No. _____

IN THE

Supreme Court of the United States

EDWARD TOLIVER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are plea agreement appeal waivers that forfeit a criminal defendant's right to challenge errors in the district court's interpretation and application of the U.S. Sentencing Guidelines lawful, and if so, what are the limits on their validity and enforceability?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Toliver*, No. 2:19-cr-150, U.S. District Court for the Eastern District of Louisiana. Judgment entered April 29, 2021.
- *United States v. Toliver*, No. 21-30246, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 24, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edward Toliver respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On March 24, 2022, a panel of the Fifth Circuit Court of Appeals dismissed Mr. Toliver's appeal of his sentence based on an appeal waiver in his plea agreement. A copy of the order is attached to this petition as the appendix (1a–2a).

JURISDICTION

The Fifth Circuit entered its order of dismissal on March 24, 2022, and no petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13 because it is being filed within 90 days of the Fifth Circuit's final judgment.

FEDERAL STATUTE INVOLVED

18 U.S.C. § 3742(a) provides, in relevant part:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> . . .
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range ….

INTRODUCTION

The right to appeal a criminal sentence is a statutory entitlement under 18 U.S.C. § 3742. But in many federal jurisdictions—including the Eastern District of Louisiana—local U.S. Attorney's Offices have developed "standard" plea agreements requiring that all defendants wishing to plead guilty pursuant to a written agreement waive nearly all appellate and collateral relief rights. The Eastern District's standard agreement includes the broadest and most restrictive appeal waivers available, mandating forfeiture of all appellate and collateral relief rights except attacks on sentences imposed in excess of the statutory maximum and claims of ineffective assistance of counsel. Defendants are required to enter these agreements long before sentencing occurs, almost always without any agreement among the parties about the sentence the defendant might face or even the Guidelines range that will apply.

This Court has yet to directly rule on the permissibility of these waivers, despite intense criticism, questionable legality, and inconsistent treatment by lower courts. Particularly concerning is the federal government's use of standardized, non-negotiable appeal waivers that force defendants to relinquish their right to challenge yet-to-be-made U.S. Sentencing Guidelines errors. Those waivers are inherently unknowing and involuntary, threaten the integrity of the judicial process, create unwarranted sentencing disparities, and stifle the development of the law. They also betray the purpose of the Sentencing Guidelines: to achieve "a more honest, uniform, equitable, proportional, and therefore effective sentencing system." U.S.S.G. Ch. 1 Pt. A.1(3). This Court should intervene to address the validity of such waivers.

STATEMENT OF THE CASE

On February 6, 2020, Edward Toliver pleaded guilty to two federal crimes pursuant to a plea agreement with the government, namely, (1) aiding and abetting the possession of 15 or more fraudulent credit cards, and (2) aggravated identity theft. The first charge carried a statutory maximum of ten years of imprisonment, while the second charge carried a mandatory, consecutive two-year sentence. As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Toliver's plea agreement required him to waive all appellate and collateral relief rights except an attack on a sentence imposed in excess of the statutory maximum or a claim of ineffective assistance of counsel. Relevant here, the waivers specifically encompassed his right "to challenge any United States Sentencing Guidelines determinations and their application by any judge to the defendant's sentence and judgment."

The fraud charge to which Mr. Toliver pleaded guilty arose from a search conducted by law enforcement on September 16, 2014, during which officers found another individual in possession of over 200 fraudulent access device cards. Mr. Toliver acknowledged that he aided and abetted that person's possession of the cards by obtaining stolen credit card numbers and producing the fraudulent cards. He also acknowledged that the person possessed the cards with the intent to make purchases of items that would be charged to the actual account holders without their authorization.

