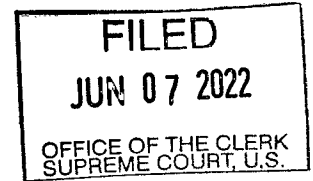


No. 21-8134

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JACQUERE DORAN,
PETITIONER,

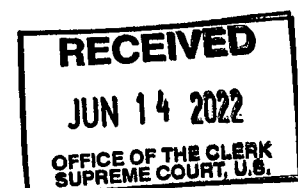
vs.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

JACQUERE DORAN, Pro-Se
Reg. No. 77521-097
Federal Correctional Institution
P.O. Box 800
Herlong, California 96113



QUESTION PRESENTED

Whether the District Court Erred in Ruling that Petitioner Waived an Ineffective Assistance of Counsel Claim Based on a Fourth Amendment Violation?

PARTIES TO THE PROCEEDING

Petitioner, Jacquere Doran, was the defendant-appellant below. Respondent, United States of America, was the plaintiff-appellee below.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Case No. 22-1090) appears at Appendix A to this Petition and is unpublished.

The opinion of the United States District Court for the Eastern District of Missouri appears at Appendix B to this Petition and is reported at *Doran v. United States*, 2021 U.S. Dist. Lexis 243089 (E.D. Mo. Dec. 21, 2021).

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided my case was March 17, 2022. No petition for rehearing was timely filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution holds that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

STATEMENT OF THE CASE

On May 2, 2018, Doran was charged by a federal grand jury in one count: 1) felon in possession of a firearm in violation of Title 18, United States Code, Section 922(g)(1) ("Count One"). Case No. 4:18CR00365SNLJ. District Court Docket ("DCD") 1, 2. On September 13, 2018, Joel Schwartz entered his appearance on behalf of Doran. DCD 11.

Guilty Plea Agreement

On April 4, 2019, Doran pleaded guilty to Count One of the indictment. DCD 38. Pursuant to the Guilty Plea Agreement (the "Agreement"), the parties agreed that the Base Offense Level would depend on Section 2K2.1(a) United States Sentencing Guidelines ("U.S.S.G.") range. DCD 38, para. 2. The parties also recommended that no Specific Offense Characteristics were applicable. Id.

However, both parties agreed to waive the right to appeal the non-sentencing issues. Id. at para. 7. Specifically, the parties agreed as follows:

7. WAIVER OF POST-CONVICTION RIGHTS:

A. Appeal: The defendant has been fully apprised by defense counsel of the Defendant's rights concerning appeal and fully understands the right to appeal the sentence under Title 18, United States Code, Section 3742.

(i) Non-Sentencing Issues: The parties waive all rights to appeal all non-jurisdictional, non-sentencing issues, including, but not limited to, any issues relating to pretrial motions, discovery and the guilty plea.

(ii) Sentencing Issues: In the event the Court accepts the plea and, after determining a Sentencing Guidelines range, sentences the Defendant within or below that range, then, as part of this agreement, the Defendant hereby waives all rights to appeal all sentencing issues other than Criminal History as it affects the base offense level calculations. Similarly, the United States hereby waives all rights to appeal all sentencing issues other than Criminal History, provided the Court accepts the plea and sentences the Defendant within or above the determined Sentencing Guidelines range.

1. Habeas Corpus: The Defendant agrees to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to Title 28, United States Code, Section 2255, except for claims of prosecutorial misconduct or ineffective assistance of counsel. Id. at para. 7(A), (B).

During the change of plea hearing, the Sentencing Court questioned Doran to determine if he understood the contents of the Agreement.

COURT: The lawyers have given me this written Guilty Plea Agreement consisting of 11 pages. I see that you and the lawyers signed it on page 11. Is that right?

DEFENDANT: Yes, sir.

COURT: Have you read the agreement?

DEFENDANT: Indeed I have, sir.

COURT: Have you gone over it in detail with your lawyer?

DEFENDANT: Yes.

COURT: Has he explained the contents of the agreement in detail to you?

