge sentenced Petitioner to 36 months' imprisonment. The judge also imposed a fine of $15,000. In deciding on the fine, the judge expressed the belief that "he'll be getting . . . his Social Security while in BOP [custody][.]" The judge added: "I understand he'll be paying [child

support] while in BOP, but he'll be getting his pension and his Social Security while in BOP as well."

4. The Second Circuit notes that the judge's decision to impose the $15,000 fine rested, in part, on an error, but enforces the appeal waiver, relying on the *Dominguez Benitez* prejudice standard.

Petitioner appealed only the $15,000 fine, not his conviction or prison sentence.

The Second Circuit noted that "[t]he district court decided to include a fine in Pagliuca's sentence based in part on its belief that he would receive Social Security benefits while incarcerated." United States v. Pagliuca, 767 Fed. App'x 93, 94 (2d Cir. 2019). This belief was erroneous, however: "In fact, federal law prohibits Social Security recipients from receiving payments for any month in which they are in prison." Id. (citing 42 U.S.C. § 402(x)(1)(A)(i)).

But the Second Circuit stated: "For us to reach Pagliuca's challenge to the court's decision, however, Pagliuca must overcome the plea agreement he signed, which included an appeal waiver of any fine below $300,000." Id.

It reasoned that "[b]ecause Pagliuca did not object below to the alleged Rule 11 violation, our review is for plain error." Id. at 95. Regarding the Rule 11 colloquy, the Circuit observed: "[T]he court did not specifically point out that Pagliuca could only appeal a fine of more than $300,000. Arguably, then, the court may not have verif[ied] that [Pagliuca] understood the breadth of the

waiver." Id. (citation and internal quotation marks omitted) (brackets in original).

But the Second Circuit stated, "[w]e need not decide whether this plea colloquy violated Rule 11, however, because any such error did not affect Pagliuca's substantial rights." Id. It explained: "This Court has repeatedly stated that '[i]n the Rule 11 context,' the substantial rights prong 'require[s] that a defendant show a reasonable probability that, but for the error, he would not have entered the plea.'" Id. (quoting United States v. Lloyd, 901 F.3d 111, 119 (2d Cir. 2018)(which quotes United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)); see id. (noting that "[t]his standard derives from . . . United States v. Dominguez Benitez[.]"). Since there was no claim that Petitioner would not have pleaded guilty but for the court's failure to advise him he was waiving the right to challenge the fine, he could not demonstrate an effect on his substantial rights. So his "appellate waiver remains valid and bars his appeal." Id. at 97.

The Second Circuit recognized "[t]here is a circuit split on this question." And "several circuits have declined to extend the substantial rights formulation of Dominguez Benitez" in the appellate waiver context when a defendant seeks only to vacate his sentence, not to attack the underlying conviction. Id. at 95, 96 n.2. It noted that the Third, Sixth, and Ninth Circuits have

declined to extend the Dominguez Benitez standard to such cases.[2] But at least one other circuit had, like the Second Circuit, "applied Dominguez Benitez to Rule 11 errors when defendants have attacked appellate waivers that bar their sentencing appeals." Id. at 96 n.2 (citing United States v. Tanner, 721 F.3d 1231, 1235-36 (10th Cir. 2013) (per curiam)).

The Second Circuit also stated that Petitioner's knowledge of the appeal waiver concerning fines could be found because, at the plea hearing, the judge told him he faced a statutory maximum fine of $250,000 and confirmed he had read the plea agreement and discussed it with counsel. Id. at 96. However, the record shows no indication the imposition of any fine was a serious consideration of either party in this criminal case, as the defendant had appointed counsel, the Probation Office did not recommend a fine, and the prosecutor's sentencing memorandum mentioned nothing about one. Instead, applying the Dominguez Benitez standard, the Second Circuit concluded that "the district court's Rule 11 error did not affect Pagliuca's substantial rights" and dismissed the appeal. Id. at 97.

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[2] See United States v. Corso, 549 F.3d 921, 929 (3d Cir. 2008); United States v. Murdock, 398 F.3d 491, 496-97 (6th Cir. 2005); United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004).

REASONS FOR GRANTING THE WRIT

The federal circuits are divided on the proper application of the third prong of plain-error review (the "affected substantial rights" prong), with respect to deficient guilty plea allocutions on appeal waivers, where the defendant seeks to challenge his sentence only, not his guilty plea.