In addition to describing the facts related to his offenses of conviction, Mr. Toliver's factual basis described "broader conduct" to which he admitted,

including details about a credit card fraud scheme in which he and his co-defendant "obtained hundreds of thousands of stolen credit card numbers," used them "to create tens of thousands of fraudulent access devices," and then "distributed thousands" of those devices to other individuals, who used them "to fraudulently obtain things of value." The factual basis described a specific incident from August 2013 in which law enforcement agents caught a co-conspirator at an airport with over 700 fraudulent access devices. The agents requested information for the accounts related to approximately 549 of the cards and determined that the total loss was approximately $35,096.92. The factual basis also described a search warrant executed on Mr. Toliver and his co-defendant's card manufacturing location, which resulted in the seizure of laptop computers containing approximately 380,000 credit card numbers in text files.

Prior to Mr. Toliver's sentencing, a U.S. Probation officer prepared a Presentence Investigation Report ("PSR"), which calculated his advisory Sentencing Guidelines range under U.S.S.G. § 2B1.1. As part of that calculation, the probation officer applied a 26-level enhancement to Mr. Toliver's offense level based on the officer's determination that "[t]he intended loss was at least $190,000,000" for his offense. *See* U.S.S.G. § 2B1.1(b)(1)(N). The probation officer explained that the $190 million figure was based on application of commentary to § 2B1.1, which states: "In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device *and shall be not less than $500*." *See* U.S.S.G. § 2B1.1, cmt. n. 3(F)(i) (emphasis added). The probation officer assigned a $500 loss amount

to each of the 380,000 card numbers discovered on computers associated with Mr. Toliver, generating the $190 million loss amount. His resulting Guidelines range was 188 to 235 months, restricted to Count 1's 120-month statutory maximum.

Mr. Toliver objected to the PSR's calculation of his Sentencing Guidelines range, including specifically the application of the commentary requiring a $500-per-access-device loss amount. He argued through counsel that application of the commentary "grossly overstates the actual loss amount in this case and ignores the fact that law enforcement was able to determine the *actual* per-card loss amount for a batch of cards seized from another individual involved in the scheme." Mr. Toliver argued that the court should reject the commentary and use the actual loss evidence (*i.e.*, the average, per-card loss of $63.93 for the 549 cards for which agents obtained account information) to extrapolate a reasonable estimate of the total intended loss. The probation officer maintained its position, and the district court judge adopted the PSR's $190 million loss calculation, rejecting Mr. Toliver's arguments and applying the $500-per-access-device Guideline commentary. The court sentenced Mr. Toliver to 124 months of imprisonment—100 months for the fraud offense, plus 24 months for the identity theft charge. Mr. Toliver filed a timely notice of appeal.

On appeal, Mr. Toliver raised a single issue: a challenge to the district court's application of the Sentencing Guideline commentary requiring a minimum, $500-per-device loss amount. He argued that the court erred in deferring to that commentary because it is not a "reasonable interpretation" of a "genuinely ambiguous" Guideline, as required for deference under this Court's holding in *Kisor*

v. Wilkie, 139 S. Ct. 2400 (2019). In support of his argument, Mr. Toliver cited a Sixth Circuit decision reaching that precise conclusion in holding the $500-per-device commentary to be invalid. *See United States v. Riccardi*, 989 F.3d 476, 489 (6th Cir. 2021). He argued that the resulting loss amount grossly overstated the actual loss and disregarded evidence showing that the loss resulting from Mr. Toliver's offense conduct was significantly lower, requiring remand for resentencing "based on the proper application of U.S.S.G. §2B1.1(b)(1)."[1]

The government moved to dismiss Mr. Toliver's appeal based on the appellate waiver in his plea agreement. Mr. Toliver opposed dismissal, arguing that appeal waivers like the ones in his case are bad policy, harmful to the integrity of the criminal process, and inherently unknowing and involuntary. He acknowledged, however, that his challenges to the waiver's validity were foreclosed under Fifth Circuit precedent. Rather than dismissing the appeal outright, a panel of judges ordered that the motion would be carried with the case, and the government filed a brief responding to the merits of Mr. Toliver's argument—albeit failing to argue that the challenged commentary was a "reasonable interpretation" of the word "loss." Following Mr. Toliver's reply, another panel of the Fifth Circuit held, consistent with