DEFENDANT: Yes, sir, he has.

COURT: And do you understand the contents of the agreement?

DEFENDANT: I do, sir.

COURT: Is there anything in here that you do not understand?

DEFENDANT: I understand it completely.

Plea Hearing Transcript ("Plea Tr."), pp. 6-7.

The Sentencing Court confirmed with Doran that he understood the specific terms of the Agreement, including the elements of the charges to which Doran was pleading guilty (Plea Tr. 15), the statutory penalty (Plea Tr. 11-12), and the sentencing guidelines (Plea Tr. 9-10). After confirming that Doran understood the possible consequences of pleading guilty, the Sentencing Court accepted the Agreement, finding Doran "competent to enter the plea of guilty" and that his plea was being entered knowingly and voluntarily." Id. at 15.

Presentence Investigation Report

Following the change of plea, the United States Probation Office issued its Final Presentence Investigation Report ("PSR"). DCD 44. The PSR determined a Base Offense Level of 24, pursuant to U.S.S.G. Section 2K2.1(a)(2), because Doran had committed the offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense. Three levels were then deducted under Section 3E1.1(a) and (b) for Doran's "acceptance of responsibility," resulting in a Total Offense Level of 21. Id. at para. 28-30.

With a Criminal History Category of VI and a Total Offense Level of 21, the PSR calculated an advisory guidelines range of 77 to 96 months. Id. at para. 76. On August 6, 2019, Doran filed his objection and memorandum in support of his objections to the PSR. DCD 46, 47.

Doran argued that his prior California felony conviction for Possession of Marijuana for Sale did not qualify as a prior felony conviction for a controlled substance offense under U.S.S.G. Section 2K2.1(a) because it had been redesignated to a misdemeanor under California law. DCD 46.

Doran also argued that his prior California offense of Threaten Crime with Intent to Terrorize with Prior Prison did not qualify as a crime of violence under U.S.S.G. Section 2K2.1(a) because it did not have the element of intentional causation of death or great bodily injury. DCD 47. On September 30, 2019, the United States filed its response in opposition to the objections. DCD 55. On September 26, 2019, the Probation Office filed its Revised Final PSR, which outlined its position as to the enhancements under U.S.S.G. Section 2K2.1(a)(2). DCD 53.

Sentencing

Doran appeared before the Sentencing Court for sentencing on October 3, 2019. DCD 58. Before hearing arguments on the objections, the Sentencing Court started a hearing by reviewing the Rehaif Waiver that had been signed by Doran. Doc. 59 (Waiver); S. Tr., p. 3. The Sentencing Court then took up the objections to the PSR by Doran, explaining its rationale, and denied the objections. Doc. 58; S. Tr., p. 4-6. Doran was given an opportunity for allocution and argument, during which defense counsel requested a sentence at the low-end of the guidelines. Id at 11. S. Tr., p. 18. Ultimately, Judge Limbaugh sentenced Doran to a sentence of 96 months of imprisonment. S. Tr., p. 21.

Appeal

On March 9, 2020, Doran appealed and argued that the District Court erred in treating his prior California conviction for sale of marijuana as a felony conviction and using it to enhance his base offense level pursuant to Section 2K2.1(a)(2) of Sentencing Guidelines, because the

state of California had redesignated the conviction as a misdemeanor offense. Brief of Appellant ("Doran Br."), p. 2. Doran further argued that the District Court had relied on Eighth Circuit precedent "wrongly decided" in finding that Doran's prior conviction under a threat statute was a crime of violence. *Id.* On May 7, 2020, the United States filed its responsive brief. On November 2, 2020, the Eighth Circuit affirmed the judgement of the District Court. *United States v. Doran*, 978 F.3d 1337 (8th Cir. 2020). Doran subsequently filed a Petition for a Writ of Certiorari with this Court. However, the writ was denied on March 1, 2021. *Doran v. United States*, 141 S.Ct. 1507, 209 L.Ed.2d 186 (2021).

