No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS BENITEZ-PENALOSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

LARS ROBERT ISAACSON **
Hawai'i Bar No. 5314
1100 Alakea Street, 20th Floor
Honolulu, HI 96813
Phone: (808) 497-3811
Fax: (866) 616-2132

** Counsel of Record

QUESTION PRESENTED FOR REVIEW

I. Did the Ninth Circuit err when it failed to find that a sentencing error can amount to a "miscarriage of justice" allowing appellate review even if there is a plea agreement containing an appellate waiver?

A. Because there is a circuit split as to the definition of circumstances warranting the disregard of an appellate waiver, this Court should grant certiorari.

B. Because there is a circuit split as to how allegations of circumstances warranting the disregard of an appellate waiver are addressed, this Court should grant certiorari.

C. Because unobjected to guideline error is "plain error" and because "plain error" is indistinguishable from "miscarriage of justice," guideline error should be held to be a miscarriage of justice allowing disregard of appellate waiver.

PARTIES

Carlos Benitez-Penalosa is the petitioner. The United States of America is the respondent.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS BENITEZ-PENALOSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petitioner, Carlos Benitez-Penalosa, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit opinion is captioned as *United States of America v. Carlos Benitez-Penalosa*, No. 19-10357 (9th Cir. 2020). A copy of the opinion is attached as Appendix A. A Motion for Rehearing En Banc was denied on April 27, 2021. A copy of that decision is attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit were filed on December 15, 2020. [Appendix A]. Defendant's Motion for Rehearing En Banc was denied on April 27, 2021 [Appendix B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and is timely pursuant to this Court's March 19, 2020 Order extending filing deadlines.

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case are the Fifth Amendment to the United States Constitution, which provides in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property without due process of law . . . .

Also implicated is Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remainder of the statutory and regulatory provisions are set out in the appendices.

STATEMENT OF THE CASE

On February 8, 2019, an Information was filed charging Petitioner Carlos Benitez-Penalosa with one count of violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), attempt to possess with the intent to distribute heroin, a Schedule I controlled substance, all in violation of 21 U.S.C § 846. A plea agreement was entered into and provided certain factual stipulations concerning the actions of Mr. Benitez-Penalosa and the purity of drugs seized in regard to the case. The plea agreement also contained an appellate waiver provision:

> 13. The defendant is aware that he has the right to appeal his conviction and the sentence imposed. The defendant knowingly waives the right to appeal, except as indicated in subparagraph "b" below, his conviction and any sentence within the Guidelines range as determined by the Court at the time of sentencing, and any restitution order imposed, or the manner in which the sentence or restitution order was determined, on any ground whatsoever, in exchange for the concessions made by the prosecution in this Agreement. The defendant understands that this waiver includes, but is not limited to, the right to assert any constitutional challenges to the defendant's conviction and guilty plea on appeal or collateral review, including any arguments that the statute or statutes to which the defendant is pleading guilty are unconstitutional, and any claims that the statement of facts provided in this Agreement is insufficient to support the defendant's guilty plea.
>
> a. The defendant also waives the right to challenge his conviction or sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255, except that the defendant may make such a challenge (1) as indicated in subparagraph "b" below, or (2) based on a claim of ineffective assistance of counsel.
>
> b. If the Court imposes a sentence greater than specified in the guideline range determined by the Court to be applicable to the defendant, the defendant retains the right to appeal the portion of his sentence greater than specified in that guideline range and the manner in which that

portion was determined and to challenge that portion of his sentence in a collateral attack.

The court asked Petitioner if he understood that he was knowingly waiving his right to appeal or challenge his conviction except as indicated in the language of the waiver, to which he replied, "yes." The district court continued: "And that language states you may appeal any sentence greater than the guidelines range determined by the Court at the time of sentencing, but only for that portion of your sentence that is greater than the specified guideline range, and the same is true with any—with regard to any collateral attacks on your sentence. Do you understand that?" Benitez-Penalosa responded "Yes."[1]

Petitioner made two objections to the application of the Federal Sentencing Guidelines: In paragraph 8 of the Plea Agreement, the parties stipulated that the amount of heroin in a controlled buy on October 9, 2018, amounted to 908 grams. This was the only drug amount mentioned in the plea agreement. However, the draft PSR included an additional 1,000 grams of heroin that Petitioner allegedly delivered to another party in August of 2018 at the Pacific Marina Inn in Honolulu, Hawaii as reported by a cooperating defendant. Petitioner argued that there was

---

[1] The court also discussed with the parties its concern over the language of plea agreement that the Petitioner would be "waiving his right to appeal the constitutionality of the statute of which he has been convicted." As a result of this concern, before sentencing the parties entered into a stipulation that modified the appeal waiver provision in the MOPA, namely inserting that Defendant waived *"all legally waivable claims."* The language of subparagraphs (a), (b), and (c) was not changed.

insufficient and unreliable evidence justifying the additional 1000 grams of heroin included in Petitioner's drug totals and his base level under U.S.S.G. ¶2D1.1 should be 28. The final PSR rejected his arguments, and calculated 1908 grams of heroin for a base level of 30.

