No. 20-1352

IN THE
Supreme Court of the United States

ALEXANDER CHRISTIAN MILES,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 22, 2021

QUESTION PRESENTED

Whether oral pronouncements by the court or the government at a plea colloquy which clarify the extent of an appellate and collateral attack waiver in the parties' plea agreement can narrow the scope of the waiver pursuant to contract law principles.

RELATED PROCEEDINGS

United States Court of Appeals for the Tenth Circuit

United States v. Miles, No. 20-6150 (10th Cir. 2020), Order and Judgment terminating the Petitioner's appeal by enforcement of the plea agreement's collateral attack waiver.

United States v. Miles, No. 18-6119, 923 F.3d 798 (10th Cir. 2019), *cert. denied* 589 U.S.___ (2019). Opinion and Judgment affirming the District Court's denial of the Petitioner's second petition for a writ of error coram nobis by enforcement of the plea agreement's collateral attack waiver.

United States v. Miles, No. 13-6110, 553 Fed. Appx. 846 (10th Cir. 2014). Order and Judgment affirming the District Court's denial of the Petitioner's first petition for a writ of error coram nobis by enforcement of the plea agreement's collateral attack waiver.

United States v. Miles, No. 12-6011, 546 Fed. Appx. 730 (10th Cir. 2012) Order and Judgment denying the Petitioner's application for a certificate of appealability by enforcement of the plea agreement's collateral attack waiver.

United States District Court for the Western District of Oklahoma

United States v. Miles, Case No. 5:06-CR-096-HE-1 [Doc. #255](W.D.O.K. September 1, 2020). Order denying the Petitioner's third petition for a writ of error coram nobis by enforcement of the plea agreement's collateral attack waiver.

United States v. Miles, Case No. 5:06-CR-096-HE-1 [Doc. #236](W.D.O.K. June 20, 2018), Order denying

the Petitioner's second petition for a writ of error coram nobis by enforcement of the plea agreement's collateral attack waiver.

United States v. Miles, Case No. 5:06-CR-096-HE-1 [Doc. #147](W.D.O.K. December 22, 2011). Order denying the Petitioner's initial habeas motion under 28 U.S.C. §2255 by enforcement of the plea agreement's collateral attack waiver.

Certiorari Petitions Presenting a Similar Question

Haws v. Idaho, No. 20-1095, where the Question Presented is:

> Whether a criminal defendant's purported waiver of the right to appeal in a plea agreement is knowing, intelligent, and voluntary – as required by the Due Process Clauses of the Fifth and Fourteenth Amendments – when the trial court incorrectly informs the defendant, during the colloquy in which the court accepts the defendant's guilty plea, that the defendant has reserved the right to appeal.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Dr. Alexander C. Miles, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The petition seeks review of whether and to what extent parol evidence in the form of oral pronouncements by the court or the government at a plea colloquy have the power to narrow the scope of an appellate and collateral attack waiver contained in an integrated plea agreement.

OPINIONS BELOW

The Tenth Circuit's unpublished order denying Dr. Miles' third petition for a writ of error coram nobis based on enforcement of the waiver provision in the parties' plea agreement is reported as *United States v. Miles*, No. 20-6150 (10th Cir. 2020), and reproduced in Appendix A. The three preceding Tenth Circuit orders denying Dr. Miles' application for a certificate of appealability and first and second coram nobis petitions, likewise by enforcement of the waiver, are reported as *United States v. Miles*, 546 Fed. Appx. 730 (10th Cir. 2012), *United States v. Miles*, 553 Fed. Appx. 846 (10th Cir. 2014), and *United States v. Miles*, 923 F.3d 798 (10th Cir. 2019), *cert. denied* 589 U.S.___(2019).

JURISDICTION

The Tenth Circuit rendered its judgment and order on December 2, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1). On March 19, 2020, the Supreme Court extended the deadline for certio-

rari petitions to 150 days after the lower court judgment. The filing deadline for the instant case is therefore May 2, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const., amend. V and VI, Fed.R.Crim.P. Rule 7(e) and Rule 11, and 28 U.S.C. §2255 (h). These provisions are reproduced in the Constitutional and Statutory Addendum in Appendix B.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

After two unsuccessful attempts to convict Dr. Miles under the Mann Act for crossing state lines with an intent to engage in marital relations with his minor alien wife when relocating from New York to Oklahoma,[1] the United States Attorney for the Western District of Oklahoma[2] offered him a guilty plea to a one count violation of 18 U.S.C. §1001(a)(3). This time around his crime supposedly consisted of having misrepresented his wife's age in an INS form Affidavit of Support, in support of her application for a K-1 visa, in accordance with the particulars contained in a Superceding Information, dated June 19, 2009, and a Plea Agreement, executed June 24, 2009.

