No. _____

In the Supreme Court of the United States

JAYVONNE JOHNSON, also known as Tyrone Antonio Ruffin, *Petitioner*,

v.

United States of America, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The right to appeal a criminal sentence is a statutory entitlement under 18 U.S.C. § 3742. But many local U.S. Attorney's Offices—including the Eastern District of Louisiana—have developed so-called "standard" plea agreements requiring that all defendants wishing to plead guilty pursuant to a written agreement waive nearly all appellate and collateral relief rights. The Eastern District's standard agreement includes the broadest and most restrictive appeal waiver available, mandating forfeiture of all appellate and collateral relief rights with only limited exceptions. Defendants are required to enter into these agreements long before sentencing occurs, most often without any agreement between the parties about the sentence the defendant might face. In some cases—like this one—the waivers bar resolution of undecided questions of law that are of great consequence to thousands of criminal defendants.

This Court has yet to directly rule on the permissibility of these waivers, despite intense criticism, questionable legality, and inconsistent treatment by lower courts, which have adopted different frameworks for determining appeal waivers' scope and validity. And serious questions remain about whether broad appeal waivers should be enforced at all, both because of their threat to the integrity of the judicial process and the inherently unknowing and involuntary nature of forced, prospective relinquishment of challenges to yet-to-be-made errors and future rights violations.

Thus, the question presented is: Are broad waivers of appellate rights lawful and, if so, what are the limits on their validity and enforcement?

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JAYVONNE JOHNSON,

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v.

UNITED STATES OF AMERICA,

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Jayvonne Johnson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On August 12, 2019, a panel of the Fifth Circuit Court of Appeals granted the Government's Motion to Dismiss Mr. Johnson's appeal of his sentence imposed by the United States District Court for the Eastern District of Louisiana. App., *infra*, 1a. The dismissal was based solely on the appeal waiver in Mr. Johnson's plea agreement. A copy of the order is attached to this petition as an appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on August 12, 2019. No petition for rehearing was filed. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3742(a) provides:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

Mr. Johnson appealed the 120-month prison sentence imposed after he pleaded guilty to possession with intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). In his Appellant's Brief, Mr. Johnson argued that the district court miscalculated his criminal history points and misapplied the U.S.S.G. § 4B1.1 career offender guideline by enhancing his sentence based on an eighteen-month supervised release revocation sentence imposed over twenty years prior to his instant offense of conviction. As Mr. Johnson noted in his brief, the district court's decision to count the stale revocation sentence as a qualifying prior conviction more than doubled Mr. Johnson's recommended Sentencing Guidelines range.

Notably, the Guidelines expressly mandate that criminal convictions imposed over fifteen years prior to commencement of the instant offense be excluded from a defendant's criminal history score calculation—and any career offender calculation—unless the sentence imposed for the stale conviction resulted in the defendant's incarceration within that fifteen-year period. *See* U.S.S.G. §§ 4A1.2(e)(1), 4B1.2(c)(2). In Mr. Johnson's case, he initially was convicted for a federal drug offense in 1990, released in 1992, and resentenced in 1995 to an eighteen-month revocation sentence for violation of the terms of his supervised release. Even counting his supervised release term, however, the sentence for the outdated 1990 conviction only would have resulted in his incarceration up until May of 1997—well over fifteen years prior to the commencement of his instant offense in 2016. Nonetheless, the district court determined that the 1990 conviction qualified for criminal history points and as a

predicate conviction for career offender purposes because the eighteen-month revocation sentence happened to be run *consecutively* to a much lengthier 234-month sentence imposed in a separate case. *That* sentence caused Mr. Johnson's total incarceration to reach into the relevant fifteen-year window leading up to his instance offense and no doubt counted for criminal history purposes. But the early 1990 conviction and its significantly shorter sentence did not and *could* not reach into the relevant fifteen-year period.

Mr. Johnson's counsel adamantly objected in the district court, and thus the error in his case was well preserved for appeal. Moreover, the circumstances appeared to present a complex Guidelines calculation issue that the Fifth Circuit had not yet squarely addressed. District courts in the Fifth Circuit are without guidance on the question of whether the protective provisions of U.S.S.G. § 4A1.2—which seek to exclude overly stale convictions from Guidelines calculations—can be circumvented merely because a short, decades-old revocation sentence was run consecutively with a much lengthier sentence imposed for a separate conviction. Although the Government defended the Guidelines calculation in the district court, it was unable to present the court with binding caselaw in support of its position.