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[1] Mr. Toliver asserted on appeal that "the most generous calculation of loss for the government was the one that Mr. Toliver's trial counsel proposed," which required extrapolating the average loss amount for the 549 seized cards to the 380,000 numbers seized from the computers and would have resulted in a Guidelines range of 100 to 125 months. However, he noted that the evidence supported a significantly lower Guidelines range of 57 to 71 months based on a loss amount less than $1 million, because the factual basis stated that the number of devices actually created and distributed for use was in the *thousands*, not *hundreds of thousands*. There was also no evidence that all 380,000 numbers found on the computers were unique, valid, or functional credit card numbers.

circuit precedent, that his appeal waiver was valid and enforceable. The panel dismissed the appeal without addressing the merits of his Guideline challenge.

REASONS FOR GRANTING THE PETITION

As this Court has repeatedly held:

> [A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.

Gall v. United States, 552 U.S. 38, 50 (2007); *see also Rita v. United States*, 551 U.S. 338, 347–48 (2007). Two U.S. Courts of Appeals—the Sixth and Ninth Circuits—now have held that the precise commentary upon which the district court relied to calculate Mr. Toliver's "benchmark" Guidelines range is invalid, requiring that similarly situated defendants be resentenced. *See Riccardi*, 989 F.3d at 480–89; *United States v. Kirilyuk*, 29 F.4th 1128, 1138–39 (9th Cir. 2022). What's more, judges on the Fifth Circuit have, in other contexts, signaled agreement with the reasoning employed by the Sixth and Ninth Circuits and their application of this Court's precedent to the Guideline commentary. *See United States v. Vargas*, 35 F.4th 936 (5th Cir. 2022); *United States v. Goodin*, 835 F. App'x 771, 782 & n.1 (5th Cir. 2021). Nonetheless, Mr. Toliver was prevented from even litigating this issue on appeal due to the broad, boilerplate sentencing appeal waivers in his plea agreement.

Although this Court has suggested possible limits on the reach of appeal waivers, it has not yet fully examined their legality or clarified restrictions on their enforcement. *See Garza v. Idaho*, 139 S. Ct. 738, 744–45 (2019) (recognizing that "no appeal waiver serves as an absolute bar to all appellate claims" and that "all

jurisdictions appear to treat at least some claims as unwaiveable"). For a number of reasons, this Court should provide that necessary clarification now. First, as commentators and judges alike have observed, the widespread and compulsory forfeiture of appellate rights—especially those regarding yet-to-be-made Sentencing Guideline errors—raises serious policy and fairness concerns, implicating not only the fundamental rights of huge swaths of criminal defendants, but also the health of the criminal process as a whole. Second, broad waivers like the one in Mr. Toliver's case are inherently unknowing and involuntary and therefore are legally dubious. Finally, the circuits are split over the limits on and exceptions to the enforcement of appeal waivers, leading to confusion and unpredictability. Absent intervention by this Court, important legal issues regarding the proper application of the Sentencing Guidelines will continue to be insulated from appellate scrutiny in the vast majority of criminal cases.[2] Clarification from this Court is urgently needed.

I. Appeal waivers raise serious policy and fairness concerns that require this Court's attention.

Many judges and commentators have expressed dismay over the appeal waiver trend, noting the serious policy concerns raised by the widespread, compelled forfeiture of appellate rights—and the inherent unfairness of those waivers. Appeal

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[2] Approximately ninety-seven percent of federal criminal defendants plead guilty pursuant to plea agreements, which typically mandate broad waivers of appellate rights. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012); Conrad & Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99, 153 (2018); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-26 (2015); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (observing that "criminal justice today is for the most part a system of pleas, not a system of trials.").

waivers like those in Mr. Toliver's plea agreement require defendants to forfeit serious errors that they could not have anticipated at the time of relinquishment and that arise from inherently inequitable bargaining positions.