The Second Circuit and the Tenth Circuit hold that the substantial rights formulation of Dominguez Benitez applies to such cases: "the defendant must demonstrate that there is a reasonable probability that, but for the error, he would not have entered the plea." United States v. Pagliuca, 767 Fed. App'x 93, 95-96 (2d Cir. 2019); see United States v. Tanner, 721 F.3d 1231, 1235-36 (10th Cir. 2013).

But, as the Second Circuit recognized, the Third, Sixth, and Ninth Circuits "have declined to extend the substantial rights formulation of Dominguez Benitez to such cases." Pagliuca, 767 Fed. App'x at 95 (citing cases).

Other courts have also observed that the circuits have taken "varying approaches" to the "[r]eview of a claim of invalidity of an ostensible waiver of the right to appeal (but not the entire plea)[.]" United States v. Shemirani, 802 F.3d 1, 3 (D.C. Cir. 2015) (citing cases); see United States v. Lee, 888 F.3d 503, 507 n.2 (D.C. Cir. 2018) (noting the varying approaches to invalid appeals waivers and citing cases). "The Supreme Court has not

addressed the proper remedy for an invalid appeal waiver." Lee, 888 F.3d at 507 n.2.

Therefore, because the application of the third prong of plain-error review to these kinds of cases is an important and recurring question in the federal courts of appeals that has created a recognized split among the circuits, the Court should grant certiorari in this case to resolve that division.

I. The circuits are divided on whether the substantial rights formulation of Dominguez Benitez applies when the defendant claims an appeal waiver is invalid, but does not challenge the guilty plea.

A. At least two circuits apply the Dominguez Benitez standard to Rule 11(b)(1)(N) violations and require that the defendant demonstrate "a reasonable probability that, but for the [Rule 11] error, he would not have entered the plea."

The Second Circuit has held -- in both published and unpublished decisions -- that a Rule 11(b)(1)(N) error does not affect a defendant's substantial rights unless the defendant meets the standard formulated in Dominguez Benitez: the defendant must demonstrate that "but for the error, he would not have entered the plea." United States v. Pagliuca, 767 Fed. App'x 93, 95 (2d Cir. 2019)) (quoting Dominguez Benitez, id. at 83). The Circuit explained: "This Court has repeatedly stated that '[i]n the Rule 11 context,' the substantial rights prong 'require[s] that a defendant show a reasonable probability that, but for the error, he would not have entered the plea.'" Id. (quoting United States v. Lloyd, 901

F.3d 111, 119 (2d Cir. 2018)(which quotes United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)).

In addition, the Tenth Circuit, as the Second Circuit noted in Pagliuca, has also applied Dominguez Benitez to bar a sentencing appeal. In United States v. Tanner, 721 F.3d 1231 (10th Cir. 2013) (per curiam), the district court had failed to mention the appeal waiver at the guilty plea. And after sentencing, the defendant brought an appeal attacking his sentence. Id. at 1233. The Tenth Circuit enforced the appeal waiver. It quoted Dominguez Benitez and stated that the defendant "does not tell us why he would probably change his [guilty] plea," and proceed to trial, based on "the judge's failure to specifically discuss the appeal waiver[.]" Tanner, 721 F.3d at 1235-36.

Additionally, in United States v. Crain, 877 F.3d 637 (5th Cir. 2017) -- also cited in Pagliuca -- the Fifth Circuit, although not expressly mentioning Rule 11(b)(1)(N), upheld the validity of a "collaterally attack waiver," barring a sentencing appeal based on the Dominguez Benitez standard. Id. at 639, 643-45. The Fifth Circuit concluded that "Crain has not shown 'a reasonable probability that, but for the error, he would not have entered the plea.'" Id. at 645.

Thus, at least two circuits -- the Second and the Tenth, but perhaps also the Fifth -- apply the Dominguez Benitez standard to "Rule 11 errors when defendants have attacked appellate waivers

that bar sentencing appeals." See Paglicua, 767 Fed. App'x at 96, n.2. As discussed below, three other circuits have reached the contrary conclusion.

B. The Third, Sixth, and Ninth Circuits have concluded that the Dominguez Benitez standard is inappropriate for violations of Rule 11(b)(1)(N), because the defendant seeks -- not to set aside a guilty plea -- but merely to void an appeal waiver.