On appeal, the Government made no argument in defense of the error. Instead, the Government moved to dismiss Mr. Johnson's appeal based solely on the broad appeal waiver contained in his plea agreement. As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Johnson's plea agreement required him to waive all appellate and collateral relief rights except an attack on a

sentence imposed in excess of the statutory maximum or a claim of ineffective assistance of counsel. And he had to do so long before he received his PSR and long before he could have known that it would severely miscalculate his Guidelines range. The appeal waiver in Mr. Johnson's case is the broadest and most restrictive appeal waiver permitted by law and U.S. Department of Justice Policy.[1] Inclusion of this language was in accordance with the policy of the Eastern District of Louisiana United States Attorney's Office, which uses a "standard plea agreement" containing this broad waiver as a matter of course. Assistant United States Attorneys in the Eastern District do not have authority to change the template's standard terms. Accordingly, essentially all defendants who wish to plead guilty in the Eastern District of Louisiana pursuant to a plea agreement *must* waive all appellate rights. The sole claim Mr. Johnson raised on appeal fell within the scope of his broad waiver.

The record in Mr. Johnson's case reflected that, before accepting the guilty plea, the district court described the appeal waiver provision and asked if Mr. Johnson understood it. After conferring with counsel, Mr. Johnson responded, "I understand." Under the Fifth Circuit's binding precedent, that was sufficient to show that an appeal waiver is enforceable, unless the record indicated otherwise. *See*

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[1] *See* U.S. Dep't of Justice, "Department Policy on Waivers of Claims of Ineffective Assistance of Counsel," Oct. 14, 2014, https://www.justice.gov/file/70111/download (prohibiting federal prosecutors from seeking in plea agreements to have a defendant waive any claims of ineffective assistance of counsel); U.S. Dep't of Justice, U.S. Attorney's Manual, CRM § 626, "Plea Agreements and Sentencing Appeal Waivers—Discussion of the Law" (detailing various arguments on appeal that cannot legally be waived, including challenges to sentences exceeding the statutory maximum).

United States v. McKinney, 406 F.3d 744, 746 (5th Cir. 2005) ("Because McKinney indicated that he had read and understood the plea agreement, which includes an explicit, unambiguous waiver of appeal, the waiver was both knowing and voluntary."). Thus, under Fifth Circuit law, the record supported enforcement of the waiver.

Mr. Johnson opposed the Government's motion to dismiss on the ground that his appeal waiver and others like it are invalid, but acknowledged that his position was foreclosed by circuit precedent. The Fifth Circuit granted the Government's motion and entered judgment dismissing Mr. Johnson's appeal on August 12, 2019.

REASONS FOR GRANTING THE PETITION

Approximately ninety-seven percent of federal criminal defendants plead guilty pursuant to plea agreements, which typically mandate broad waivers of appellate rights. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012); Conrad & Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99, 153 (2018); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-26 (2015); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (observing that "criminal justice today is for the most part a system of pleas, not a system of trials."). Because of the near-extinction of the criminal trial, the proliferation of the appeal waiver is significant—and concerning. "The glut of plea bargaining and the pandemic waiver of these rights have rendered trial by jury an inconvenient artifact." *United States v. Vanderwerff*, No. 12-CR-00069, 2012 WL 2514933, at *4 (D. Colo. June 28, 2012), *rev'd and remanded*, 788 F.3d 1266 (10th Cir. 2015). And the criminal appeal—despite being a statutory entitlement—faces a similar fate. *See* 18 U.S.C. § 3742. In districts like the Eastern District of Louisiana, appeals are threatened with extinction due to exceptionally high plea rates combined with the existence of appeal waivers in all or nearly all plea agreements. Appellate courts like the Fifth Circuit have imposed few limits on their enforcement.

Although this Court recently signaled possible limits on the reach of appeal waivers, it has not yet fully examined their legality or clarified restrictions on their enforcement. *See Garza v. Idaho*, 139 S. Ct. 738, 744-45 (2019) (recognizing that "no

appeal waiver serves as an absolute bar to all appellate claims" and noting lower court decisions refusing to enforce waivers that were not knowing and voluntary). For a number of reasons, this Court should provide that necessary clarification now. First, as commentators and judges alike have observed, the widespread and compulsory forfeiture of appellate rights raises serious policy and fairness concerns, implicating not only the fundamental rights of huge swaths of criminal defendants, but also the health of the criminal process as a whole. Second, broad waivers like the one in Mr. Johnson's case are inherently unknowing and involuntary and therefore are legally dubious. Third, the circuits are split over the limits on and exceptions to the enforcement of appeal waivers, leading to confusion and unpredictability. Clarification from this Court is urgently needed. Finally, Mr. Johnson's case provides an ideal vehicle to address this issue, as his appeal waiver barred consideration of an important issue of first impression that should have received appellate attention.