At the ensuing June 24, 2009 Fed.R.Crim.P. Rule 11 Plea Colloquy, the government (as directed by the District Court) stipulated to the factual basis for Dr. Miles' offense, and clarified the extent of the Plea

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1.This appears to be the first time in the history of American jurisprudence that a husband has been prosecuted under the Mann Act for intending to engage in sexual relations with his wife within the context of a valid state law marriage.

2. Hereinafter "the government."

Agreement's limited appellate waiver provision. Following the Plea Colloquy, the District Court accepted the guilty plea and found him guilty as charged.[3]

On September 24, 2009, the District Court sentenced Dr. Miles to 60 months of imprisonment[4] to account for the 4 years he had been locked up in jail without bond prior to trial, thereby varying upward from the 0-6 month sentencing guideline range otherwise applicable to the offense.

The 'Superceding Information,'[5] charged that Dr. Miles' offense consisted of "[i]n or about February of 2002" falsely stating to the INS, "**on an affidavit in support of an application for a K1 Visa**," that his wife "was 18 years of age when he knew she was under 18 years of age."

The Plea Agreement further specified that the making or using of "a false **Affidavit of Support for an Alien Fiance Visa application**" which contained "a materially false and fictitious statement * * * that the age of [Dr. Miles' wife] was eighteen"[6] constituted the factual basis for the guilty plea.

The Plea Agreement was fully integrated pursuant to a *Merger/Integration Cause*' according to which any additional agreement or modification would be rejected unless in writing and ratified by both parties:

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3. Transcript of Plea of Guilty (hereinafter "Rule 11 Plea Colloquy"), Case No. 06-CR-096-HE [Doc. #90], p.16. ll.18-23. Appx. E, a30.

4. Fed.R.Crim.P. Rule 7(e), prohibits any amendment of an information after a defendant has been sentenced, no matter how non-prejudicial or trivial.

5. Superseding Information, Case No. 06-CR-096-HE [Doc. #63], Appx C, a14. [Emphasis added].

6. Plea Agreement, Case No. 06-CR-096-HE [Doc. #68], par. 2, Appx. D, a15 [Emphasis added].

> This document contains the entire plea agreement between defendant, Alexander C. Miles, and the United States through its undersigned attorney. No other agreement or promise exists, nor may any additional agreement be entered into unless in writing and signed by all parties. **Any unilateral modification of this agreement is hereby rejected by the United States. This agreement applies only to the criminal violations described** * * *[7]

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

> The defendant waives any claim that venue is not proper in the Western District of Oklahoma. Defendant also waives all defenses based on the statute of limitation **with respect to Count 1 of the Information referenced in paragraph 2 of this agreement.**[8]

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

> Appeal, collaterally challenge, or move to modify * * * his sentence as imposed by the Court and the manner in which the sentence is determined, **provided the sentence is within or below the advisory guideline**

7. Plea Agreement, par. 1, Appx D, a15 [Emphasis added].
8. Plea Agreement, par. 12, Appx D, a16 [Emphasis added].

range determined by the Court to apply to this case.[9]

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

> THE COURT: **All right. Mr. Sengel, if you would, please, question the defendant to determine whether there's a factual basis for the plea.**
>
> MR. SENGEL: **Yes, your Honor. In or about February of 2002, in New York, did you make a false affidavit in support of an application for a K-1 visa by SK?**
>
> THE DEFENDANT: **Yes, I did.**
>
> MR. SENGEL: **Did you know at the time you made the affidavit that it falsely stated SK was 18 years of age when you knew she was under 18 years of age?**
>
> THE DEFENDANT: **Yes.**
>
> MR. SENGEL: **Did you make the affidavit voluntarily and intentionally?**
>
> THE DEFENDANT: **Yes.**
>
> MR. SENGEL: **And do you admit that the affidavit was material to the Immigration and Naturalization Service in that it was capable of influencing a decision of the Service?**
>
> THE DEFENDANT: **Yes.**
>
> MR. SENGEL: And do you admit that the **Immigration and Naturalization Service** is part of the executive branch of the United States government?

