

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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DAVIN SETH WATERS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

- 1) Does the doctrine of mutual mistake provide a cognizable basis to find a guilty plea involuntary?

## **PARTIES**

Petitioner: Davin Seth Waters

Respondent: United States of America

## **RELATED PROCEEDINGS**

There are no related proceedings.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner Davin Seth Waters respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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**OPINION BELOW**

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Waters*, 846 Fed. Appx. 263 (5th Cir. April 27, 2021). *See* Pet. App. at 1-3.

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**JURISDICTIONAL STATEMENT**

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition has been filed within 90 days of the court of appeals opinion and is therefore timely. *See* Sup. Ct. R. 13.1.

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**RELEVANT CONSTITUTIONAL PROVISION INVOLVED**

For a plea to be voluntary, it must comport with the Due Process Clause of the Fifth Amendment. *McCarthy v. United States*, 394 U.S. 459, 466 (1069).

The Due Process Clause of the Fifth Amendment provides, in relevant part, that:

[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

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## **STATEMENT OF THE CASE**

### **Introduction**

This case arises on direct appeal of a federal criminal conviction and sentence. Petitioner pleaded guilty pursuant to a plea agreement with the government. Both sides believed the particular plea agreement they had entered would lead to a Guidelines range of approximately 25 years imprisonment. But the plea agreement entailed making admissions to additional offenses which, unbeknownst to both parties, actually produced a recommended Guidelines range of Life. The district court ultimately imposed a life sentence. Petitioner submits that his plea was involuntary under the doctrine of mutual mistake, a doctrine which the court of appeals below has yet to recognize.

### **District court proceedings**

Pursuant to a plea agreement, Petitioner Davin Seth Waters pleaded guilty to a one-count indictment charging him with transporting minors with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). (ROA. 42-45, 110-132.) The one-count

indictment alleged unlawful conduct with two minors. (ROA. 513.)

But Petitioner had been under investigation for conduct involving additional minors. As part of the plea agreement, Petitioner admitted to unlawful conduct with five other minors and the government agreed not to pursue charges based on those crimes. (ROA. 44-46, 240-249.) By entering this plea agreement, both the government and the defense believed that the additional minors would not figure in to the calculation of the advisory Guidelines. (ROA. 278, 297.)

But they did. The admissions to conduct involving three of the additional minors ultimately catapulted the applicable Guidelines range from 324-405 months to Life. (ROA. 270.). Defense counsel objected. He emphasized that Petitioner had only “agreed to the government’s factual resume . . . and waiver of appeal, and to fully disclose what he had done, under the understanding that the guidelines would recommend about twenty-five years in prison.” (ROA. 278.)

The government did not deny this contention, and candidly admitted that “the parties had not anticipated a guideline imprisonment of life during plea negotiations.” (ROA. 283-287, 297.) Nevertheless, it defended the guideline calculation. (ROA. 283-287.) While the government deferred to the district court as to the appropriate sentence, in the same breath it argued that “[t]he court would be legally and morally justified in imposing a life sentence.” (ROA. 298.)

At sentencing the district court concluded that Petitioner's admissions to additional extraneous offenses supported the calculated Guidelines range of life. (ROA. 142-146, 190.) The court imposed a life sentence. (ROA. 190.)

### **Appeal to the Fifth Circuit**

Petitioner appealed. He argued that the plea had been involuntary due to the doctrine of mutual mistake. The Fifth Circuit rejected his claim and affirmed the sentence in a short, perfunctory opinion. Pet. App. at 2-3.

This petition follows.

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### **REASONS FOR GRANTING THE PETITION**

The circuits are divided as to whether the doctrine of mutual mistake can invalidate a plea agreement and render a plea involuntary. The First, Second, Sixth, Seventh, and Tenth Circuits have at least recognized that in the right circumstances the doctrine of mutual mistake could invalidate a plea agreement. *See United States v. Teeter*, 257 F.3d 14, n. 12 (1st. Cir. 2001); *United States v. Frazier*, 805 Fed. Appx. 15, 17 (2d Cir. 2020); *United States v. Payton*, 380 Fed. Appx. 509, 511-512 (6th Cir. 2010); *United States v. Bradley*, 381 F.3d 641, 647-648 (7th Cir. 2004); *United States v. Frownfelter*, 626 F.3d 549, 555 (10th Cir. 2010). By contrast, the Eighth and Ninth Circuits have held that the

doctrine of mutual mistake does not apply in the plea agreement context. *See United States v. Ritchison*, 887 F.3d 365, 369 (8th Cir. 2018); *United States v. Transfiguracion*, 442 F.3d 1222, 1229-1230 (9th Cir. 2006) (refusing to invalidate plea agreements based on mutual mistake of law); *but see United States v. Trahan*, 1996 U.S. App. LEXIS 16494 (9th Cir. 1996) (unpublished) (plea based on mutual mistake of fact was found to be involuntary). And the Fifth Circuit, the court of appeals below, has declined to decide whether the doctrine has any application. *See United States v. Sherman*, 817 F.3d 224, 226 (5th Cir. 2016) (refusing to recognize mutual mistake doctrine but noting defendant would not prevail even if it had adopted Tenth Circuit's mutual mistake test). The Court should grant certiorari to resolve this disagreement among the federal circuits. *See* Sup. Ct. R. 10(a).