Petitioner also objected to the inclusion of one criminal history point to the conviction in 2015 for driving while license suspended. Paragraph 49 of the draft PSR calculated a criminal history score of 7, which, by one point, placed Petitioner in criminal history category IV. Evidence produced to the court at sentencing and more clearly as an exhibit to the motion for reconsideration, showed that Petitioner's driver's license was issued on June 29, 2017 which showed that he did not have a suspended license in 2015, this point should not have been added to his criminal history point total. On September 30, 2019, the trial court denied these objections and imposed a sentence of eighty-four months incarceration.[2]

Petitioner timely appealed and argued that (1) appellate waiver should not be enforced; (2) the drug amounts were wrongly decided; (3) the criminal history points were wrongly calculated and (4) the trial court wrongly denied Defendant's Rule 35

---

[2] On October 11, 2019, the trial court also denied the Petitioner's post-conviction Rule 35 motion, noting that the submission of a clearer copier of Petitioner's driver's license did not correct an "obvious" sentencing error, and that "the date on the driver's license was immaterial to the Court's sentencing decision" as "regardless on the date on the driver's license found in [Petitioner's] possession at the time of the arrest, there was sufficient evidence to conclude in May of 2015 of Driving After License Suspension."

motion for reconsideration. On November 25, 2020, the Government filed a motion to dismiss Petitioner's appeal, arguing that the appeal waiver should be upheld in this case. On December 15, 2020, a panel of the Ninth Circuit dismissed Petitioner's appeal with the following one-page order:

> Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 29) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's argument, applying the waiver to his claims that his Guidelines range was miscalculated does not result in a miscarriage of justice. *See United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2015) (applying sentencing appeal waiver to claim that the Guidelines range was incorrectly calculated); *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998) ("When a plea agreement expressly waives a defendant's right to appeal a sentence, the waiver extends to an appeal based on an incorrect application of the sentencing guidelines.").

On December 29, 2020, Petitioner filed his "Petition for Rehearing En Banc" requesting the Ninth Circuit affirm that it applies a "miscarriage of justice" exception to an appellate wavier in an otherwise valid plea agreement and to apply this standard to the present case. On April 27, 2021, the Ninth Circuit issued the following order: "We treat appellant's "Petition for Rehearing En Banc" (Docket Entry No. 33) as a motion for reconsideration en banc. So treated, the motion is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11."

REASON FOR GRANTING THE WRIT

I. Did the Ninth Circuit err when it failed to find that a sentencing error can amount to a "miscarriage of justice" allowing appellate review even if there is a plea agreement containing an appellate waiver?

A. Because there is a circuit split as to the definition of circumstances warranting the disregard of an appellate waiver, this Court should grant certiorari.

While the term "appellate waiver" is a "useful shorthand" for clauses in plea agreements, "it can misleadingly suggest a monolithic end to all appellate rights. In fact, however, no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). "Separately, all jurisdictions appear to treat at least some claims as unwaiveable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain." *Id.* at 745.

In *Garza*, this Court held that when an attorney failed to file a notice of appeal despite the defendant's express instructions to do so, prejudice in regard to the Sixth Amendment right to effective assistance of counsel is presumed regardless of whether a defendant has signed an appeal waiver. *Id.* at 749-750. Beyond its holding in *Garza*, the Supreme Court has not defined the contours of further exceptions to an appeal waiver, nor specifically recognized a "miscarriage of justice"

exception to appellate waiver.[3] As referenced in *Garza*, Circuits have generally held that an appeal waiver will not be upheld if the language of the plea agreement does not encompass the defendant's right to appeal and the plea agreement was not entered into knowing and voluntarily.[4] However, beyond this, the Circuits are split as to what standard and circumstances allow appellate waivers not to be enforced.

---

[3] *See Garza*, 139 S. Ct. at 745 n.6. (" . . . Lower courts have also applied exceptions for other kinds of claims, including 'claims that a sentence is based on race discrimination, exceeds the statutory maximum authorized, or is the product of ineffective assistance of counsel.' . . . see also, *e.g., United States v. Puentes-Hurtado* , 794 F.3d 1278, 1284 (CA11 2015) ('[A]ppellate review is also permitted when a defendant claims that the government breached the very plea agreement which purports to bar him from appealing or collaterally attacking his conviction and sentence'); *State v. Dye* , 291 Neb. 989, 999, 870 N.W.2d 628, 634 (2015) (holding that appeal waivers are subject to a 'miscarriage of justice' exception). We make no statement today on what particular exceptions may be required").