In cases involving alleged violations of Rule 11(b)(1)(N), the Third, Sixth, and Ninth Circuits have held that the Dominguez Benitez standard was inappropriate because the defendants in those cases were seeking to pursue sentencing appeals, not set aside the convictions.

In United States v. Murdock, 398 F.3d 491 (6th Cir. 2005), the Sixth Circuit declined to adopt the Government's view that, where "the district court never told Murdock that he was waiving his appellate rights" -- in order to meet the "affected substantial rights" prong of plain error -- Murdock had to demonstrate that, "but for the error, he would not have entered the plea." Id. at 498-99. It explained:

> Dominguez Benitez is inapplicable here because Murdock is not seeking to reverse his conviction, but merely to void the appellate waiver provision in order to challenge his sentence. We therefore will not require that Murdoch show that, but for the district court's failure to discuss the appellate waiver provision of the plea agreement, he would not have pleaded guilty.

Id. at 496 (citations omitted).

The Sixth Circuit stated that "a defendant can prove that his substantial rights are affected when he shows that the district court failed to comply with the key safeguard in place to protect those rights." And "there was no functional substitute for that safeguard." Id. at 497 (footnote omitted).

Similarly, the Third Circuit addressed a claim that the district court violated Rule 11(b)(1)(N): it "failed during its colloquy with him at the change-of-plea hearing both to adequately inform him of the terms of his appellate waiver and to ensure that he understood those terms." United States v. Corso, 549 F.3d 921, 928 (3d Cir. 2008). The Third Circuit declined to apply the affects-substantial-rights standard of Dominguez Benitez since "the defendant does **not seek the reversal of his conviction** (i.e., does not seek to withdraw his guilty plea) but only challenges the validity of his appellate waiver so that he may appeal from his sentence[.]" Id. at 929 (emphasis added). It concluded, rather, that the defendant

> is obliged to show a reasonable probability that the Rule 11 error precluded him from understanding that he had a right to appeal and that he had substantially agreed to give up that right.

Corso, 549 F.3d at 929 (internal quotation marks and citation omitted).[3]

[3] Corso held that the plea-taking court's "deviation from the mandates of Rule 11(b)(1)(N) affected his substantial rights." But

The Ninth Circuit has also declined to apply the Dominguez Benitez standard to appellate waivers. United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004) ("Indeed, Arellano does not appeal his conviction. Cf. [Dominguez Benitez]. He only appeals from his sentence.").

Thus, the Third, Sixth, and Ninth Circuits, have declined to extend Dominguez Benitez to Rule 11 errors involving provisions of plea agreements waiving the right to appeal or collaterally attack the sentence. See Fed.R.Crim.P. 11(b)(1)(N). In these jurisdictions, a defendant claiming a violation of Rule 11(b)(1)(N) is not required to demonstrate that she or he would have gone to trial "but for" the court's failure to discuss the appeal waiver. Rather, a defendant's substantial rights are affected if "there was no functional substitute" for the Rule 11(b)(1)(N) inquiry that would demonstrate the defendant understood the appeal waiver. See Murdock, 398 F.3d at 497; Corso, 549 F.3d at 931; Arellano, 387 F.3d at 797.

II. This case presents an excellent vehicle to resolve the question.

This case presents an excellent vehicle to resolve this important question for two reasons.

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it declined to exercise its discretion to set aside the appeal waiver because of the fourth-prong of plain error: that the error affect the fairness, integrity, or public reputation of the judicial proceedings. 549 F.3d at 931.

First, the case squarely presents the question presented. The Second Circuit acknowledged that its rule is that the Dominguez Benitez standard applies to violations of Rule 11(b)(1)(N), even though the defendant seeks only to void an appeal waiver. Its Pagliuca decision also made clear that this rule rested on binding Second Circuit precedent. Pagliuca, 767 Fed. App'x at 95-96 (relying on United States v. Burden, 860 F.3d 45, 52-53 (2d Cir. 2017); Tellado v. United States, 745 F.3d 48, 54-55 (2d Cir. 2014); United States v. Cook, 722 F.3d 477, 482-83 (2d Cir. 2013)). And it acknowledged that the Second Circuit's rule is contrary to the law in three other circuits. Thus, the circuit split on the question presented is starkly presented in this case.