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9. Plea Agreement, par. 8(b), Appx. D, a16 [Emphasis added].

> THE DEFENDANT: I do.
> MR. SENGEL: **I have no further questions, your Honor.**
> THE COURT: **I think that sufficiently makes out the factual basis for the offense.**
> * * *
> THE COURT: **Well, the bottom line, Dr. Miles, is did you in fact do what you're charged with in this superseding information?**
> THE DEFENDANT: **Yes, sir.**[10]

At the Rule 11 Plea Colloquy, the government, under the direction of the District Court, further clarified the extent of the Plea Agreement's collateral attack waiver and the waivers of venue and the statute of limitations:

> THE COURT: I understand there is a plea agreement with the government in this case. **Mr. Sengel, if you would, please, describe for the record the principal terms of that plea agreement, please.**
> MR. SENGEL: Yes, your Honor. Pursuant to the plea agreement, the defendant agrees to enter a plea of guilty to the superseding information charging a violation of Title 18 United States Code, Section 1001(a)(3).
> Further, he has agreed to waive any claim that venue as to that offense is improper in the Western District of Oklahoma, and further

10. Rule 11 Plea Colloquy, p.13-14, Appx. E, a28-29 [Emphasis added].

> waive any defense based on the statute of limitations.
> **The defendant has also agreed to waive his right to appeal or collaterally challenge the conviction and the sentence imposed by the court provided the court does not impose a sentence above the advisory guideline range determined to apply** [11]

In February 2011, while on supervised release, Dr. Miles sought relief under 28 U.S.C. §2255. He contended that he had pleaded guilty to non-criminalized conduct, because the age of his spouse was immaterial under 18 U.S.C. §1001(a)(3) since controlling Board of Immigration Appeals (BIA) precedent[12] expressly recognizes the validity of voidable state law marriages to minors for purposes of adjustment of status from K-1 fiancée to conditional lawful permanent resident

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11. Rule 11 Plea Colloquy, p.11, ll. 3-18, Appx E, a26 [Emphasis added].

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

(CLPR): The government's original charges correctly reflected that the INS only requires one Affidavit of Support in conjunction with a K-1 visa application which is to be executed by the U.S. petitioner when the alien beneficiary seeks adjustment of status to CLPR following the parties' U.S. marriage. However, some Consular Visa Issuing Posts (which are part of the Department of State, and not the INS) in Third World countries, such as Cambodia, require an additional I-134 Affidavit of Support when the alien beneficiary applies for the actual K-1 visa itself.

However, unbeknownst to the government, there exists no minimum age for alien beneficiaries of either I-864 or I-134 Affidavits under 8 C.F.R. §213a.2 It is only the U.S. citizen sponsor of an Affidavit of Support who must be 18 years or older. 8 C.F.R. §213a.2(c)(1)(i)(A).

Due to its ignorance of immigration regulations governing Affidavits of Support, the government, in order to avoid the impact of *Matter of G----*, and *Matter of Agoudemos*, claimed that Dr. Miles' §2255 petition had caused it to belatedly realize that it had made an inadvertent charging error. Thus, while the government originally had charged Dr. Miles with lying about his wife's age in the I-864 Affidavit of Support to the INS on February 17, 2002, it two years later, in 2011, realized that it had meant the I-134 Affidavit of Support in support of the actual K-1 visa application itself, mistakenly assumed to have been in filed with the INS in July 2001. However, the I-134 Affidavit of Support had in fact been submitted to the consulate of

the U.S. Embassy to Cambodia in Phnom Penh, in November 2001, as required under U.S. immigration laws and agency policy.[13]

Equally clueless about U.S. immigration laws and procedure, the District Court, when amending the date of the offense from February 2002 to July 2001[14] (at the behest of the government), adopted the government's mistaken assumptions about the time, place and agency of the Executive Branch to which the I-134 Affidavit had been submitted. The District Court thus found that the date of Dr. Miles' offense was undisputed, and that the post-conviction amendment of the original charges, at most, resulted in a "non-prejudicial" "variance," which merely prevented Dr. Miles from capitalizing on an "inconsequential mistake" without impacting his "substantial rights."[15,16] The District Court further discounted Dr.

