No. 20-_____

SUPREME COURT OF THE UNITED STATES

Ivan Dario Obregon,

Petitioner,

vs.

United States,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

Are unforeseeable sentencing mistakes beyond the scope of federal appeal waivers?

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IV. Petition for Writ of Certiorari

Ivan Dario Obregon, a federal inmate currently incarcerated at Reeves III Correctional Institution in Pecos, Texas, by and through his Criminal Justice Act attorney, Thomas S. Berg, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

V. Opinions Below

The decision by the United States Court of Appeals for the Fifth Circuit denying Mr. Obregon's direct appeal, No. 20-20017, *United States v. Obregon* (5th Cir. Jan. 26, 2021) is unreported. That opinion is attached at Appendix ("App.") at 10.

VI. Jurisdiction

Mr. Obregon's direct appeal to the United States Court of Appeals for the Fifth Circuit was denied on January 26, 2021. Mr. Obregon invokes this Court's jurisdiction under 28 U.S.C. §1254, having timely filed his petition for a writ of certiorari within 150 days of the judgment of the United States Court of Appeals for the Fifth Circuit.

VII. Constitutional Provisions Involved

United States Constitution, Amendment V provides that [n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . .

VIII. Statement of the Case

1. Mr. Obregon's Plea Colloquy

Mr. Obregon, a 37-year-old Colombian national, pleaded guilty to a charge of possession with intent to distribute just under a kilogram of heroin, a violation of 21 U.S.C. § 841(a)(1). He had been arrested while delivering the drug to a co-defendant who had unwittingly been negotiating with federal agents to sell narcotics. Subsequent to that arrest, the agents released Mr. Obregon for a while as he agreed to cooperate with them. Although that cooperation led to an arrest and state charges against a violent trafficker, Mr. Obregon was nonetheless indicted for conspiracy and for the delivery of the heroin. He was taken into custody and detained.

Mr. Obregon pleaded guilty to the possession charge in a plea agreement that provided for dismissal of the conspiracy count and possible consideration for cooperation, as in the words of the government,

> Pursuant to 11(c)(1)(a) and (b), Mr. Obregon is agreeing to plea to Count 2 of the indictment. Mr. Obregon agrees to cooperate with the United States, and he also agrees to waive his right to appeal his conviction and sentence directly or collaterally.

Record on Appeal (ROA) at 123. Those provisions were incorporated into a written agreement[1]. Beyond asking whether Mr. Obregon understood what he was signing, the district court made no further explication or explanation of the consequences of the plea waiver. The court certainly did not state that if it were to make a consequential error in its sentencing determination unforeseeable at the time of the plea that Mr. Obregon would nonetheless be stuck with it.

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[1] **Waiver of Appeal and Collateral Review**

7. Defendant is aware that Title 28, United States Code, section 1291, and Title 18, United States Code, section 3742, afford a defendant the right to appeal the conviction and sentence imposed. Defendant is also aware that Title 28, United States Code, section 2255, affords the right to contest or "collaterally attack" a conviction or sentence after the judgment of conviction and sentence has become final. Defendant knowingly and voluntarily waives the right to appeal or "collaterally attack" the conviction and sentence, except that Defendant does not waive the right to raise a claim of ineffective assistance of counsel on direct appeal, if otherwise permitted, or on collateral review in a motion under Title 28, United States Code, section 2255. In the event Defendant files a notice of appeal following the imposition of the sentence or later collaterally attacks his conviction or sentence, the United States will assert its rights under this agreement and seek specific performance of these waivers.

8. In agreeing to these waivers, Defendant is aware that a sentence has not yet been determined by the Court. Defendant is also aware that any estimate of the possible sentencing range under the sentencing guidelines that he may have received from his counsel, the United States or the Probation Office, is a prediction and not a promise, did not induce his guilty plea, and is not binding on the United States, the Probation Office or the Court. The United States does not make any promise or representation concerning what sentence the defendant will receive. Defendant further understands and agrees that the United States Sentencing Guidelines are "effectively advisory" to the Court. *See United States v. Booker*, 543 U.S. 220 (2005). Accordingly, Defendant understands that, although the Court must consult the Sentencing Guidelines and must take them into account when sentencing Defendant, the Court is not bound to follow the Sentencing Guidelines nor sentence Defendant within the calculated guideline range.

9. Defendant understands and agrees that each and all waivers contained in the Agreement are made in exchange for the concessions made by the United States in this plea agreement.

ROA. 172.