I. Appeal waivers raise serious policy and fairness concerns that require this Court's attention.

Many judges and commentators have expressed dismay over the appeal waiver trend, noting the serious policy concerns raised by the widespread, compelled forfeiture of appellate rights—and the inherent unfairness of those waivers. Appeal waivers like Mr. Johnson's require defendants to forfeit serious errors that they could not have anticipated at the time of relinquishment and arise from inherently inequitable bargaining positions. At the time a defendant pleads guilty, he or she does so in the face of "information deficits and pressures to bargain," with the threat of severe potential penalties that can be imposed at the prosecution's whim.

Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011).

As one commentator explained:

> The lack of bargaining equality between the defense and prosecution has led some judges to reject appeal waivers as contracts by adhesion. Because conditioning the plea agreement on acceptance of an appeal waiver skews the balance so far in the prosecution's favor, the defendant has no hope at achieving equal bargaining power. This renders the contract unconscionable.

Andrew Dean, *Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191, 1211 (2013); *see also* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. Times, July 17, 2012, at A24 ("Congress gave appeals courts the power to review federal sentences to ensure the government applies the law reasonably and consistently. Without an appeals court's policing, the odds go up that prosecutors will do neither. Our system of pleas then looks more like a system of railroading."). At the same time—while in the vice-like grip of plea bargaining—the defendant has no way of knowing what future errors may be committed by the district court or what rights may be trampled—nor the potential cost of those harms. Indeed, the Sentencing Guidelines' range has not even been calculated yet at that early stage.

On an institutional level, waivers reduce incentives for careful sentencing and strict compliance with the Sentencing Guidelines, insulating serious errors from review and correction. This not only leads to unfair and inconsistent outcomes, but leaves difficult or open legal questions unanswered and otherwise inhibits development of the law. As one district court put it, "[t]he criminal justice system is not improved by insulating from review either simple miscalculations or novel

questions of law." *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1339 (W.D. Wash. 2016); *see also United States v. Melancon*, 972 F.2d 566, 573 (5th Cir. 1992) (Parker, J., concurring) ("Any systemic benefits that might inhere in this type waiver cannot overcome its extremely deleterious effects upon judicial and congressional integrity, and individual constitutional rights.").

Even the Department of Justice has recognized the danger that appeal waivers pose to the integrity of our current Guidelines-based sentencing scheme. *See* John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 Fed. Sent. R. 209, 210 (Jan./Feb. 1998) ("The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the sentencing guidelines."). And the post-*Booker* "reasonableness" review of sentences is undermined by a system that leaves the length of sentences and the procedures producing them immune from review. *See Vanderwerff*, 2012 WL 2514933, at *5 ("Indiscriminate 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.").

Of course, courts long have pointed to the institutional benefits of appeal waivers, most commonly conservation of resources and finality. However, as one district court observed, these benefits may be overblown:

> Any suggestion that unilateral waivers of the right to appeal promote finality is disingenuous. Finality is not secured simply because only the Government, and not the defendant, is entitled to appeal. Moreover, to the extent the Government's motive is merely to reduce the burden of appellate and collateral litigation on sentencing issues, the avenue for achieving such finality is explicitly contemplated in Rule 11(c)(1)(C), pursuant to which the Government may agree to a specific [Sentencing Guidelines] range and bind both the defendant and the Court.

Mutschler, 152 F. Supp. 3d at 1340 (internal citations omitted).

Moreover, use of compulsory appeal waivers in *every* plea agreement does not merely reduce direct criminal appeals—it eliminates them. No doubt, some balance must be struck between the interests of resource management and finality on the one hand, and, on the other, the statutory right to appeal with all of its benefits, such as error correction, guidance for lower courts, and just results. The former cannot be allowed to consume the latter. *Vanderwerff*, 2012 WL 2514933, at *4 ("Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.").

II. Appeal waivers like Mr. Johnson's are inherently unknowing and involuntary and therefore are of questionable legality.

"The Supreme Court has not yet ruled on the constitutionality of plea agreement waivers of the statutory right to direct appeal of conviction by plea or direct appeal of sentence after conviction by plea." Klein et al, *supra*, at 81. Although the Court recently signaled possible limits on the reach of such waivers, it has not yet fully examined their legality or clarified restrictions on their enforcement. *See Garza v. Idaho*, 139 S. Ct. 738, 744–45 (2019) (recognizing that "no appeal waiver serves as

an absolute bar to all appellate claims" and noting lower court decisions refusing to enforce waivers that were not knowing and voluntary).