[4] *See United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000)("These cases establish that, with two exceptions, a defendant may not appeal his sentence if his plea agreement contains an express and unqualified waiver of the right to appeal, unless that waiver was unknowing or involuntary"); *United States v. Barnes*, 953 F.3d 383, 386 (5th Cir. 2020)("We consider "(1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement"); *United States v. Smith*, 344 F.3d 479, 483 (6th Cir. 2003) "For a plea agreement to be constitutionally valid, a defendant must have entered into the agreement knowingly and voluntarily"); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997)("A waiver of appeal rights can only be upheld if it is voluntarily made"); *United States v. Medina-Carrasco*, 815 F.3d 457, 461 (9th Cir. 2015)("A waiver of appellate rights 'is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made' ")(citation omitted).

The First, Third, Fourth, Eighth, Tenth and D.C. Circuits have expressly approved of a "miscarriage of justice" exception to appellate waiver.[5] The Ninth Circuit seemingly has adopted a "miscarriage of justice" exception, but there is within-circuit authority to the contrary.[6] The Sixth Circuit has "implicitly adopted" a "miscarriage of justice" exception to appellate waiver.[7]

---

[5] *See United States v. O'Farrill-López*, 991 F.3d 45, 49 (1st Cir. 2021)("The premise on which this contention rests is unimpugnable: we long have recognized a miscarriage-of-justice exception to the enforcement of appeal waivers"); *United States v. Khattak*, 273 F.3d 557, 558 (3d Cir. 2001)("We hold that waivers of appeals are generally permissible if entered into knowingly and voluntarily, unless they work a miscarriage of justice"); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016)("We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice"); *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003)("Assuming that a waiver has been entered into knowingly and voluntarily, we will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice"); *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1216 (10th Cir. 2008)("A waiver of appellate rights in a plea agreement cannot be enforced if doing so would result in a miscarriage of justice")(citation omitted); *United States v. Julian Zapata Espinoza*, No. 17-3088 at *2 (per curium)(D.C. Cir. September 18, 2020)("An otherwise valid appeal waiver does not bar a claim of ineffective assistance of counsel in connection with agreeing to the waiver, nor will we enforce it 'if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice' ") (citation omitted).

[6] *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011)("Generally, appellate courts 'retain[] subject matter jurisdiction over [an] appeal by a defendant who has signed an appellate waiver.' . . . Absent some miscarriage of justice, however, 'we will not exercise that jurisdiction to review the merits of[an] appeal if we conclude that [the defendant] knowingly and voluntarily waived' the right to bring the appeal")(citations omitted). *But see United States v. Ligon*, 461 F. App'x 582, at *3 (9th Cir. 2011)("This court does recognize certain exceptions to valid appellate waivers, . . , but a nebulous 'miscarriage of justice' exception is not among them"); *United States v. Bernal-Arias*, No. 17-10013, at *2 (9th Cir. Nov. 17, 2017)("We also reject Bernal-Arias's call to ignore the appeal waiver to prevent a

The Second Circuit does not use the term "miscarriage of justice," but holds that an exception to the enforcement of plea agreement occurs where there is a "violation of a fundamental right."[8] The Seventh Circuit similarly has rejected the use of the term "miscarriage of justice" and instead recognizes a "set of exceptional situations in which waiver does not foreclose appellate review."[9] The Fifth Circuit has held that it is "unnecessary to address" if it will adopt a "miscarriage of justice" exception to the enforcement of a plea agreement.[10] The Eleventh Circuit has rejected a "miscarriage of justice" exception.[11]

'miscarriage of justice.' Even assuming this court recognized such an exception to the enforceability of an appeal waiver, it does not apply here").

[7] *See United States v. Matthews*, No. 12-5183, at *10-11 (6th Cir. Aug. 16, 2013)("Although we have never expressly recognized the miscarriage -of-justice exception to the enforcement of appellate waivers in a published decision, we have implicitly recognized it in several unpublished decisions. *See United States v. Lee*, 464 F. App'x 457, 458 (6th Cir. 2012) (per curiam) (enforcing appellate waiver in part because doing so 'will not result in a miscarriage of justice')[ ]").

[8] *See United States v. Riggi*, 649 F.3d 143, 147-48 (2d Cir. 2011)("A violation of a fundamental right warrants voiding an appeal waiver").

[9] *See United States v. Nulf*, 978 F.3d 504, 507 (7th Cir. 2020)("Along the way to that holding, we noted that some circuits decline to enforce appeal waivers if doing so would result in a "miscarriage of justice." *Id.* at 910. But we did not adopt a general miscarriage-of-justice exception for this circuit. To the contrary, we reiterated our circuit's longstanding recognition of only a limited set of exceptional situations in which waiver does not foreclose appellate review[ ]").