Post-Conviction Proceedings

On August 10, 2021, Doran filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28, United States Code, Section 2255. In that motion, Doran raised four ineffective assistance of claims, including a claim that defense counsel provided ineffective assistance of counsel by failing to file a motion to suppress evidence. Without conducting an evidentiary hearing, the Sentencing Court, on December 21, 2021, denied Doran relief and dismissed the case. *Doran v. United States*, 2021 U.S. Dist. Lexis 243089 (E.D. Mo. Dec. 21, 2021). Doran filed a timely notice of appeal and sought a Certificate of Appealability ("COA") from the Eighth Circuit. The Circuit Court, however, summarily denied Doran's a COA on March 17, 2022. Case No. 22-1090.

REASONS FOR GRANTING THE PETITION

I. Criminal Defendants Have a Right to Counsel Under the Sixth Amendment to the United States Constitution

In a long line of cases that include *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *Johnson v. Zerbst*, 304 U.S. 335, 58 S.Ct. 1019, 82 L.Ed. 1161 (1938), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."
U.S. Const. Amend. VI.

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams v. United States ex. rel.*

McCann, 317 U.S. 269, 275, 63 S.Ct. 236, 87 L.Ed. 268 (1942); see also *Powell v. Alabama*, supra, at 68-69, 53 S.Ct. 55, 77 L.Ed. 158.

A. The Right to Counsel is the Right to "Effective Assistance" of Counsel

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has a right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Gideon v. Wainwright*, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, this Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

A claim that an attorney's ineffective assistance has deprived a criminal defendant of his Sixth Amendment right to counsel is controlled by the standards announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed on such a claim, a petitioner must demonstrate two elements: (1) "that counsel's performance was deficient," and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 686; 104 S.Ct. 2052, 80 L.Ed.2d 674. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied on as having produced a just result." *Id.* at 686. See also *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)(holding that trial counsel's conduct in failing to file a timely suppression motion fell below the level of reasonable professional assistance guaranteed by the Sixth Amendment and thus, it was constitutionally deficient).

B. The Right to Effective Assistance of Counsel Applies to All "Critical" Stages of the Criminal Proceedings

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009)(quoting *United States v. Wade*, 388 U.S. 218, 227-228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). Critical stages include arraignment, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.

C. Plea Negotiations is a "Critical Stage" of the Criminal Proceedings

With respect to the right to effective assistance of counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea. In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), this Court established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill*, *supra*, at 57, 106 S.Ct. 366, 88 L.Ed.2d 203. In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for

parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, this Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill*, *supra*, at 60, 106 S.Ct. 366, 88 L.Ed.2d 203.

In *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), this Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla*, *supra*, at 373. 130 S.Ct. 1473, 176 L.Ed. 284.

II. Defendants May Waive Certain Constitutional Rights

This Court has long held that a defendant may waive certain constitutional rights by entering a guilty plea. For example, in *Parke v. Raley*, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), this Court stated that "a guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination." *Parke*, 506 U.S. at 29, 113 S.Ct. 517, 121 L.Ed.2d 391; see also *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

A. The Lower Courts Have Extended Supreme Court Precedent To Hold that Guilty Pleas Waive All Non-Jurisdictional Claims

Despite this Courts holding that a guilty plea waives only three constitutional rights, the lower courts have ruled that "[w]hen a defendant pleads guilty, he waives all nonjurisdictional

defects in the proceedings conducted prior to entry of the plea and thus has no non-jurisdictional ground upon which to attack that judgment except the adequacy of the plea." *United States v. Smith*, 640 F.3d 580, 591 (4th Cir. 2011); see also *United States v. Abreo*, 30 F.3d 29 (5th Cir. 1994)(by pleading guilty defendant waived right to challenge the validity of search); *United States v. Winheim*, 143 F.3d 1116 (8th Cir. 1998)(guilty plea waives all challenges not connected to jurisdiction); *United States v. Littlefield*, 105 F.3d 527 (9th Cir. 1997)(statute of limitations is nonjurisdictional and is therefore waived); *Bishop v. State*, 969 S.W.2d 366 (Mo. Ct. App. 1998)(entrapment defense was waived since plea was voluntary); *Jackson v. State*, 452 So.2d 895 (Ala. Ct. App. 1984)(defendant waived issue of whether confession was coerced).