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13. *See* United States Citizenship and Immigration Services (USCIS): *Summary of Process for the K-1 Fiancé/Fiancée program*, par. 2, Appx. F, a33. Moreover, under agency policy it is the alien fiancée herself who must file the DS-156K (now DS-160) "Nonimmigrant Fiancé Visa Application" at the U.S. embassy abroad, and appear in person before consular officers to swear under oath that the factual averments contained in her K-1 visa application are true.

14. The District Court disregarded Dr. Miles' timely objections that Fed.R.Crim.P. Rule 7(e) and the Sixth Amendment prohibited any amendments of the original charges after his September 2009 sentencing.

15. Order, Case No. 5:06-CR-096-HE-1 [Doc. #147](W.D.O.K. December 22, 2011) p. 6.

16. The date of Dr. Miles' offense was in fact of the essence under Tenth Circuit precedent, because the statute of limitations had expired for both his original offense, charged in June 2009, and his new offense, charged post hoc by the District Court' amendment of the original charges in December 2011. *See United States v. Gammill*, 421 F.2d 185, 186 (10th Cir. 1970). *See also*

Miles' statute of limitations objections: "The defendant waived the statute of limitations with respect to the charge that he made a false statement concerning S.K's age **on the affidavit submitted in support of a K1 fiancée visa.** He *did not waive* the commission of the offense restricted to a particular date."[17] Ultimately, the District Court's disposition rested on enforcement of the Plea Agreement's collateral attack waiver, since no "miscarriage of justice" would ensue because Dr. Miles was not factually innocent of the new charges levied by its post hoc amendment of the government's original charges.[18]

At the time, however, none of the parties were aware that the Plea Agreement's limited waiver provision, as clarified by the government at the Rule 11 Plea Colloquy, appeared to entitle Dr. Miles to challenge both his conviction and his sentence, because the District Court had varied upward from the applicable guideline range. *See United States v. Wilken*, 498 F.3d 1160, 1168 (10th Cir. 2007)(oral clarifications of the particulars of a defendant's appellate waiver at a Rule 11 plea colloquy by the court, or the government acting under the direction of the court, supersede ambiguous written provisions of plea agreements if they render the guilty plea involuntary and unintelligent).

The Tenth Circuit, in December 2012, denied Dr. Miles' application for a certificate of appealability by affirming the District Court's enforcement of the Plea

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United States v. McIntosh, 580 F.3d 1222, 1228 (11th Cir. 2009)(the date of an offense is an essential element of the offense if the offense occurred outside the statute of limitations).

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

18. Order, pp.7 & 9.

Agreement's collateral attack waiver. *United States v. Miles,* 546 Fed. Appx. 730, 732-34 (10th Cir. 2012). The circuit panel acknowledged that the government mistakenly had conflated the K-1 visa application with the application for adjustment of status when drafting the charging terms of the Superseding Information and the Plea Agreement. *Id.* at 731-32. It further conceded that Dr. Miles could not have been held criminally culpable under the original, albeit unilaterally mistaken charges, to which he had pleaded guilty and been convicted of, since agency precedent recognizes voidable marriages to minors for purposes of adjustment of status to CLPR. *Id.* at 732. But, since Dr. Miles apparently had misrepresented wife's age in two different Affidavits of Support to further her efforts to attain CLPR status, the panel contended that the District Court should be at liberty to pick and choose which Affidavit of Support he had lied in, even several years after his conviction, and even after he had served out his prison sentence. *Id.* at 731-32. Nevertheless, the panel expressed reservations about the District Court's amendment of the date of the offense by 7 months (from February 2002 to July of 2001), as it considerably exceeded any temporal amendments heretofore deemed permissible under Tenth Circuit precedent. *Id.* at 733. The panel further expressly found that the Plea Agreement's waiver of the statute of limitations only pertained to Dr. Miles' false statement made in February 2002, and therefore failed to encompass any earlier false statements in 2001. *Id.* at 733. Despite these concerns, the panel ruled that the Plea Agreement's waiver provision obviated the need for further consideration of the otherwise prohibited amendment of the date of the offense

and the bar otherwise imposed by the expiration of the 5-year statute of limitations. *Id.* at 733.

