No. _____

In the Supreme Court of the United States

ROLAND CHAMBERS, also known as Troy Chambers,
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

CLAUDE J. KELLY
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
SAMANTHA J. KUHN
COUNSEL OF RECORD

500 POYDRAS STREET, SUITE 318
HALE BOGGS FEDERAL BUILDING
NEW ORLEANS, LOUISIANA 70130
(504) 589-7930
SAMANTHA_KUHN@FD.ORG

COUNSEL FOR PETITIONER

QUESTION PRESENTED

The right to appeal a criminal sentence is a statutory entitlement under 18 U.S.C. § 3742. But in many federal jurisdictions—including the Eastern District of Louisiana—local U.S. Attorney's Offices have developed "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 except attacks on sentences imposed in excess of the statutory maximum and claims of ineffective assistance of counsel. Defendants are required to enter into these agreements long before sentencing occurs, usually without any agreement between the parties about the sentence the defendant might face.

This Court has yet to directly rule on the permissibility of these waivers, despite intense criticism, questionable legality, and inconsistent treatment by lower courts. Although appellate courts generally have enforced appeal waivers, the circuits have adopted different frameworks for determining their scope and validity. Amidst this confusion, 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 the forced relinquishment of challenges to yet-to-be-made sentencing 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

IN THE
SUPREME COURT OF THE UNITED STATES

ROLAND CHAMBERS, also known as Troy Chambers,
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

Petitioner Roland Chambers 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 January 2, 2020, a panel of the Fifth Circuit Court of Appeals affirmed Mr. Chambers's conviction and dismissed his appeal with respect to his challenge to the 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. Chambers'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 January 2, 2020. No petition for rehearing was filed. Mr. Chambers's petition is timely filed within 150 days after entry of that judgment.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] Mr. Chambers's petition originally was due April 1, 2020—*i.e.* within 90 days of the lower court judgment. *See* Sup. Ct. R. 13.1. That deadline was extended to 150 days from the date of the lower court judgment pursuant to this Court's Order of March 19, 2020, which extended the deadline to file petitions for writs of certiorari in light of the ongoing public health concerns relating to COVID-19.

FEDERAL STATUTE 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

On April 4, 2018, Roland Chambers pleaded guilty to a single count of conspiring to distribute 100 grams or more of heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B), pursuant to a plea agreement with the government. As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Chambers'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. This waiver, which is standard in most plea agreements in the Eastern District of Louisiana, is the broadest and most restrictive waiver permitted by law and U.S. Department of Justice Policy, and it required him to waive his right to appeal any sentence imposed up to and including the statutory maximum.[2]

In anticipation of sentencing, the U.S. Probation Office completed a Presentence Investigation Report (PSR) for Mr. Chambers. The PSR calculated his base offense level as 24, based on the drug quantity to which Mr. Chambers and the government stipulated in the factual basis. The PSR then applied two separate two-level enhancements. First, the PSR applied an enhancement pursuant to U.S.S.G. § 3B1.1(c) based on its finding that Mr. Chambers was a leader, organizer,

---

[2] *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).

manager or supervisor in the criminal activity. Second, the PSR applied an enhancement pursuant to U.S.S.G. § 3C1.2, which increases a defendant's base offense level if evidence shows that the defendant recklessly created a substantial risk of death or serious body injury to another person while fleeing from law enforcement.

In explaining the § 3C1.2 enhancement, the PSR provided only a brief description of Mr. Chambers's attempt to flee from law enforcement following a controlled purchase, stating:

> Once the defendant exited his vehicle, he observed [law enforcement] and began running back to his vehicle. The defendant entered the vehicle and fled the scene. Despite [law enforcement] activating their emergency lights to conduct a stop of the defendant's vehicle, the defendant refused to stop his vehicle. While attempting to flee the area, the defendant's vehicle struck an unmarked police vehicle. The defendant was ultimately apprehended.

The PSR provided no other information about the details of the incident, such as whether the unmarked police vehicle was occupied at the time or even the circumstances that led to the two vehicles colliding.

Incorporating the two enhancements and a three-point reduction based on Mr. Chambers's prompt acceptance of responsibility, the PSR calculated a total offense level of 25. Combined with Mr. Chambers's criminal history category of III, the PSR calculated an advisory Guidelines range was 70 to 87 months. At sentencing, Mr. Chambers's counsel objected to the PSR's application of the § 3B1.1(c) leadership role enhancement, and the court agreed that it should not apply. As a result, the court

applied a reduced advisory sentencing range of 51 to 71 months based on the revised offense level of 23 and criminal history category of III.

Nevertheless, the court determined that an upward departure was warranted based on underrepresented criminal history. *See* U.S.S.G. § 4A1.3(a). After "incrementally review[ing] the criminal history categories," the court settled on an adjusted criminal history category of VI for Mr. Chambers, resulting in a new sentencing range of 92 to 115 months. The court sentenced him to the top of that range—115 months—and stated "for the record" that it would have ordered the same sentence as a variance even if its application of the Guideline departure was erroneous.