[10] *See United States v. Portillo-Palencia*, No. 20-10493, at *6 (5th Cir. Dec. 9, 2020) ("Notwithstanding his valid appeal waiver, Portillo-Palencia contends that this court should join six other circuits in adopting a miscarriage-of-justice exception to the waiver and reach the merits of his appeal. . . . But we conclude that it is unnecessary to address whether this court should adopt such an exception because,

In deciding whether it will not enforce an appeal waiver, the First and Third Circuits "choose not to earmark specific situations," but consider "certain factors to consider" before "reliev[ing] the defendant of the waiver": [T]he 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." *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) citing to *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001). The *Teeter* court noted, "This category is infinitely variable, but, by way of illustration, we would include within it situations in which appellants claim that their sentences were based on constitutionally impermissible factors (say, race or ethnicity), . . , or that the plea proceedings were tainted by ineffective assistance of counsel[ ]" *Teeter*, 257 F.3d at 25, n.9. Further, "we do not think that a waiver should be construed to bar an appeal if the trial court imposes a sentence exceeding the maximum penalty permitted by law, . . . or one that violates a material term of the plea agreement[.]" *Id.* at 25, n.10.

---

in any event, Portillo-Palencia has failed to show a miscarriage of justice in this case").

[11] *See United States v. Cabezas*, No. 18-10258, at *11 (11th Cir. Dec. 5, 2019)("To the extent that Cabezas argues that a miscarriage of justice would result from enforcement of his sentence appeal waiver, we have not adopted a 'miscarriage of justice' exception").

Other Circuits do not employ a factor-driven individual case analysis, but rather list certain situations that they deem worthy to warrant relief from appellate waiver. The Tenth Circuit defines a "miscarriage of justice" as being "(1) the district court relied on an impermissible factor such as race; (2) ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful." *United States v. Cudjoe*, 634 F.3d 1163, 1167 (10th Cir. 2011) (internal quotations and citations omitted). More restrictively, the Fourth Circuit has noted that it has "applied the miscarriage of justice exception only to allow review of sentences imposed 'in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race,' . . . and for a valid claim of actual innocence[ ]" *United States v. Rich*, No. 18-4828, at *2-3 (4th Cir. Apr. 9, 2019)(citations omitted).

At perhaps the furthest end of the spectrum, the Fifth Circuit that has declined to adopt a "miscarriage of justice" exception to an appellate waiver, and held, "We have recognized only two exceptions to the general rule that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, . . . and second, a sentence exceeding the statutory maximum." *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020). *See also United States v. Leal*, No. 20-10790, at *2 (5th Cir. Mar. 24, 2021)("Moreover, we decline to consider an appeal waiver exception for challenging an illegal sentence").

These differences in these standards are important as it may result in the loss of a defendant's ability to appeal in compelling and deserving circumstances warranting the disregard of an appellate waiver. For example, a common basis for disregarding an appellate waiver is a trial court's imposition of an "illegal sentence"[12] and those sentences imposed in excess of the statutory limit.[13] A

---

[12] See *United States v. Williams*, 597 F. App'x 99, 4 n.3 (3d Cir. 2015)("Since we conclude that Judge Davis' sentence was not authorized by law, we reject the Government's claim that Williams waived his right to appeal the sentence by failing to object when the sentence was imposed"); *United States v. Wall*, 230 F. Supp. 3d 771, 774 (E.D. Mich. 2017)("An illegal sentence is recognized as a basis for setting aside an appeal waiver in [the Sixth] circuit"); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000)(Appeal waivers "are not absolute. For example, defendants cannot waive their right to appeal an illegal sentence[ ]"); *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003)("[A] 'sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime' ")(citation omitted).

[13] *See United States v. Ruiz-Gonzalez*, 427 F. App'x 22, 26 (1st Cir. 2011)("[W]e have observed that a miscarriage of justice occurs . . . where the sentence exceeds the maximum penalty permitted by law");*United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000)("An express knowing waiver will not bar appeal of a sentence when the sentence was . . . imposed in excess of the maximum penalty provided by law[ ]"); *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020)("We have recognized only two exceptions to the general rule that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, . . . and second, a sentence exceeding the statutory maximum"); *United States v. Caruthers*, 458 F.3d 459, 472 (6th Cir. 2006)("Thus, we agree with our unanimous sister circuits that an appellate waiver does not preclude an appeal asserting that the statutory-maximum sentence has been exceeded"); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997)(A waiver of appeal rights "will not be enforced . . . if the judge sentenced a defendant in excess of the statutory maximum sentence for the crime committed"); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000)("[A] waiver may not be used to preclude appellate review of a sentence that exceeds the statutory maximum"); *United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008)(A defendant cannot "be said to have

number of Circuits also agree that a sentenced premised on an impermissible factor, such as race, can be reviewed despite appellate waiver.[14] Other decisions have indicated an appellate waiver may be invalid if "actual innocence of Defendant" is

---

waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute[ ]")(citation omitted); *United States v. Adams*, 780 F.3d 1182, 1184 (D.C. Cir. 2015)(Appellate waiver not enforced if "the sentence exceeds the statutory maximum[ ]")(citation omitted).