Dr. Miles' first coram nobis petition was denied by the Tenth Circuit for the same reasons as his application for a certificate of appealability, by affirmance of the District Court's enforcement of the Plea Agreement's waiver provision. *United States v. Miles*, 553 Fed. Appx. 846, 848 (10th Cir. 2014).

When Dr. Miles in his second coram nobis petition informed the Tenth Circuit that its own precedent[19] appeared to invalidate the Plea Agreement's waiver provision because his sentence exceeded the applicable guideline range, it nevertheless again enforced the waiver to deny relief. *See United States v. Miles*, 923 F.3d 798 (10th Cir. 2019), *cert. denied,* 589 U.S.___(2019). In so doing, the Circuit panel, relying on *Prost v. Anderson,* 636 F.3d 578 (10th Cir. 2011), extended the AEDPA's restrictions on successive habeas petitions under 28 U.S.C §2255(h) of the AEDPA[20] to include former defendants at liberty seeking relief under the All Writ's Act.[21] *Id.* at 585.

On March 26, 2020, Dr. Miles filed a third petition for coram nobis petition relief based on new evidence contained in a January 11, 2019 U.S. Senate Report titled '*How the U.S. Immigration System Encourages Child Marriages*' [22] The Report revealed that the long standing policy of the State Department and INS has been to issue spousal and K-1 visas to minor alien

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19. *Wilken*, 498 F.3d at 1168, *supra.*
20. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
21. 28 U.S.C. §1651.
22. Majority Staff Report of the Committee on Homeland Security and Governmental Affairs, United States Senate, Senator Ron Johnson, Chairman.

beneficiaries without requiring advance proof of either parental consent or judicial permission, even if required to issue a marriage license in the state where the parties intended to marry. Furthermore, the Report reaffirmed that it is only the U.S. sponsor of an Affidavit of Support who must be 18 or older, and that no minimum age exists for alien beneficiaries. Therefore, as long as the parties' intended marriage does not violate the laws of the state where they intend to marry, or the public policy of the state where they intend to reside, a minor alien will be issued a K-1 visa. Given this new evidence of previously non-transparent INS and State Department policies, Dr. Miles contended that his misrepresentation of his wife's age in an Affidavit of Support in support of her K-1 visa application was immaterial under 18 U.S.C. §1001, and that his successive petition for relief therefore was authorized under 28 U.S.C. §2255 (h)(1) of the AEDPA because this new evidence established by clear and convincing evidence that no reasonable fact-finder could have found him guilty of the government's charges, even as amended post hoc.

On September 1, 2020, the District Court denied the petition. Dr. Miles filed a timely appeal which was again denied by the Tenth Circuit on December 2, 2020 by enforcement of the plea agreement's waiver provision. The appellate panel found that the waiver's language only permitted a collateral challenge of the sentence, and not the underlying conviction, thereby disregarding the government's oral pronouncements at the Fed.R.Crim.P. Rule11 plea colloquy which expressly granted Dr. Miles permission to collaterally challenge both his conviction and sentence in the event of an upward variance.

Due to the foregoing, the Petitioner now seeks a writ of certiorari to address the lack of uniformity and circuit split with respect to the ability of parol evidence, and specifically oral pronouncements rendered at plea colloquies, to narrow the scope of written appellate and collateral attack waivers.

REASONS FOR GRANTING THE WRIT

1. Whether oral pronouncements by the court or the government at a plea colloquy in accordance with Rule 11 of the Federal Rules of Criminal procedure can narrow the scope of written appellate and collateral attack waivers merits Supreme Court review.

In *Garza v. Idaho*, this Court recognized that "[a]s courts widely agree, "[a] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope."" *Id.* 139 S.Ct. 738, 744 (2019), *quoting United States v. Hardman*, 778 F.3d 896, 899 (11th Cir. 2014). "That an appeal waiver does not bar claims outside its scope follows from the fact that, "[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts." *Garza* at 744, *quoting Puckett v. United States*, 556 U.S. 129, 137 (2009). As with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived. *Garza* at 744. Furthermore, in *Class v. United States*, 138 S.Ct. 798, 804 (2018), this Court reconfirmed that a guilty plea, in the absence of a valid, express waiver contained in the plea agreement, does not bar a post-conviction challenge based on that the facts alleged and admitted by a defendant in conjunction with his guilty plea fail to state an offense, as in the instant case.