At the time a defendant pleads guilty, he or she does so in the face of "information deficits and pressures to bargain," with the threat of severe potential penalties that can be imposed at the prosecution's whim. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011). As one commentator explained:

> The lack of bargaining equality between the defense and prosecution has led some judges to reject appeal waivers as contracts by adhesion. Because conditioning the plea agreement on acceptance of an appeal waiver skews the balance so far in the prosecution's favor, the defendant has no hope at achieving equal bargaining power. This renders the contract unconscionable.

Andrew Dean, *Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191, 1211 (2013); *see also* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. Times, July 17, 2012, at A24 ("Congress gave appeals courts the power to review federal sentences to ensure the government applies the law reasonably and consistently. Without an appeals court's policing, the odds go up that prosecutors will do neither. Our system of pleas then looks more like a system of railroading."). At the same time—while in the vice-like grip of plea bargaining—the defendant has no way of knowing what future errors may be committed by the district court or what rights may be trampled, nor the potential cost of those harms. Indeed, the Sentencing Guidelines' range has not yet been calculated at that early stage, nor have disputes about the proper application of the Guidelines surfaced.

On an institutional level, waivers reduce incentives for careful sentencing and strict compliance with the Sentencing Guidelines, insulating serious and obvious errors—like the one in this case—from review and correction. This not only leads to unfair and inconsistent outcomes but leaves difficult or open legal questions unanswered and otherwise inhibits development of the law. As one district court put it, "[t]he criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law." *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1339 (W.D. Wash. 2016); *see also United States v. Melancon*, 972 F.2d 566, 573 (5th Cir. 1992) (Parker, J., concurring) ("Any systemic benefits that might inhere in this type waiver cannot overcome its extremely deleterious effects upon judicial and congressional integrity, and individual constitutional rights.").

Even the Department of Justice has recognized the danger that appeal waivers pose to the integrity of our current Guidelines-based sentencing scheme. *See* John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 Fed. Sent. R. 209, 210 (Jan./Feb. 1998) ("The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the sentencing guidelines."). And the post-*Booker* "reasonableness" review of sentences is undermined by a system that leaves the length of sentences and the procedures producing them immune from review. *See United States v. Vanderwerff*,

No. 12-CR-00069, 2012 WL 2514933, at *5 (D. Colo. June 28, 2012), *rev'd and remanded*, 788 F.3d 1266 (10th Cir. 2015) ("Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions.").

Of course, courts long have pointed to the institutional benefits of appeal waivers. Most common among those are the conservation of resources and finality of judgments. However, as one district court observed, these benefits may be overblown:

> Any suggestion that unilateral waivers of the right to appeal promote finality is disingenuous. Finality is not secured simply because only the Government, and not the defendant, is entitled to appeal. Moreover, to the extent the Government's motive is merely to reduce the burden of appellate and collateral litigation on sentencing issues, the avenue for achieving such finality is explicitly contemplated in Rule 11(c)(1)(C), pursuant to which the Government may agree to a specific [Sentencing Guidelines] range and bind both the defendant and the Court.

Mutschler, 152 F. Supp. 3d at 1340 (internal citations omitted).

Moreover, use of sentencing appeal waivers in *every* plea agreement does not merely reduce direct criminal appeals—it seeks to eliminate them. No doubt, some balance must be struck between the interests of resource management and finality on the one hand, and, on the other, the statutory right to appeal—a right that allows for error correction and just results while also providing guidance for lower courts. The former cannot be allowed to consume the latter. *Vanderwerff*, 2012 WL 2514933, at *4 ("Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.").

II. Appeal waivers that forfeit the right to challenge Sentencing Guidelines errors are inherently unknowing and involuntary.

