No. _____

In the Supreme Court of the United States

DARRYL HENRY,
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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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?

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner Darryl Henry 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 March 30, 2020, a panel of the Fifth Circuit Court of Appeals dismissed Mr. Henry's appeal of his sentence based solely on the appeal waiver in his 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 March 30, 2020. No petition for rehearing was filed. Mr. Henry's petition is timely filed, pursuant to Supreme Court Rules 13 and 30, because 90 days from the entry of judgment was Sunday, June 28, 2020, and this petition is being filed the following Monday, June 29. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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—
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> (1) was imposed in violation of law;
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> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
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> (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 3, 2019, Darryl Henry pleaded guilty to federal robbery and firearm charges pursuant to a plea agreement with the government. As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Henry'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.[1]

In anticipation of sentencing, the U.S. Probation Office prepared a Presentence Investigation Report ("PSR") that calculated Mr. Henry's total criminal history score of seven, corresponding to a criminal history category of IV. One of the criminal history points assigned to Mr. Henry resulted from a marijuana possession charge in Wisconsin for which he was reportedly arrested on May 1, 2017. The PSR indicated that Mr. Henry was convicted of the charge on June 5, 2017, in West Allis Municipal Court and "sentenced to a fine." However, the PSR indicated that "[t]he amount and

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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).

status of the fine are unknown." Combined with Mr. Henry's offense level of 25, his criminal history category of IV resulted in an advisory Sentencing Guidelines range of 84 to 105 months. Without the criminal history point attributed to the Wisconsin charge, his criminal history category would have been III, resulting in a Sentencing Guidelines range of 70 to 87 months.

Mr. Henry objected to the assignment of a criminal history point for the Wisconsin marijuana possession charge, arguing that he never appeared in court on the charge, never entered a guilty plea, and did not have a trial. In support of his argument, Mr. Henry quoted the Sentencing Guidelines' definition of "prior sentence," requiring that the sentence be "imposed upon adjudication of guilty, whether by guilty plea, trial or plea of nolo contendere," as well as a Wisconsin Criminal Procedure statute requiring the defendant's presence at the "pronouncement of judgment and imposition of sentence." *See* U.S.S.G. § 4A1.2(a)(1) and WIS. STAT. § 971.04. He further asserted that the Clerk's Office for West Allis Municipal Court advised his counsel that he was found guilty of "failure to appear" because he did not appear for a scheduled court date on June 5, 2017. In response to his objection, however, the U.S. Probation Office stated that a Clerk's Office representative advised that "although the defendant failed to appear in court, he was adjudicated guilty by default, and ordered to pay a fine."

The district court overruled Mr. Henry's objection to his criminal history score and determined that the applicable Guidelines range was 84 to 105 months. The court stated that, "[u]nder Wisconsin law, a court may enter a default judgment against a

defendant who does not appear at the initial appearance and has not made a deposit in the amount set for the violation." *See* WIS. STAT. § 800.035(9). Relying on the Seventh Circuit's decision in *United States v. Jiles*, the court then explained that "[p]ursuant to this statute, a person charged with a municipal violation who fails to appear in court is deemed to have entered a plea of no contest; in other words, a plea of nolo contendere." *See United States v. Jiles*, 102 F.3d 278 (7th Cir. 1996) (citing WIS. STAT. § 800.09). The district court concluded that:

> Although Henry did not have a trial or enter a guilty plea, his failure to appear for his scheduled hearing in the West Allis Municipal Court on June 5th, 2017, constitutes a plea of nolo contendere under Wisconsin law and is thereby properly included as a prior sentence under Section 4A1.2(a)(1) of the sentencing guidelines. Therefore, his objection is overruled.