Circuit courts generally interpret ambiguities regarding the terms of a plea agreement contra proferentem, against the government and in favor of defendants. *See e.g. United States v. Hahn*, 359 F.3d 1315, at 1325 (10th Cir. 2004)("In determining a waiver's scope, we will strictly construe [appeal waivers] and any ambiguities . . . will be read against the Government and in favor of a defendant's appellate rights"). Moreover. all federal circuits, similar to *Hahn,* consider "(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *Id.* at 1325. These three grounds for overcoming waivers are interdependent since the terms of a plea agreement are interpreted according to contract principles and what a defendant reasonably understood when he entered his plea. *United States v. Chavez-Salais,* 337 F.3d 1170, 1172 (10th Cir. 2003). Thus, Federal courts seemingly recognize that a defendant's reasonable understanding of oral pronouncements rendered at his plea colloquy may modify or even narrow written waiver provisions in the parties' plea agreement, absent express language to the contrary, especially since any ambiguities are interpreted contra proferentem and in favor of a defendant's appellate rights. *See id.* at 1173. This blurs the distinction between whether a defendant's reasonable understanding of oral statements rendered at his plea colloquy narrows the scope of waiver provisions as a matter of contract law, and whether such statements render his guilty plea unknowing and involuntary and therefore constitutionally invalid. However, to date,

cases which have addressed the impact of oral pronouncements at plea colloquies have focused exclusively on whether the pronouncements have created an ambiguity about the extent of the waiver rendering the guilty plea unknowing and involuntary. No cases have addressed whether oral pronouncements at a plea colloquy, considered together with the plea agreement's written terms, as understood by a reasonable defendant, and interpreted under principles of contract law, have narrowed the scope of waiver provisions. *See e.g. Wilken*, 498 F.3d at 1168:[23]

> [l]ogic indicates that if we may rely on the sentencing court's statements to eliminate ambiguity prior to accepting a waiver of appellate rights, we must also be prepared to recognize the power of such statements to achieve the opposite effect. If it is reasonable to rely upon the court's words for clarification, then we cannot expect a defendant to distinguish and disregard those statements of the court that deviate from the language of a particular provision in a lengthy plea agreement * * *

Ostensibly this is because the sentences imposed in those cases have remained within the guideline range contemplated by the parties' plea agreements, unlike here, thereby failing to trigger an outright contractual entitlement to pursue a post-conviction challenge. Little incentive has therefore existed to

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23. *See also Haws v. Idaho*, No. 20-1095, currently pending before this Court, which presents the question whether patently erroneous statements by the trial court at a plea colloquy which contradict the express terms of the waiver provision in the parties' plea agreement nevertheless will render the defendant's guilty plea unknowing, unintelligent and involuntary.

consider whether, in the absence of express language to the contrary, a written waiver provision which permits a defendant to appeal or collaterally challenge his sentence also allows him to challenge the underlying conviction, based on oral pronouncements rendered at his plea colloquy.

Moreover, although oral pronouncements pursuant to Fed.R.Crim.P. Rule 11 merit deference, they nevertheless run afoul of the parol evidence rule if they vary or contradict the written terms of the parties' plea agreement. The federal circuit courts lack a consensus regarding the proper role of the parol evidence rule and extrinsic evidence in the interpretation of plea agreement terms, referred to by one legal scholar as a 'doctrinal mess.[24] The Second, Fifth, Sixth and Tenth Circuits (representing the majority view) decline to admit extrinsic evidence when a plea agreement contains an integration clause, as here.[25] Other circuits adopt an 'overreaching approach' holding the government responsible for ambiguous drafting under the contra proferentem rule, especially

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24. *See* Tina M. Woehr: *The Use of Parol Evidence in Interpretation of Plea Agreements*, Columbia L.Rev. Vol. 110. No. 3 (April 2010), pp.840-884.