Appellate courts, on the other hand, generally have upheld appeal waivers based on a false equivalency between prospectively waiving the right to appeal and the waiver of certain constitutional rights this Court previously has found to be relinquished upon entry of a guilty plea. Appellate courts generally reason that, since defendants can waive constitutional rights by pleading guilty, they may also waive statutory rights, including the right to appeal a sentence. *See*, *e.g.*, *Melancon*, 972 F.2d at 567; *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), *overruled in part by United States v. Andis*, 333 F.3d 886, 892 n.6 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52-54 (4th Cir. 1990). At the same time, appellate courts generally will not enforce waivers that were not knowing and voluntarily made. *See, e.g.*, *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

These two positions are at odds. Appeal waivers like the one in this case are inherently unknowing, because a defendant's sentence—and any sentencing errors contributing to it—cannot be known at the time of the defendant's plea. Importantly, defendants enter into appeal waiver agreements long before sentencing occurs, and those waivers often are made, as here, with no agreement between the parties regarding the sentence the defendant might face. In other words, a defendant cannot knowingly waive a future appeal of those yet-to-be-made errors.

Appellate courts have sidestepped these issues by reasoning that, because defendants may waive *constitutional* rights, they also may waive the statutory right to appeal a sentence. *See, e.g.*, *Andis*, 333 F.3d at 889 ("[T]he right to appeal is not a constitutional right but rather purely a creature of statute. . . . Given that the Supreme Court has allowed a defendant to waive constitutional rights, we would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." (internal quotation marks and citations omitted)); *Khattak*, 273 F.3d at 561 ("The ability to waive statutory rights, like those provided in 18 U.S.C. § 3742, logically flows from the ability to waive constitutional rights."); *Teeter*, 257 F.3d at 21-22 ("[T]he idea of permitting presentence waivers of appellate rights seems relatively tame because the right to appeal in a criminal case is not of constitutional magnitude.").

But the analogy courts have drawn between a sentence-appeal waiver and the waiving of constitutional rights by pleading guilty is flawed. The constitutional rights waived by a guilty plea are known at the time they are waived:

> [O]ne waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (Parker, J., concurring). Due process only can be satisfied when a waiver is an intentional, knowing "relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United States v. Olano*, 507 U.S. 725, 732-33 (1993); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969). By contrast, there can be no waiver without knowledge of the right waived.

Cf. Newton v. Rumery, 480 U.S. 386, 390–403 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment, when right to sue had already accrued). Because sentence-appeal waivers are made at the time of the plea, they lack the essential prerequisite for waiver: contemporaneous knowledge of the rights being relinquished. At that moment, the right to appeal has not yet accrued,[2] sentencing errors have not yet occurred, and constitutional rights have not yet been violated.

A defendant cannot preserve sentencing errors for review by making a blanket objection at re-arraignment to any prospective error in the court's application of the Sentencing Guidelines. *See* Fed. R. App. P. 51(b) (requiring an objection "when the court ruling or order is made or sought"); *Puckett v. United States*, 556 U.S. 129, 135 (2009) (describing Rule 51(b) as a "contemporaneous-objection rule"). Conversely, a defendant cannot waive—i.e., knowingly and intentionally relinquish—the right to have such an error corrected without first knowing what the error is. *See Olano*, 507 U.S. at 733. Moreover, it is unreasonable to expect a defendant to anticipate—and thus "know"—whether errors will be made in calculating a sentence, much less the severity of those errors' impact. A defendant cannot have concrete knowledge of what is ceded when supposedly waiving the right to appeal the sentence. Worse, a defendant cannot know what constitutional rights an overly zealous prosecutor may later violate with impunity. In other words, a defendant cannot have concrete

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[2] *See* Fed. R. App. P. 4(b)(2) (allowing the filing of a notice of appeal before the entry of the judgment so long as the notice is filed "*after* the court announces a . . . sentence" (emphasis added)).

knowledge of what is ceded when supposedly waiving the right to appeal the sentence.[3]

Nor are agreements like Mr. Johnson's "voluntary." U.S. Attorney's Offices like the one in the Eastern District increasingly *require* appellate waivers or else defendants are not permitted to plead guilty pursuant to an agreement. These are not specific, bargained-for relinquishments of rights in exchange for some benefit. Defendants have no choice in the matter and receive nothing in return.

III. There is a circuit split over how to enforce appeal waivers, leading to inconsistent treatment of identically situated criminal defendants.