2. The Sentencing Error

The presentence report (PSR), using the 2018 Guidelines Manual, placed Mr. Obregon at a total offense level of 25, Criminal History Category of II, and a guideline range of 63 to 78 months. The PSR noted that Mr. Obregon faced a mandatory minimum sentence of 60 months and had he been held accountable for all the heroin charged in the indictment he would have a sentencing range of 78 to 87 months. In his objections to the PSR, Mr. Obregon contended that his sole misdemeanor conviction for assault, which placed him in criminal history category II, did not disqualify him from eligibility for the "safety valve" provisions of the sentencing guidelines. He argued that under the recently enacted First Step Act (P.L. 115-391, December 21, 2018) his conviction was not a disqualifying crime of violence and his properly calculated sentencing range was therefore 51 to 63 months. The probation office held its ground but agreed that the sentencing range was 51 to 63 months if the "safety valve" applied.

At sentencing, the government agreed that Mr. Obregon was eligible for the safety valve and the district court thereafter sustained Mr. Obregon's objection. But the district court mistakenly found the guideline range to be 63 to 78 months, failing to make a two-level reduction under the guidelines for the safety valve. Based on that higher range but allowing for the assistance Mr. Obregon had provided post-arrest that was acknowledged but not deemed "substantial" by the government, the

district court, as a "variance," sentenced Mr. Obregon to 54 months confinement, a three-yar term of supervised release, and a $100 cost assessment.

3. Direct Appeal

Mr. Obregon argued that the district court, after sustaining Mr. Obregon's objection regarding the application of the safety valve, failed to give it effect with a two-level reduction in the offense level as called for by the Guidelines. This was a procedural error. The district court ultimately imposed a sentence of imprisonment, 54 months, that was within the range that should have applied absent the error. Notwithstanding, there was a reasonable probability that it would have considered a lower sentence had it correctly applied the Guidelines. Mr. Obregon sought vacatur of the sentence and remand. Anticipating that the government might invoke the plea waiver, Mr. Obregon argued in his brief that although the waiver was acknowledged to be knowing and voluntary, there was no way either party could contemplate "the circumstances at hand," *i.e.*, the district court's unprovoked error in misapplying the range after sustaining the defense objection about the safety valve.

On appeal the government invoked the appeal waiver in the plea agreement and asked that the appeal be dismissed.

The court of appeals agreed with the government and dismissed the appeal based on the appeal waiver, avoiding the merits of the claimed error:

"We review de novo whether an appeal waiver bars an appeal. *United States v. Jacobs*, 635 F.3d 778, 780-81 (5th Cir. 2011). The record reflects that Obregon's appeal waiver was knowing and voluntary, *see United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005), and Obregon concedes as much. In addition, the language of the appeal waiver applies to Obregon's appellate arguments. *See Jacobs*, 635 F.3d at 781. Accordingly, the appeal is DISMISSED."

IX. Reasons for Granting the Writ

This Court has held that because a plea agreement is essentially a contract, it does not bar claims outside its scope. *Garza v. Idaho*, __ U.S. __;139 S. Ct. 738, 745 (2019). "[N]o appeal waiver serves as an absolute bar to all appellate claims." *Id.* The realm of exceptions for a miscarriage of justice is undeveloped. As the Court noted, "We make no statement today on what particular exceptions may be required." *Garza*, 139 S.Ct. at 745, n.6. When a district court commits a completely unforeseeable procedural mistake at sentencing even after the correct sentencing range has been brought to its attention, does an appeal waiver clause bar appellate correction?

Fundamentally, this is not an attack on Mr. Obregon's conviction. The finality of Mr. Obregon's guilty plea and conviction – the "primary purpose of plea agreements" *Garza*, 139 S. Ct. at 755 (Thomas, J., dissenting) – is not implicated. It merely asks the court of appeals, a court that exists "to determine whether or not the law was applied correctly in the trial court" to address a sentencing error that was unforeseeable to the parties at the time of the entry of the plea. https://www.uscourts.gov/about-federal-courts/court-role-and-structure.

We inhabit a world of bargained pleas. See Genly, Dervan, Lucian E., *Class v. United States: Bargained Justice and a System of Efficiencies* (September 17,

2018). Cato Supreme Court Review (2018), Available at SSRN: https://ssrn.com/abstract=3293868. Amidst the talk about efficiencies, costs and finality is a growing concern for accuracy. In Mr. Obregon's case, the district court made no searching enquiry into his understanding of the so-called appeal waiver and certainly did not address that waiver in terms of a post-plea mistake by the district court in computing the sentence. *See e.g., Class v. United States*, __U.S.__, 138 S. Ct. 798, 807 (2018) ("Under these circumstances, Class' acquiescence neither expressly nor implicitly waived his right to appeal his constitutional claims."). Mr. Obregon's claim of error does not undo his confession of guilt and should be decided on the record rather than avoided.

As long as we adhere to an imperfect system of sentencing guidelines administered by human and imperfect administers of justice, review of unforeseeable mistakes that amount to real time in prison should be reviewable. There is no justification for a miscarriage of justice in this context.

X. Conclusion

For the foregoing reasons, Mr. Obregon respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

DATED this 9th day of March 2021.

Respectfully submitted,

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XI. APPENDIX