25. *See United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994)(parol evidence is inadmissible to prove the meaning of an unambiguous plea agreement); *United States v. Rockwell Int'l Corp.*, 124 F.3d 1194, 1196 (10th Cir. 1997)(parol evidence is inadmissible as evidence of an additional term modifying a completely integrated plea agreement); *United States v. Altro* (*In re Altro*), 180 F.3d 372, 376 (2nd Cir. 1999)(when the government incorporates an integration clause in the plea agreement, a defendant may not rely on a purported implicit understanding to demonstrate that the government is in breach).

when there is evidence of government overreaching and foul play.[26]

However, congressional intent behind Rule 11 of the Federal Rules of Criminal Procedure appears to have been to integrate oral statements by the government and sentencing court with the written terms of the parties' plea agreement: Under Fed.R.Crim.P 11(b)(1)(N) the court must explain "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence," and under §11(b)(3) "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Furthermore, the evidentiary concerns related to admission of extrinsic evidence, which are the raison d'être for the parol evidence rule,[27] appear to be absent when it comes to plea colloquies under Rule 11 since, pursuant to §11(g), "[t]he proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device." Consequently, the parol evidence rule should not preclude claims that oral statements by the court or government have narrowed the scope of a written waiver provision absent express language to the contrary contained in the parties' plea agreement.

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26. *See United States v. Garcia*, 956 F.3d 41, 44 (4th Cir. 1992)("Both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990)(Only where the language of the agreement is ambiguous or where government overreaching is alleged can the court consider parol evidence, such as the plea hearing transcript).

27. *See* John H. Wigmore: *A Brief History of the Parol Evidence Rule*, Columbia L.Rev. Vol. 4 No. 5 (May, 1904), pp. 338-355.

2. This case represents an ideal vehicle for resolving whether oral clarifications rendered at plea colloquies can expand a defendant's post-conviction challenge rights.

This case is ideal for addressing whether oral pronouncements by the sentencing court or the government have the power to modify the scope of waiver provisions in plea agreements since (1) it is uncontested that the District Court's upward variance entitled the Petitioner to collaterally attack his sentence; (2) nothing in the parties' plea agreement expressly prohibits a collateral challenge of the underlying conviction, in the event of an upward variance; and (3) the government, acting under the direction of the District Court, expressly granted the Petitioner a right to challenge both his conviction and his sentence in the event of an upward variance at the Rule 11 plea colloquy, as further detailed below.

Paragraph 8 of parties' plea agreement contains a boilerplate waiver provision pursuant to which Dr. Miles agreed not to:

> a. Appeal or collaterally challenge his guilty plea, sentence and restitution imposed, and any other aspect of his conviction, including but not limited to any rulings on pretrial suppression motions or any other pretrial dispositions of motions and issues;
>
> b. Appeal, collaterally challenge, or move to modify under 18 U.S.C. § 3582(c)(2) or some other ground, his sentence as imposed by the Court and the manner in which the sentence is determined, provided the sentence is within

> or below the advisory guideline range determined by the Court to apply to this case. * * *[28]

While the waiver precludes a challenge of *the guilty plea, sentence, restitution* and "*any other aspect of [the] conviction*" it does not expressly bar a challenge of the underlying conviction itself. If a [plea] agreement expressly states that a defendant is waiving a particular right, a court will hold him to that waiver. *See Chavez-Salais,* 337 F.3d at 1173. However, here, the parties' plea agreement contains no such explicit waiver of the right to challenge the conviction itself, and therefore does not reach Dr. Miles' petition for coram nobis relief, *See id.* at 1173.
Moreover, at the Rule 11 Plea Colloquy, the government, under the direction of the District Court and pursuant to Fed.R.Crim.P. 11(b)(1)N) clarified the extent of the waiver provision:

> The defendant has also agreed to waive his right to appeal or collaterally challenge the conviction and the sentence imposed by the court provided the court does not impose a sentence above the advisory guideline range determined to apply. [29]

Any ambiguity caused by these oral clarifications must be interpreted contra proferentem, and in favor of Dr. Miles' rights to collaterally challenge both his conviction and his sentence. *See Hahn*, at 1325, *supra.*

Furthermore, while the language of 18 U.S.C. §3742 (providing federal defendants a statutory right to appeal) only refers to the right to appeal a *sentence*,

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28. Plea Agreement, Appx. D, a16.
29. Rule 11 Plea Colloquy, Appx. E, a26.