[14] *See United States v. Ruiz-Gonzalez*, 427 F. App'x 22, 26 (1st Cir. 2011)("[W]e have observed that a miscarriage of justice occurs when a sentencing court considers a constitutionally impermissible factor such as the defendant's race[ ]");*United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)("Similarly, a sentence tainted by racial bias could not be supported on contract principles, since neither party can be deemed to have accepted such a risk or be entitled to such a result as a benefit of the bargain");*United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000)("An express knowing waiver will not bar appeal of a sentence when the sentence was. . . based on a constitutionally impermissible factor such as race");*United States v. Hower*, 442 F. App'x 213, 2 (6th Cir. 2011)("Hower's argument that his sentence is illegal is without merit, as the sentence does not exceed the statutory maximum and is not based on any constitutionally prohibited factor, nor will any miscarriage of justice occur if the sentence is not reviewed"); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997)(A waiver of appeal rights "will not be enforced if a sentencing judge relied on impermissible facts (such as a defendant's race)[ ]"); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000)(Citing to Second Circuit authority, "a sentence tainted by racial bias could not be supported on contract principles, since neither party can be deemed to have accepted such a risk or be entitled to such a result as a benefit of the bargain")(citation omitted); *United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008)(A defendant cannot "be said to have waived his right to appellate review of a sentence . . . based on a constitutionally impermissible factor such as race")(citation omitted);*United States v. Adams*, 780 F.3d 1182, 1184 (D.C. Cir. 2015)(Appellate waiver not enforced if "the sentence is 'colorably alleged to rest upon a constitutionally impermissible factor, such as the defendant's race or religion' ")(citation omitted).

proven[15]; when the court failed to advert 18 U.S.C. § 3553(a) factors at sentencing;[16] when there exists a colorable claim of ineffective assistance of counsel;[17] when there

---

[15] *See United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016)("A proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement").

[16] *See United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)("We do not hold that the waiver of appellate rights forecloses appeal in every circumstance. . . . At some point, one that is not approached here, an arbitrary practice of sentencing without proferred reasons would amount to an abdication of judicial responsibility subject to mandamus, particularly since one purpose served by the requisite statement of reasons is to facilitate collection of sentencing data, *see* S. Rep. No. 225, 98th Cong., 1st Sess. 80 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3263"); *United States v. Adams*, 780 F.3d 1182, 1183-84 (D.C. Cir. 2015)(Appellate waiver not enforced if "the district court utterly fails to advert to the factors in 18 U.S.C. § 3553(a)[ ]") (citation omitted).

[17] *United States v. Hernandez*, 242 F.3d 110, 113-14 (2d Cir. 2001)("We have suggested that a plea agreement containing a waiver of the right to appeal is not enforceable where the defendant claims that the plea agreement was entered into without effective assistance of counsel"); *United States. v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007)("Enforcing a collateral-attack waiver where constitutionally deficient lawyering prevented Shedrick from understanding his plea or from filing a direct appeal as permitted by his plea agreement would result in a miscarriage of justice. In this context, we will exercise our jurisdiction to consider Shedrick's ineffective-assistance-of -counsel claims"); *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020)("We have recognized only two exceptions to the general rule that knowing and voluntary appellate and collateral-review waivers are enforceable: first, ineffective assistance of counsel, . . . and second, a sentence exceeding the statutory maximum"); *United States v. Hodges*, 259 F.3d 655, 659 n.3 (7th Cir. 2001)("But a valid appellate waiver contained in a plea agreement does not preclude a defendant's claim that the plea agreement itself was the product of ineffective assistance of counsel"); *United States v. Adams*, 780 F.3d 1182, 1183 (D.C. Cir. 2015)("We will not enforce [an appellate] waiver, however, if 'the defendant makes a colorable claim he received ineffective assistance of counsel in agreeing to the waiver[ ]' ")(citation omitted).

is a failure to abide by the terms of the plea agreement;[18] the existence of "extreme circumstances,"[19] and challenges to sentences citing to *Johnson v. United States*, 135 S. Ct. 2552 (2015) where the ACCA's residual clause was held to be unconstitutional.[20]

---

[18] *See Garza*, 139 S. Ct. at 745 n.6 ("See also, *e.g.*, *United States v. Puentes-Hurtado* , 794 F.3d 1278, 1284 (CA11 2015) ('[A]ppellate review is also permitted when a defendant claims that the government breached the very plea agreement which purports to bar him from appealing or collaterally attacking his conviction and sentence')"); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000)(Appeal waivers "are not absolute. For example, defendants cannot waive their right to appeal . . . a sentence imposed in violation of the terms of an agreement").