Following that ruling, the court sentenced Mr. Henry to concurrent, within-Guidelines sentences of 96 months for his robbery convictions.[2]

Mr. Henry filed a timely notice of appeal. On appeal, he raised the single issue of whether the district court's ruling on his sentencing challenge was erroneous. In Mr. Henry's appellate brief, he demonstrated that the district court relied solely on a Wisconsin statute that no longer exists in overruling his objection. Specifically, the Seventh Circuit's holding in *Jiles* that a default judgment in Wisconsin municipal court qualified as a "prior sentence" under the Sentencing Guidelines was based on the fact that Wisconsin law explicitly stated, at the time, that a defendant who fails

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[2] The court also sentenced Mr. Henry to a mandatory, consecutive 84-month sentence for his § 924(c) conviction, for a total sentence of 180 months.

to appear "may be deemed to have entered a plea of no contest[.]" *See* WIS. STAT. § 800.09(2)(b) (1996). In 2009, however, the Wisconsin state legislature repealed that statute, and Wisconsin law no longer treats the default judgment entered against Mr. Henry as a plea of no contest. Thus, the district court's reasoning was unquestionably flawed and its ruling erroneous, as it relied on a non-existent statute and outdated caselaw.

Mr. Henry further argued that Wisconsin's current law—and the law that existed at the time of his default judgment in 2017—make it clear that default judgments are *not* considered to be the same as "no contest" pleas in the state. While the post-2009 version of the statute still permits municipal courts to enter default judgments based on a defendant's failure to appear, *see* WIS. STAT. § 800.08(5), it no longer permits courts to "deem the defendant to have entered a plea of no contest" in that scenario. Moreover, a separate section of the Wisconsin statute makes it clear that a default judgment is *not* considered the same as a "no contest" plea by the defendant. Section 800.035 of the Wisconsin statute addresses the defendant's initial appearance, and a subsection of that provision—WIS. STAT. § 800.035(6)—indicates that "a defendant may enter a plea of no contest and provide a deposit at any time before the initial appearance." Subsection 800.035(8) states that "[i]f the defendant does not appear, *but has made a deposit* in the amount set for the violation, he or she is deemed to have tendered a plea of no contest[.]"[3] WIS. STAT. § 800.035(8) (emphasis

[3] At that point, the municipal court "may either accept the plea of no contest

added). In contrast, "[i]f a defendant does not appear at the initial appearance *and has not made* a deposit in the amount set for the violation, upon proof of jurisdiction under s. 800.01(2), the court may either enter a default judgment under s. 800.09 or issue a warrant or summons to bring the defendant before the court." WIS. STAT. § 800.035(9) (emphasis added). Thus, at the time that the default judgment was entered against Mr. Henry, it could not have been treated as the tendering of a "no contest" plea under Wisconsin law because he never made a deposit for the violation amount.

Finally, Mr. Henry argued that even if his default judgment still could somehow qualify as a "prior sentence" under U.S.S.G. § 4A1.2(a)(1), it must be classified as an offense "similar to" contempt of court and therefore excluded from his criminal history calculation. Indeed, the entry of judgment against Mr. Henry was based on his failure to appear in court, not any factual findings establishing the elements of the underlying charge. Thus, to the extent it could be considered an "adjudication of guilt," it is the equivalent of contempt, not a drug conviction.

The government moved to dismiss Mr. Henry's appeal based on the appellate waiver in his plea agreement. Mr. Henry opposed dismissal, 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

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and enter judgment accordingly, or reject the plea and issue a summons." WIS. STAT. § 800.035(8).

many of his arguments were foreclosed by Fifth Circuit precedent. On March 30, 2020, the Fifth Circuit granted the government's motion to dismiss based solely on the appeal waiver.

REASONS FOR GRANTING THE PETITION

Darryl Henry is serving a sentence that is more than a year longer than he likely would have received absent a specific sentencing error by the district court. The error resulted from the district court's reliance on Wisconsin state law that was repealed more than a decade ago and an outdated Seventh Circuit case that relied on that repealed law. What's more, it is clear from the applicable state laws that the district court's reasoning was flawed and its ruling erroneous. However, as a result of the appeal waivers in Mr. Henry's plea agreement—waivers that have become standard in all plea agreements in the Eastern District of Louisiana—the Fifth Circuit could not review, much less correct, the error. And, absent intervention by this Court, the error can never be addressed and remedied.

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. Henry'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. Henry'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 and obvious 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. Henry'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. Henry's case,

he could not have known at the time of his guilty plea that the court would rely on non-existent law and invalid precedent to increase his sentencing range by over a year. 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

[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)).

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. Henry'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*

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[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).

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. Henry'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. Henry'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. Henry respectfully requests that his petition for a writ of certiorari be granted.

Respectfully submitted June 29, 2020,

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