Appellate courts generally have upheld appeal waivers based on a false equivalency between prospectively waiving the right to appeal and the waiver of certain constitutional rights that are relinquished upon entry of a guilty plea. Appellate courts generally reason that, since defendants can waive constitutional rights by pleading guilty, they may also waive statutory rights, including the right to appeal a sentence. *See*, *e.g.*, *Melancon*, 972 F.2d at 567; *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), *overruled in part by United States v. Andis*, 333 F.3d 886, 892 n.6 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52-54 (4th Cir. 1990). At the same time, appellate courts generally will not enforce waivers that were not knowing and voluntarily made. *See, e.g.*, *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

These two positions are at odds. Appeal waivers like the one in this case are inherently unknowing, because a defendant's sentence—and any Guideline errors contributing to it—cannot be known at the time of the defendant's plea. Importantly, defendants enter into appeal waiver agreements long before sentencing occurs, and those waivers often are made, as here, with no agreement between the parties regarding the sentence the defendant might face. In other words, a defendant cannot knowingly waive a future appeal of those yet-to-be-made errors. In Mr. Toliver's case, he could not have known at the time of his guilty plea that the court would impute a

$190 million loss amount to his criminal conduct when the only identifiable, provable loss was approximately $35,000.

Appellate courts have sidestepped these issues by reasoning that, because defendants may waive *constitutional* rights, they also may waive the statutory right to appeal a sentence. *See, e.g.*, *Andis*, 333 F.3d at 889 ("[T]he right to appeal is not a constitutional right but rather purely a creature of statute. . . . Given that the Supreme Court has allowed a defendant to waive constitutional rights, we would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." (internal quotation marks and citations omitted)); *Khattak*, 273 F.3d at 561 ("The ability to waive statutory rights, like those provided in 18 U.S.C. § 3742, logically flows from the ability to waive constitutional rights."); *Teeter*, 257 F.3d at 21–22 ("[T]he idea of permitting presentence waivers of appellate rights seems relatively tame because the right to appeal in a criminal case is not of constitutional magnitude.").

But the analogy courts have drawn between a sentence-appeal waiver and the waiving of constitutional rights by pleading guilty is flawed. The constitutional rights waived by a guilty plea are known at the time they are waived:

> [O]ne waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

Melancon, 972 F.2d at 571 (Parker, J., concurring). Due process only can be satisfied when a waiver is an intentional, knowing "relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United*

States v. Olano, 507 U.S. 725, 732-33 (1993); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969). By contrast, there can be no waiver without knowledge of the right waived. *Cf. Newton v. Rumery*, 480 U.S. 386, 390–403 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment, when right to sue had already accrued). Because sentencing-related appeal waivers are made at the time of the plea, they lack the essential prerequisite for waiver: contemporaneous knowledge of the rights being relinquished. At that moment, the right to appeal has not yet accrued,[3] and the sentencing errors have not yet occurred.

A defendant cannot preserve sentencing errors for review by making a blanket objection at re-arraignment to any prospective error in the court's application of the Sentencing Guidelines. *See* Fed. R. App. P. 51(b) (requiring an objection "when the court ruling or order is made or sought"); *Puckett v. United States*, 556 U.S. 129, 135 (2009) (describing Rule 51(b) as a "contemporaneous-objection rule"). Conversely, a defendant cannot waive—*i.e.*, knowingly and intentionally relinquish—the right to have such an error corrected without first knowing of the error's existence. *See Olano*, 507 U.S. at 733. Moreover, it is unreasonable to expect a defendant to anticipate—and thus "know"—whether errors will be made in calculating a sentence, much less the severity of those errors' impact. A defendant cannot have concrete knowledge of what is ceded when supposedly waiving the right to appeal the sentence.[4]

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[3] *See* Fed. R. App. P. 4(b)(2) (allowing the filing of a notice of appeal before the entry of the judgment so long as the notice is filed "*after* the court announces a . . . sentence" (emphasis added)).

[4] For some courts, the adoption of Federal Rule of Criminal Procedure 11(b)(1)(N)—which requires district courts to ensure that defendants understand the terms of appellate waivers when

Nor are agreements like Mr. Toliver's "voluntary." U.S. Attorney's Offices like the one in the Eastern District increasingly *require* appellate waivers or else defendants are not permitted to plead guilty pursuant to an agreement. These are not specific, bargained-for relinquishments of rights in exchange for some benefit. Defendants have no choice in the matter and receive nothing in return. In fact, when defense attorneys have attempted to push back on boilerplate provisions in the Eastern District, prosecutors have stated in no uncertain terms that they are not permitted to modify the template agreement.