[19] *See United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999)("A waiver of the right to appeal includes a waiver of the right to appeal difficult or debatable legal issues — indeed, it includes a waiver of the right to appeal blatant error"); *Id.* at 1169, n. 5 ("In extreme circumstances — for instance, if the district court had sentenced Howle to a public flogging — due process may require that an appeal be heard despite a previous waiver").

[20] *See United States v. Barnes*, 953 F.3d 383, 388 n.9 (5th Cir. 2020)(enforcing appellate bar to *Johnson* challenge), citing cases on both sides of issue:

> *See, e.g.* , *United States v. Bey* , 825 F.3d 75, 82–83 (1st Cir. 2016) (enforcing appellate waiver to bar *Johnson* challenge, even after considering "miscarriage of justice" exception); *Sanford v. United States* , 841 F.3d 578, 581 (2d Cir. 2016) (per curiam) ("Sanford's collateral attack waiver therefore bars the present motion because the waiver encompasses any challenge to his sentence."); *In re Garner* , 664 F. App'x 441, 442 (6th Cir. 2016) ("[W]e must deny Garner's motion for the same reason he lost his direct appeal and his § 2255 action: Garner waived his right to challenge his sentence collaterally in his plea agreement."); *United States v. Ford* , 641 F. App'x 650, 651 (8th Cir. 2016) (per curiam) (enforcing appeal waiver to bar defendant's *Johnson* challenge); *United States v. Hurtado* , 667 F. App'x 291, 292 (10th Cir. 2016) (per curiam) ("The government unequivocally establishes that the [*Johnson* -based] appeal falls within the scope of the waiver, the waiver was knowing and voluntary, and enforcing the waiver will not result in a miscarriage of justice."). *But see [United States v.] Torres*, 828 F.3d

A unified Circuit approach to those situations that justify the disregarding of appellate waiver is necessary. For example, it makes no sense that in the Fifth Circuit, one could be sentenced on the basis of that person's race and the wavier of appeal would presumably be upheld, but that same fact pattern would be rejected in almost every other jurisdiction. As well, while the Eighth and Eleventh Circuits would hold that appellate wavier can be disregarded if the Government breaches the plea agreement, it is unclear if any other Circuit would so hold. Similar vagarities in the holdings of the individual Circuits make it a matter of geographic chance, not merit, if a Defendant can get relief from an appellate waiver. Such disparate treatment is a violation of Defendant's guarantee of equal protection and due process under the law. *See generally Baxstrom v. Herold,* 383 U.S. 107, 111 (1966)("[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made").

B. Because there is a circuit split as to how allegations of circumstances warranting the disregard of an appellate waiver are addressed in motions to dismiss, this Court should grant certiorari.

[1113,] at 1125 [9th Cir. 2016](refusing to enforce appeal waiver on the ground that such waivers don't apply "a defendant's sentence is 'illegal,' which includes a sentence that 'violates the Constitution' "); *United States v. Cornette* , 932 F.3d 204, 210 (4th Cir. 2019) ("[W]e may review Cornette's sentencing challenge [under *Johnson*] notwithstanding the appeal waiver.").

In the present case, a motion to dismiss was filed prior to merits consideration by the panel of the Ninth Circuit assigned to Benitez-Penalosa's case. The panel granted this motion, determining only that waiver of appeal was valid, and made no finding or evaluation of whether a "miscarriage of justice" occurred. *See United States v. Medina-Carrasco*, 806 F.3d 1205, 1209 (9th Cir. 2015) (indicating that waivers of appellate rights are enforceable if "the language of the waiver encompasses [the] right to appeal on the grounds raised" and "the waiver is knowingly and voluntarily made"). This circumvention of review of whether a "miscarriage of justice" has occurred is not limited to the Ninth Circuit. *See United States v. Howard*, 402 F. App'x 776, 777 (4th Cir. 2010)(Granting motion to dismiss appeal without evaluation of "miscarriage of justice" claim, holding, "Furthermore, enforcement of the valid waiver provision does not result in a miscarriage of justice "); *United States v. Fairley*, No. 17-60812, at *2 (5th Cir. Aug. 21, 2018)("Our review of the record shows that Fairley's appeal waiver was knowing and voluntary and that, under the plain language of the plea agreement, the waiver applies to his claims. . . . We decline to adopt the miscarriage of justice exception to appellate waivers. The Government's motion to dismiss the appeal is GRANTED, and the appeal is DISMISSED).