Second, the plain-error standard the Second Circuit applied was determinative of the outcome. The Circuit noted that the district court's imposition of the $15,000 fine was based, in part, on its erroneous belief that Petitioner would continue receiving Social Security payments during his incarceration. Pagliuca, 767 Fed. App'x at 94. But it declined to review the error. Instead, it dismissed the appeal because of its application of the Dominguez Benitez standard, holding that Petitioner's substantial rights were not affected by any violation of Rule 11(b)(1)(N) because he could not show that "but for the error, he would not have entered the plea." See Pagliuca, 767 Fed. App'x at 95 (quoting Dominguez Benitez, id. at 83) .

Although the Second Circuit also stated that Petitioner could be found to have understood the appeal waiver because the judge told him that he faced a statutory maximum fine of $250,000 and confirmed he read the plea agreement and discussed it with counsel, id. at 96, it was the Dominguez Benitez standard that determined the outcome in this appeal. There is no indication that the imposition of a fine was weighed as a serious consideration by either party in this criminal case where the Petitioner had appointed counsel. The plea agreement's brief reference to a waiver of the right to appeal a $300,000 fine was a single sentence in a six-page, single-spaced document. The prison term is always the core concern in a criminal case, whereas the imposition of a fine on defendants represented by appointed counsel is a rarity, and not an everyday consideration. It was instead the application of the Dominguez Benitez standard that determined the appeal. Id. at 97. This case, therefore, presents an excellent vehicle to resolve the split among the federal circuits.

III. The Second Circuit's decision was incorrect.

The Court should also grant review because the Second Circuit's decision to apply the Dominguez Benitez prejudice-standard in the appellate waiver context was incorrect.

As the First Circuit has observed: "The Supreme Court's requirement that a defendant 'must show a reasonable probability that, but for the error, he would not have entered the plea,' was

articulated in the context of 'a defendant who seeks reversal of his conviction after a guilty plea.'" United States v. Villodas-Rosario, 901 F.3d 10, 16-17 (1st Cir. 2018) (quoting Dominguez Benitez, 542 U.S. at 83). The First Circuit also noted that the Supreme Court has not "imported" the Dominguez Benitez prejudice-standard "into the realm of appellate waiver enforcement." Id.

The First Circuit pointed out that, when a defendant "raises an omission in the plea colloquy inquiry as a basis for the non-enforcement of an appellate waiver, the conviction itself is not at issue." United States v. Villodas-Rosario, 901 F.3d 10, 17 (1st Cir. 2018). Although it did not decide the issue, the First Circuit suggested that "the plain-error standard articulated in Dominguez Benitez and Vonn," should not "remain the standard used to assess the enforceability of appellate waivers." Id. It did not decide on the proper standard because defendant's knowledge of the appeal waiver was evident because "at ... sentencing, his counsel acknowledged that his plea agreement contained a provision that waived his right to appeal his sentence if he was sentenced 'within the range of eight to 17' years." Villodas-Rosario, 901 F.3d at 12, 17-18.

As the First Circuit indicated, the holdings the Third, Sixth, and Ninth Circuits are correct. This Court's formulation of the prejudice standard in Dominguez Benitez rested on the unique importance of the finality of guilty pleas to the criminal justice

system. In Dominguez Benitez, the defendant "claim[ed] the right to withdraw his plea of guilty" because of the court's "failure to give one of the warnings required by Federal Rule of Criminal Procedure 11" concerning the right to counsel. 542 U.S. at 76; see also Vonn, 535 U.S. at 60, 61 (On appeal, "Vonn sought to set aside" the convictions, "for the first time making an issue of the District Judge's failure to advise him of his right to counsel at trial, as required by the Rule."). This Court reasoned that "one can fairly ask a defendant seeking to withdraw his plea what he might ever have thought he could gain by going to trial." Dominguez Benitez, 542 U.S. at 85. It emphasized "the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system." Id., 542 U.S. at 82-83.

These concerns do not obtain, however, in the appeal waiver context. In these cases, the defendant raises an omission in the Rule 11 inquiry as a basis for not enforcing an appeal waiver. The conviction itself is not at issue. Here, for example, Petitioner did not seek the reversal of his conviction on appeal. He sought only to appeal an aspect of his sentence: the $15,000 fine. It, therefore, was wrong for the Second Circuit to require him to show "a reasonable probability that, but for the error, he would not have entered the plea."

The Court, therefore, should grant the writ and reverse the Second Circuit.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 15, 2019

Respectfully submitted,

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