it also grants defendants authority to challenge the underlying conviction. The language of 28 U.S.C. U.S.C. §2255 likewise only refers to the right of imprisoned defendants to collaterally challenge their sentences, but nevertheless also allows them to contest their convictions. Additionally, a prerequisite for coram nobis relief is that a defendant must fully have served out his sentence in order to challenge either his sentence or his conviction.[30] Thus, under the plain meaning rule of contract interpretation, a provision that grants a defendant a right to challenge his sentence, absent express language to the contrary, as here, also implicitly appears to allow him to contest the underlying conviction, even without taking into account oral pronouncements rendered at the plea colloquy. This seems logically consistent with that a conviction constitutes an obligatory condition precedent for the imposition of a sentence, and that, given the wide discretion accorded the federal judiciary in the sentencing realm, defendants generally prefer to attack both the validity of their conviction and their sentence. In addition, here, nothing in the language of Plea Agreement suggests that a felony conviction constitutes an essential provision of the Plea Agreement of fundamental importance to the government "so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense." *See United States v. Frownfelter*, 626 F.3d 549, 555 (10th Cir. 2010), *quoting United States v. Bunner*, 134 F.3d 1000, at 1004 (10th Cir.

30."The conventional understanding of "collateral attack" comprises challenges brough under, for example, 28 U.S.C. §2241, 28 U.S.C. §2254, §28 U.S.C. §2255, as well as writs of coram nobis." *Chavez-Salais*, 337 F.3d at 1172.

1998). If the government considered a felony conviction material it should have exercised greater care in drafting the Superseding Information and Plea Agreement. *See Frownfelter,* at 555.

As stated above, here, nothing in the Plea Agreement's waiver provision expressly prohibits a challenge of the underlying conviction. Consequently, the government's clarification of the scope of the waiver at the Rule 11 Colloquy entitling Dr. Miles to challenge both his conviction and his sentence does not transgress the parol evidence rule, as it does not contravene the written terms of the plea agreement, which at most are silent about to the right to challenge the underlying conviction.

In addition, the government's 2011 post hoc amendment of the charging terms, more than two years after Dr. Miles' 2009 conviction, causing them to allege a completely different offense, perpetrated seven months earlier, automatically renders Dr. Miles' guilty plea unintelligent and involuntary. This breaches and voids the plea agreement altogether (even under plain error review) since the amendment violates not only the Due Process Clause and the Sixth Amendment's right to notice, but also the Plea Agreement's integration clause and Fed.R.Crim.P. Rule 7(e). Furthermore, even as amended, the government's charging terms continue to fail to state an offense since there exists no minimum age for alien beneficiaries of Affidavits of Support.[31] Enforcement

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31. "The language employed by the government in its indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport

of the waiver would therefore also cause a miscarriage of justice, warranting sua sponte review by a court of higher instance. Consequently, a defendant who, under the circumstances present here, claims that his petition for relief falls outside the scope of the waiver provision in his plea agreement, ought not to forfeit inextricably interrelated claims that his guilty plea was unintelligent and involuntary, or that enforcement of the waiver would result in a miscarriage of justice, merely because he omitted arguing these grounds for overcoming the waiver separately in the court below.

3. This petition is suitable for a summary disposition since a different petition presenting an almost identical question is currently pending before this Court.

The question presented in *Haws v. Idaho*, No. 20-1095, a certiorari petition currently pending before this Court, is virtually identical to the question presented here. However, *Haws* focuses exclusively on whether oral statements by a trial court at a plea colloquy, even if patently erroneous, can render a guilty plea constitutionally invalid due to being unknowing and unintelligent. The Petitioner here, in contrast, seeks review of whether oral pronouncements at a plea colloquy, as reasonably understood by a defendant, have the power to narrow the scope of plea waivers purely as a matter of contract law, regardless of whether his guilty plea was unknowing and unintelligent. Both these grounds for overcoming a waiver provision are inextricably interrelated since the failure

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with those particulars." *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008).

by the government to abide by the written terms of a plea agreement, and refusal to honor its oral promises rendered at a plea colloquy violates due process to the same extent as in *Haws*. Therefore, *Haws* and this petition should be consolidated as companion cases to enable this Court to address the interrelated issues presented by these petitions in one, single opinion. The instant petition should therefore be held in abeyance until briefing and oral arguments have been completed in *Haws*.

CONCLUSION

A writ of certiorari should be granted to establish whether oral pronouncements at a plea colloquy, as interpreted pursuant to contract law principles, have the power to narrow the scope of a written waiver provision in the parties' plea agreement.

Respectfully submitted,

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APPENDIX

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