B. This Court Has Never Held That a Defendant Waives a Fourth Amendment Claim By Pleading Guilty

This Court has rejected the view that by pleading guilty a defendant "waives" any claim involving an antecedent Fourth Amendment violation. The lower courts have primarily relied on this Court's prior decisions concerning the scope of federal habeas review of a criminal conviction based upon a guilty plea. See, e.g. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Lefkowitz v. Newsome*, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975); *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975)(per curiam). In *Brady*, this Court reaffirmed that a guilty plea is not simply "an admission of past conduct," but a waiver of constitutional trial rights such as the right to call witnesses, to confront and cross-examine one's accusers, and to trial by jury. *Brady*, supra, at 747-748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (citing *Boykin v. Alabama*, 395 U.S.

238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). For this reason, a guilty plea "not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, *supra*, at 748, 90 S.Ct. 1463, 25 L.Ed.2d 747.

In *Tollett v. Henderson*, this Court concluded that an intelligent and voluntary plea of guilty generally bars habeas review of claims relating to the deprivation of constitutional rights that occurred before the defendant pleaded guilty. The Court held that, because "[t]he focus of federal habeas inquiry is the nature of [defense counsel's] advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," *Tollett*, 411 U.S. at 266, 93 S.Ct. 1602, 36 L.Ed.2d 235, *Henderson* was not entitled to a writ of habeas corpus on the basis of infirmities in the selection of the grand jury. This Court decisions subsequent to *Tollett* have all made clear that a plea of guilty does not bar the review in habeas corpus proceedings of all claims involving constitutional violations antecedent to a plea of guilty. A defendant who pleads guilty may seek to set aside a conviction based on prior constitutional claims which challenge "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30, 94 S.Ct. 2098, 40 L.Ed.2d 628. Because a challenge to an indictment on grounds of prosecutorial vindictiveness was such a claim, this Court concluded that a federal court may grant a writ of habeas corpus if it found merit in the constitutional challenge. *Id.* at 30-31, 94 S.Ct. 2098, 40 L.Ed.2d 628. The Court also applied this principle in *Menna v. New York*, *supra*, in holding that a double jeopardy claim may be raised in federal habeas proceedings following a state court conviction based on a plea of guilty. In *Lefkowitz v. Newsome*, *supra*, this Court held that *Tollett* does not apply to preclude litigation of

a Fourth Amendment claim subsequent to a guilty plea when the State itself permits the claim to be raised on appeal. "Under our past decisions [] ... a guilty plea results in the defendant's loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment. It does not follow, however, that a guilty plea is a 'waiver' of antecedent Fourth Amendment claims that may be given effect outside the confines of the criminal proceeding. The defendant's rights under the Fourth Amendment are not among the trial rights that he necessarily waives when he knowingly and voluntarily pleads guilty." *Haring v. Prosise*, 462 U.S. 306, 320-321, 130 S.Ct. 2368, 76 L.Ed.2d 595 (1983).

As is relevant here, this Court's decision in *Tollett* and the cases that followed simply recognized that when a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation because the conviction does not rest in any way on evidence that may have been improperly seized. This Court has gone on to state that "State law treats a guilty plea as 'a break in the chain in chain of events [that] preceded it in the criminal process.'" *Haring*, 462 U.S. at 321, 130 S.Ct. 2368, 76 L.Ed.2d 595 (quoting *Tollett*, 411 U.S. at 267, 93 S.Ct. 1602, 36 L.Ed.2d 235). Therefore, the conclusion that a Fourth Amendment claim ordinarily may not be raised in a habeas proceeding following a plea of guilty does not rest on any notion of a "waiver," but instead rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction. As this Court explained in *Menna v. New York*:

"[W]aiver was not the basic ingredient of this line of cases. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases,

factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Id.* at 62-63, n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195.