Circuits that refuse to recognize the doctrine of mutual mistake run contrary to the decisions in this Court. *See* Sup. Ct. R. 10(c) (identifying as a consideration whether a court of appeals has decided "an important federal question in a way that conflicts with relevant decisions of this Court"). The Court has held that "[p]lea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009). Further the Court has recognized that the doctrine of mutual mistake provides a basis upon which to invalidate a contract. *See, e.g., Griswold v. Hazard*, 141 U.S. 260, 284 (1891); *Philippine Sugar Estates Development Co. v. Government of Philippine Islands*, 247 U.S. 385, 391 (1918); *Kansas v. Nebraska*, 574 U.S. 445, 487-490

(2015) (Roberts, J., concurring) (discussing mutual mistake in contracts). And finally, the Court has held that a guilty plea predicated “on a false premise” in connection with a plea agreement “cannot stand.” *Mabry v. Johnson*, 467 U.S. 504, 510 (1984).

A guilty plea is only valid if entered “voluntarily, knowingly, and intelligently, *with sufficient awareness of the relevant circumstances and likely consequences.*” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (emphasis added); *see also Brady v. United States*, 397 U.S. 742, 748 (1970). A plea agreement predicated upon a material mutual mistake cannot be regarded as having been made “with sufficient awareness of the . . . consequences” so as to be considered “intelligently” made. *Bradshaw*, 545 U.S. at 183; *Brady*, 397 U.S. at 749. A guilty plea is a “grave and solemn act to be accepted only with care and discernment.” *Brady*, 397 U.S. at 749. It involves waiving important constitutional rights, including the right against compulsory self-incrimination, trial by jury, and the right to confront accusers. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). A plea “cannot be truly voluntary *unless the defendant possesses an understanding of the law in relation to the facts.*” *McCarthy*, 394 U.S. at 466 (emphasis added).

In this case, Petitioner pleaded guilty pursuant to a plea agreement with a complete “[mis]understanding of the law in relation to the facts.” *McCarthy*, 394 U.S. at 466. This is not a scenario where both parties simply predicted the Guidelines incorrectly. Here the parties entered this particular plea agreement with

the specific intent to *protect* Petitioner from the Guideline range of Life which inevitably would result from convictions on each extraneous offense. (ROA. 278, 297.) Petitioner had only “agreed to the government’s factual resume . . . and waiver of appeal, and to fully disclose what he had done, under the understanding that the guidelines would recommend about twenty-five years in prison.” (ROA. 278.) But instead the plea agreement only ushered in the very consequence the parties had sought to avoid. The plea agreement, with its extraneous offense admissions, did nothing to secure guidelines around “twenty-five years in prison.” On the contrary, it did precisely the opposite and catapulted the Guidelines to Life. (ROA. 142-146, 190, 278.)

The court of appeals below ignored even addressing the issue of mutual mistake. *See* Pet. App. at 1-3. Instead the panel focused on the fact that Petitioner had “affirmed at arraignment that his guilty plea was not the result of threats or promises outside those . . . in the plea agreement.” Pet. App. at 2-3. This observation does nothing to resolve the mutual mistake question. The issue is not whether the government broke a promise or whether Petitioner knew he had been subject to life imprisonment. The question is whether the parties entered a plea agreement based on mutual mistake that “relate[s] to a basic assumption on which the contract was made.” *Frownfelter*, 626 F.3d at 556 (citing Restatement 2d Contracts § 152 cmt c.).

This case presents the perfect vehicle to resolve whether mutual mistake should be recognized as a basis to render a plea involuntary. Here the mutual

misunderstanding as to the legal effect of the plea agreement relates to the very basis for its existence. The plea agreement had been animated by a belief that it would prevent a Guideline range of Life; instead the plea agreement only ensured that very consequence. The plea agreement produced the specific legal effect that the parties had sought to avoid by entering into the agreement. No plea in this circumstance can be regarded as having been made “intelligently, with sufficient awareness of the relevant circumstances and likely consequences” so as to satisfy due process. *Bradshaw*, 545 U.S. at 183.

The Court should grant certiorari.

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## CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

DATE: July 23, 2021

Respectfully submitted,

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