These dismissals do not consider whether an exception to enforcement to appellate waiver is warranted prior to the defendant's case being dismissed. A fairer

system has been implemented by the Eighth and Tenth Circuits, as stated by the court in *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004):

> We find persuasive the Eighth Circuit's treatment of these principles and adopt, with slight variation, the three-prong analysis announced in *United States v. Andis*, 333 F.3d 886, 890-92 (8th Cir. 2003) (en banc). This analysis calls for the court of appeals, in reviewing appeals brought after a defendant has entered into an appeal waiver, to determine: (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 as we define herein. *See id.*

Id. at 1325. *See also United States v. Del Valle-Cruz*, 785 F.3d 48, 57 (1st Cir. 2015)(deciding whether appeal waiver would work a miscarriage of justice before "proceed[ing] to consider the merits of the appeal" under abuse-of-discretion standard).

Requiring a three-point evaluation throughout the Circuits prior to dismissal would allow the Circuits to review each appeal similarly and to make sure no appropriate cases deserving the disregard of appellate waiver to fall through the cracks- i.e., especially egregious cases like sentences decided by race or sentences in excess of the statutory maximum. The failure of the Circuits to treat appellants equally again gives important rights to only those who happen to reside in a favorable geographical area.

C. Because unobjected to guideline error is "plain error" and because "plain error" is indistinguishable from "miscarriage of justice," guideline error should be held to be a miscarriage of justice allowing disregard of appellate waiver

Even the more lenient First and Third Circuits have rejected a claim of guideline error as basis for a "miscarriage of justice" relief from appellate waiver. *See United States v. Valdez*, 964 F.3d 117, 122 (1st Cir. 2020)("The district court did not make any erroneous calculations, let alone an error that would have made this one of the 'egregious cases' that meets the miscarriage of justice standard"); *United States v. Chambers*, 646 F. App'x 213, 6 (3d Cir. 2016)("Even if the District Court committed an error, claims relating to Sentencing Guideline calculations are exactly the type of arguments to which a broad appellate waiver applies").

Despite these and other cases, new decisions of this Court indicate that sentencing error should be evaluated under the "miscarriage of justice" standards applied by the Circuits. To begin, there is no indication that, in the correct case, sentencing error could not fall under a "miscarriage of justice" umbrella. *See Teeter*, 257 F.3d at 25 ("Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. As a subset of this premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing").

In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), this Court held, "The Guidelines' central role in sentencing means that an error related to the Guidelines can be particularly serious. A district court that 'improperly calculat[es]' a defendant's Guidelines range, for example, has committed a 'significant procedural error.' " *Id.* at 1345-1346 (citation omitted). More recently, this Court

has held that "[i]n the ordinary case . . . the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018). Such an error "is precisely the type of error that ordinarily warrants [plain error] relief under Rule 52(b)." *Id.* at 1907.

Rosales-Mireles and *Molina-Martinez* emphasize and reinforce the importance that an accurate guideline calculation is to a defendant facing sentencing. Their holdings dovetail the concerns raised in numerous cases about sentencing errors not being corrected due to appellate waivers. *See United States v. Mutschler*, 152 F. Supp. 3d 1332, 1339 (W.D. Wash. 2016)("The criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law"); *United States v. Bolinger*, 940 F.2d 478, 483 (9th Cir. 1991) (Nelson, C.J., dissenting in part, because "a salient purpose of the Guidelines is to reduce sentencing disparity and to create uniformity," an appeal asserting that the district court "misapplied the Guidelines . . . should not be barred by waiver"); *United States v. Melancon*, 972 F.2d 566, 575 (5th Cir. 1992)(Parker, D.J., concurring specially)("[W]aivers of the sort at issue in this case insulate from review factual inadequacies in the presentence reports generated by nonjudicial probation officers in Sentencing Guideline cases. Appellate review ensures that the record adequately supports whatever factual findings the district court judge makes or adopts").

It is important to note that the "plain error" standard has been held to be virtually indistinguishable from the standard defining a "miscarriage of justice." In *United States v. Cabrera-Rivera*, 893 F.3d 14 (1st Cir. 2018), the First Circuit set aside an appellate waiver where a condition of supervised release that prevented the defendant from being around minors did not exclude his own minor children. The First Circuit noted that the Defendant's "failure to object to [this condition] at sentencing means our review is only for plain error." *Id.* at 29. In response to the Government's argument that even plain error review should not be afforded as he had not met his four-part burden for forfeited claims under plain error review as set out in *United States v. Pabon*, 819 F.3d 26 (1st Cir. 2016), the First Circuit held:

> *Pabon*, however, did not address such claims in the context of an appellate waiver. *See id.* at 30 n.3 (noting that the government "expressly declined" to rely on appeal waiver because it was "easier to resolve the appeal on the merits"). **More importantly, as we have recently indicated, our circuit precedent is unclear as to "what distinction, if any, exists between the miscarriage-of-justice and the plain-error standards."** [*United States v.] Vélez-Luciano*, 814 F.3d [553 (1st Cir. 2016)], n.15 (emphasis added). Given this lack of clarity, we decline to find that Cabrera has waived his challenge and review for plain error.