It is therefore clear that Doran did not "waive" his Fourth Amendment claims by pleading guilty in federal court.

III. Modern Plea Agreements Contain Appellate and Post-Conviction Waivers

Plea agreements today crafted by prosecutors generally require a defendant to waive either his appellate rights, his post-convictions rights or both. Every circuit that has considered this issue has reached the conclusion that at least some forms of appeal waivers are permissible. See generally, *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001); *United States v. Hernandez*, 242 F.3d 110 (2d Cir. 2001); *United States v. Khattak*, 273 F.3d 557 (3d Cir. 2001); *United States v. Brown*, 232 F.3d 399 (4th Cir. 2000); *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992); *United States v. Fleming*, 239 F.3d 761 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911 (7th Cir. 2001); *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Nguyen*, 235 F.3d 1179 (9th Cir. 2000); *United States v. Rubio*, 231 F.3d 709 (10th Cir. 2000); *United States v. Howle*, 166 F.3d 1166 (11th Cir. 1999).

The policy reasons supporting appeal waivers was best summarized in *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1999):

[T]he chief virtues of plea agreements are speed, economy, and finality. Waivers of appeal in plea agreements preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty. We also note that plea agreements are of value to the accused in order to

gain concessions from the government. Id. at 829 (internal citations omitted).

A. Enforcement of Appellate and Post-Conviction Waivers

In determining whether to enforce an appellate or post-conviction waiver, courts consider three factors: "(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." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004)(en banc)(per curiam).

At issue in this Petition is the first factor, the scope of the appellate waiver.

B. The Scope of the Waiver in Doran's Plea Agreement

At the first step of the appellate waiver review -- the scope of the waiver -- courts must "strictly construe" the waiver and read any ambiguities "against the Government and in favor of a defendant's appellate rights." *Hahn*, 359 F.3d at 1325. This is so because plea agreements are essentially contracts between the defendant and the Government. But these agreements are also subject to special limitations given their unique nature. Specifically, courts have held that "application of these contract principles is tempered by the constitutional implications of a plea agreement." *Margalli-Olvera v. INS*, 43 F.3d 345, 351 (8th Cir. 1995). Again, "where a plea agreement is ambiguous, the ambiguities are construed against the government." Id. at 353. Interpreting plea agreements in this manner reflects the fact that these agreements are generally drafted by the Government and involve significant rights of a defendant. As such, the burden of proof is on the Government to demonstrate that a plea agreement clearly and unambiguously waives a defendant's right. Id.; see also *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001)(holding that waivers "are to be applied narrowly and construed strictly against the

The District Court's ruling is contrary to the holding of this Court in *Class v. United States*, 538 U.S. ___, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018). In *Class*, a federal grand jury indicted the defendant, *Class*, for possessing firearms on the grounds of the United States Capitol, in violation of Title 40, United States Code, Section 5104(e)(1). Appearing pro-se, *Class* asked the District Court to dismiss the indictment. He alleged that the statute violated the Second Amendment to the United States Constitution and the Due Process Clause. The District Court, however, dismissed the defendant's challenges. Thereafter, *Class* pleaded guilty. A written plea agreement set forth the terms of *Class*' guilty plea, including several categories of rights that he agreed to waive. But that agreement said nothing about the right to challenge on direct appeal the constitutionality of the statute of conviction. After conducting a plea hearing pursuant to Rule 11(b) of the Federal Rules of Criminal Procedure, the District Court accepted *Class*' guilty plea and sentenced him. On direct appeal, *Class* attempted to raise his constitutional claims. The Court of Appeals held that *Class* could not do so because, by pleading guilty, he had waived his constitutional claims. On certiorari, this Court reversed and remanded the case after finding that *Class*' plea agreement did not bar him from raising the specific constitutional claims he had attempted to raise on direct appeal.