Mr. Chambers filed a timely notice of appeal. In his appellate brief, Mr. Chambers argued that the district court plainly erred in applying the sentencing enhancement for reckless endangerment pursuant to U.S.S.G. § 3C1.2.[3] He argued that the facts contained in the PSR were legally insufficient to support the enhancement—specifically, the PSR failed to demonstrate that Mr. Chambers acted recklessly, nor did it provide facts showing that he endangered another person. Instead, the PSR only established that Mr. Chambers fled from law enforcement—conduct that cannot alone establish recklessness and, in fact, is specifically excluded from the reach of the enhancement. *See* U.S.S.G. § 3C1.1, cmt. n. 5(D). Mr. Chambers

[3] Mr. Chambers also challenged the validity of his conviction based on insufficient factual basis. That claim is not the subject of this petition and therefore is not discussed.

argued that the court's error was clear or obvious under the Guidelines commentary and long-established caselaw and that the error affected his substantial rights because it increased the Guidelines calculation upon which his sentence was based. In particular, even if the district court maintained its position that his criminal history was underrepresented and should be classified as category VI, Mr. Chambers's properly calculated sentencing range (absent the erroneous enhancement) would have been 77 to 96 months of imprisonment, creating a reasonable probability that his sentence would have been lower absent the error.

In its response, the government argued that Mr. Chambers's sentencing challenge should be dismissed based on the appellate waiver in his plea agreement. The government also argued that the § 3C1.2 sentencing enhancement was not plain error. However, the government did not specifically respond to Mr. Chambers's insufficiency arguments. Instead, it simply reiterated that Mr. Chambers "attempted to flee in his car" after being alerted to the presence of law enforcement and argued that courts have found the reckless flight enhancement "warranted in similar scenarios," citing a series of five cases from several different circuits.

Mr. Chambers challenged the validity of his appeal waiver on reply, arguing that appeal waivers like the one in his case are bad policy, harmful to the integrity of the criminal process, and inherently unknowing and involuntary. He recognized, however, that many of his arguments were foreclosed by Fifth Circuit precedent. Mr. Chambers also reiterated that the appeal waiver in this case leaves in place a plainly erroneous sentencing enhancement. In addressing the government's

substantive response to the sentencing challenge, Mr. Chambers explained that each of the cases cited in the government's brief included detailed facts demonstrating why the flight in *those cases* was reckless and not just regular flight. Mr. Chambers also pointed out that the government did not even attempt to address the lack of any evidence demonstrating that Mr. Chambers's flight "created a substantial risk of death or serious bodily injury to another person"—indeed, there was no indication in the PSR that the undercover police vehicle was even occupied when it was struck.

On January 2, 2020, the Fifth Circuit entered judgment affirming Mr. Chambers's conviction and dismissing his sentencing challenged based on the appeal waiver without reaching the merits of his sentencing challenge.

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 faces a similar fate. 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—especially those regarding yet-to-be-determined sentences—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. Chambers's case are inherently unknowing and involuntary and therefore are legally dubious. Finally, 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.

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 those in Mr. Chambers's plea agreement require defendants to forfeit serious errors that they could not have anticipated at the time of relinquishment, and that 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—like the one in this case—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 common among those are the conservation of resources and finality of judgments. 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 appeal waivers in *every* plea agreement does not merely reduce direct criminal appeals—it seeks to eliminate 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—a right that allows for error correction and just results while also providing guidance for lower courts. 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. Chambers's are inherently unknowing and involuntary and therefore are of questionable legality.

Appellate courts 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. In Mr. Chambers's case, he could not have known at the time of his guilty plea that the court would apply an unsupported and plainly erroneous sentencing enhancement to his Guidelines calculation, thereby increasing his sentencing range by *nearly two years*. Had he foreseen that possibility, he certainly would not have agreed to waive his right to appeal the sentence imposed.

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 sentencing-related 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,[4] and the sentencing errors have not yet occurred.

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.[5]

Nor are agreements like Mr. Chambers's "voluntary." U.S. Attorney's Offices like the one in the Eastern District increasingly *require* appellate waivers or else

---

[4] *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)).

[5] 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).

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*, 18 Fla. Coastal L. Rev. 113 (2016). That means a defendant in one circuit may be permitted to proceed with an appeal—and potentially have a sentencing error remedied—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 bright-line 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").

The broad appeal waivers in Mr. Chambers's plea agreement, and especially the waiver of the right to appeal a yet-to-be-imposed sentence, are unjust and render his plea agreement involuntary and unknowing. But even if this Court ultimately determines that broad appeal waivers like Mr. Chambers's generally are lawful, there should at least be uniform rules governing their enforcement and interpretation, including whether and when appellate courts should review a challenged sentencing error notwithstanding the existence of an applicable appeal waiver. The Court's guidance is urgently needed to clarify those rules, which impact scores of criminal defendants.

CONCLUSION

For the foregoing reasons, Mr. Chambers respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted May 26, 2020,

/s/ Samantha Kuhn
SAMANTHA J. KUHN
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
500 Poydras Street, Suite 318
Hale Boggs Federal Building
New Orleans, Louisiana 70130
(504) 589-7930
samantha_kuhn@fd.org