Although appellate courts generally will enforce appeal waivers, the limits those courts have set on waivers and the situations in which courts refuse to enforce them varies wildly by circuit. As one commentator observed, "[i]n the absence of Supreme Court precedent guiding the enforcement of appeal waivers, . . . various courts of appeal have created their own limits and exceptions to their enforcement." Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event of Superseding Supreme Court Law: The Durham Rule As Applied to Appeal Waivers*,

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[3] For some courts, the adoption of Federal Rule of Criminal Procedure 11(b)(1)(N)—which requires district courts to ensure that defendants understand the terms of appellate waivers when pleading guilty—established that such waivers are legitimate. *United States v. Redmond*, 22 Fed. App'x 345, 346 (4th Cir. 2002); *United States v. Palmer*, 7 Fed. App'x 667, 668 (9th Cir. 2001); *Teeter*, 257 F.3d at 14 (reasoning that the adoption of Rule 11(c)(6) [predecessor to Rule 11(b)(1)(N)] is one of several reasons waivers are enforceable). However, the rule stops short of stating that compliance renders such a waiver knowing and voluntary. To the contrary, the Advisory Committee expressly reserved judgment on whether appeal waivers are constitutional: "[T]he Committee takes no position on the underlying validity of such waivers." Fed. R. Crim. P. 11, advisory committee's note (1999 Amendments).

18 Fla. Coastal L. Rev. 113 (2016). That means a defendant in one circuit may be permitted to proceed with an appeal, while an identically situated defendant in another circuit will be deprived of that right entirely.

This inconsistency and uncertainty is evident in the various, diverse frameworks courts have developed to examine the validity of appeal waivers. *See generally*, *id*. at 116-22 (outlining the split). The Fifth Circuit, for example, has adopted a two-step inquiry. The court first asks "(1) whether the waiver was knowing and voluntary," and then determines "(2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *Bond*, 414 F.3d at 544. The inquiry ends there. By contrast, some courts conduct a *third* step, inquiring whether the court's failure to consider the defendant's claim will result in a "miscarriage of justice." *See, e.g.*, *United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *Khattak*, 273 F.3d at 562-63; *Teeter*, 257 F.3d at 25.

How these courts define the term "miscarriage of justice," however, varies tremendously from circuit to circuit. For example, the First Circuit holds broadly that even knowing and voluntary appeal waivers should not be enforced in "egregious cases" and "are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs." *Teeter*, 257 F.3d at 25-26. The Tenth Circuit has limited the "miscarriage of justice" exception to four discreet circumstances:

> (1) reliance by the court upon an impermissible factor such as race in imposition of the sentence; (2) ineffective assistance of counsel in

> connection with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Porter, 405 F.3d 1136, 1143 (10th Cir. 2005). The Third Circuit, while declining to adopt a brightline rule, considers certain factors (first articulated by the First Circuit), such as:

> the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Khattak, 273 F.3d at 562.

Disturbingly, appellate courts do not even agree about whether an appeal waiver properly can be applied to exclude direct or collateral claims of ineffective assistance of counsel. *Compare, e.g.*, *Hurlow v. United States*, 726 F.3d 958, 964, 966 (7th Cir. 2013) ("[A] direct or collateral review waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel."), *and United States v. Attar*, 38 F.3d 727, 729 (4th Cir. 1994) (holding that a general waiver of appellate rights cannot be construed as waiving claims of ineffective assistance of counsel), *with Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (holding that an appeal waiver precluded a collateral claim of ineffective assistance of counsel and urging that "a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless").

Even if this Court ultimately determines that broad appeal waivers like Mr. Johnson's generally are lawful, there should at least be uniform rules governing their enforcement and interpretation. At the very least, this Court should intervene to clarify those rules, which impact scores of criminal defendants.

IV. Mr. Johnson's case illustrates the harms of appeal waivers.

Mr. Johnson's case in particular provides an excellent illustration of why appellate waivers like his should concern courts and policymakers. Mr. Johnson's appeal raised a preserved, complex issue related to criminal history score calculations—one that surely affects many defendants. The cost of the error in Mr. Johnson's case was great—more than doubling his sentence. But the waiver had broader, institutional costs as well. His appeal raised a critical issue of first impression. By declining to hear Mr. Johnson's case, the Fifth Circuit not only refused to correct a costly error, but also failed to provide much-needed guidance to district courts on an issue that required clarification. As Mr. Johnson's case reveals, the Government's increased, overzealous insistence on widespread use of appeal waivers causes defendants to sit in jail far longer than they should, stymies necessary development of the law, and undermines the integrity of our judicial process. This Court should intervene.

CONCLUSION

For the foregoing reasons, Mr. Johnson's petition for a writ of certiorari should be granted.

Respectfully submitted November 8, 2019,

/s/ Celia Rhoads
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