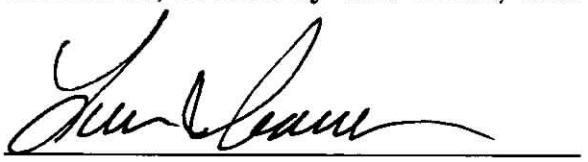
United States v. Cabrera-Rivera, 893 F.3d 14, 29-30 (1st Cir. 2018).

As noted *supra*, *Rosales-Mireles* holds that an erroneous guideline calculation is "plain error" that allows for appellate correction. Also as noted *supra*, a "miscarriage of justice" in many Circuits also allows for appellate correction even if an otherwise valid appellate waiver exists. If the "miscarriage of justice" and "plain

error tests" are functionally the same, then relief for sentencing error should be available even if one has an otherwise valid appellate wavier.

CONCLUSION

Because the Ninth Circuit erred when it failed to find that a sentencing error can amount to a "miscarriage of justice" allowing plain error review even if there is a plea agreement containing an appellate waiver, and because this case presents a question implicating this Court's supervisory powers,[21] and an important question of federal law that has not been, but should be, settled by this Court, this Court should grant certiorari.



LARS ROBERT ISAACSON
Counsel for Petitioner

[21] *See Nguyen v. United States*, 539 U.S. 69 73-74 (2003) (granting certiorari to exercise the Court's supervisory powers to review whether court of appeals in reviewing criminal cases had departed from accepted and usual course of judicial proceedings).

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CARLOS BENITEZ PENALOSA, Defendant-Appellant.	No. 19-10357 D.C. No. 1:19-cr-00018-JAO-1 District of Hawaii, Honolulu ORDER

Before: THOMAS, Chief Judge, HURWITZ and BADE, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 29) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's argument, applying the waiver to his claims that his Guidelines range was miscalculated does not result in a miscarriage of justice. *See United States v. Medina-Carrasco*, 815 F.3d 457, 462 (9th Cir. 2015) (applying sentencing appeal waiver to claim that the Guidelines range was incorrectly calculated); *United States v. Martinez*, 143 F.3d 1266, 1271 (9th Cir. 1998) ("When a plea agreement expressly waives a defendant's right to appeal a sentence, the waiver extends to an appeal based on an incorrect application of the sentencing guidelines.").

DISMISSED.

APPENDIX "B"

FILED

APR 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CARLOS BENITEZ PENALOSA, Defendant-Appellant.	No. 19-10357 D.C. No. 1:19-cr-00018-JAO-1 District of Hawaii, Honolulu ORDER

Before: THOMAS, Chief Judge, HURWITZ and BADE, Circuit Judges.

We treat appellant's "Petition for Rehearing En Banc" (Docket Entry No. 33) as a motion for reconsideration en banc. So treated, the motion is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS BENITEZ-PENALOSA

Petitioner,

v.

UNITED STATES OF AMERICA,

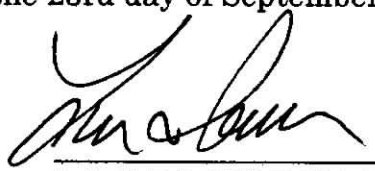
Respondent.

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), in the United States District Court for the District of Hawai'i and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this the 23rd day of September 2021.



LARS ROBERT ISAACSON **
Hawai'i Bar #5314
1100 Alakea Street
20th Floor
Honolulu, HI 96813
Phone: (808) 497-3811
Fax: (866) 616-2132

** Counsel of Record

No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS BENITEZ-PENALOSA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PROOF OF SERVICE

I, Lars Robert Isaacson, do certify that on September 23, 2021, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served. I have served the Supreme Court of the United States via United States mail, with first-class postage prepaid. The Solicitor General, Assistant United States Attorney Marion Percell, and the petitioner were each served by depositing

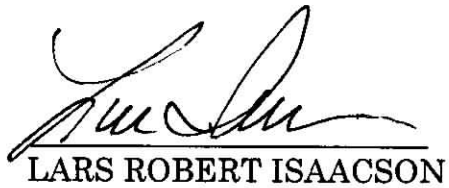
an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Office of the Solicitor General
950 Pennsylvania Ave., MW
Washington, D.C. 20530-0001

Marion Percell
Assistant U. S. Attorney
Room 6-100, PJJK Federal Bldg.
300 Ala Moana Blvd.
Honolulu, Hawai'i 96850



LARS ROBERT ISAACSON **
Hawai'i Bar #5314
1100 Alakea Street
20th Floor
Honolulu, HI 96813
Phone: (808) 497-3811
Fax: (866) 616-2132

** Counsel of Record