As in the *Class* case, a written plea agreement set forth the terms of *Doran*'s guilty plea, including several categories of rights that he expressly agreed to waive. At the same time, the plea agreement expressly enumerated categories of claims that *Doran* could raise during habeas proceedings, including claims based upon (1) prosecutorial misconduct and (2) ineffective assistance of counsel. In addition, the plea agreement stated, in part, under the heading "Voluntary Nature of the Guilty Plea and Plea Agreement":

"This document constitutes the entire agreement between the defendant and the government, and no other promises or inducements have been made, directly or indirectly, by any agent of the government, including the Department of Justice attorney, concerning any plea to be entered in this case." Doran, 2021 U.S. Dist. Lexis 243089, at * 30-31 (citing Plea Agreement, DCD 38, at paragraph 10).

And as the District Court acknowledged in its Order, it held a plea hearing during which it reviewed the terms of the plea agreement (with Doran present and under oath) to ensure the validity of the plea. After providing Doran with the required information and warnings, the District Court accepted Doran's guilty plea. *Id.* at 31.

Doran's claim in the instant case is even stronger than that in the Class case. In Class, this Court relied on the silence in the plea agreement to hold that Class had not waived his right to assert a constitutionality claim. In this case, Doran neither expressly nor implicitly waived his constitutional right to effective assistance of counsel by pleading guilty. The ineffective assistance of counsel claim at issue here did not contradict the terms of the written agreement. In fact, the plea agreement emphatically granted Doran the right to raise an ineffective assistance of counsel claim during post-conviction proceedings. And even though Doran's ineffective assistance of counsel claim was based upon an underlying Fourth Amendment violation, it still did not violate the terms of plea agreement, as the plea agreement did not preclude Doran from raising an ineffective assistance of counsel claim based on particular underlying violation.

C. The District Court's Decision Expanded the Scope of the Waiver Beyond that Contained Within the Written Plea Agreement

Despite the fact that the plea agreement allowed Doran to raise an ineffective assistance

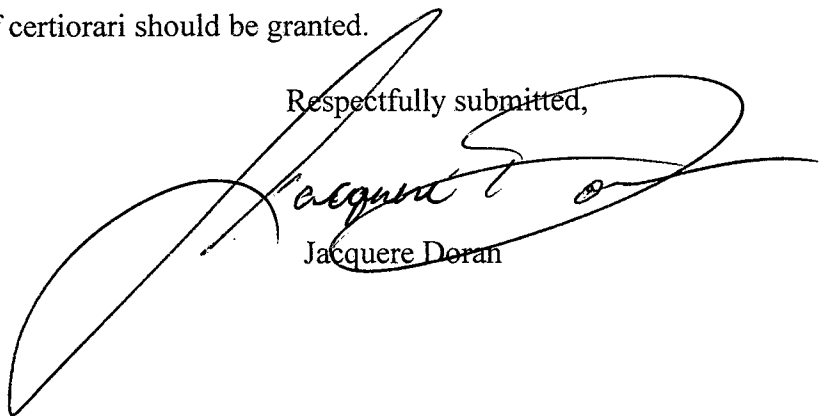
of counsel claim, the District Court denied Doran's claim on the grounds that he waived his right to assert a Fourth Amendment violation. The lower courts, particularly within the Eighth Circuit, have consistently denied post-conviction motions filed by defendants such as Doran on the basis that the plea agreement precluded them from raising any non-jurisdictional claim. See e.g. *Brown v. United States*, 2022 U.S. Dist. Lexis 7256 (E.D. Mo. Jan. 14, 2022); see also *Bennett v. United States*, 2015 U.S. Dist. Lexis 52078 (E.D. Mo. Apr. 21, 2015); *United States v. Ortiz*, 2012 U.S. Dist. Lexis 81137 (S.D. Tex. June 12, 2012).

These decisions are not only contrary to the decisions of this Court, but also implicitly expanded the waiver provisions in any written plea agreement beyond the confines of the written words. They make a mockery of the command that waivers must be "strictly construe[d]" and that any ambiguities must be charged "against the Government and in favor of a defendant's appellate rights." Hahn, *supra*, 359 F.3d at 1325. They must not be allowed to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Jacquere Doran