III. There is a circuit split over how to enforce appeal waivers, leading to inconsistent treatment of identically situated criminal defendants.

Although appellate courts generally will enforce appeal waivers, the limits those courts have set on waivers and the situations in which courts refuse to enforce them varies wildly by circuit. As one commentator observed, "[i]n the absence of Supreme Court precedent guiding the enforcement of appeal waivers, . . . various courts of appeal have created their own limits and exceptions to their enforcement." Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event*

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pleading guilty—established that such waivers are legitimate. *United States v. Redmond*, 22 Fed. App'x 345, 346 (4th Cir. 2002); *United States v. Palmer*, 7 Fed. App'x 667, 668 (9th Cir. 2001); *Teeter*, 257 F.3d at 14 (reasoning that the adoption of Rule 11(c)(6) [predecessor to Rule 11(b)(1)(N)] is one of several reasons waivers are enforceable). However, the rule stops short of stating that compliance renders such a waiver knowing and voluntary. To the contrary, the Advisory Committee expressly reserved judgment on whether appeal waivers are constitutional: "[T]he Committee takes no position on the underlying validity of such waivers." Fed. R. Crim. P. 11, advisory committee's note (1999 Amendments). Because of the near-extinction of the criminal trial, the proliferation of the appeal waiver is significant—and concerning. "The glut of plea bargaining and the pandemic waiver of these rights have rendered trial by jury an inconvenient artifact." *Vanderwerff*, 2012 WL 2514933, at *4.

of Superseding Supreme Court Law: The Durham Rule As Applied to Appeal Waivers, 18 Fla. Coastal L. Rev. 113 (2016). That means a defendant in one circuit may be permitted to proceed with an appeal—and potentially have a sentencing error remedied—while an identically situated defendant in another circuit will be deprived of that right entirely.

This inconsistency and uncertainty is evident in the various, diverse frameworks courts have developed to examine the validity of appeal waivers. *See generally*, *id*. at 116-22 (outlining the split). The Fifth Circuit, for example, has adopted a two-step inquiry. The court first asks "(1) whether the waiver was knowing and voluntary," and then determines "(2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *Bond*, 414 F.3d at 544. The inquiry ends there. By contrast, some courts conduct a *third* step, inquiring whether the court's failure to consider the defendant's claim will result in a "miscarriage of justice." *See, e.g.*, *United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *Khattak*, 273 F.3d at 562-63; *Teeter*, 257 F.3d at 25.

How these courts define the term "miscarriage of justice," however, varies tremendously from circuit to circuit. For example, the First Circuit holds broadly that even knowing and voluntary appeal waivers should not be enforced in "egregious cases" and "are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs." *Teeter*, 257 F.3d at 25-26. The

Tenth Circuit has limited the "miscarriage of justice" exception to four discrete circumstances:

> (1) reliance by the court upon an impermissible factor such as race in imposition of the sentence; (2) ineffective assistance of counsel in connection with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Porter, 405 F.3d 1136, 1143 (10th Cir. 2005). The Third Circuit, while declining to adopt a bright-line rule, considers certain factors (first articulated by the First Circuit), such as:

> the 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.

Khattak, 273 F.3d at 562.

Disturbingly, appellate courts do not even agree about whether an appeal waiver properly can be applied to exclude direct or collateral claims of ineffective assistance of counsel. *Compare, e.g.*, *Hurlow v. United States*, 726 F.3d 958, 964, 966 (7th Cir. 2013) ("[A] direct or collateral review waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel."), *and United States v. Attar*, 38 F.3d 727, 729 (4th Cir. 1994) (holding that a general waiver of appellate rights cannot be construed as waiving claims of ineffective assistance of counsel), *with Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (holding that an appeal waiver precluded a collateral claim of ineffective assistance of counsel and urging that "a

contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless").

The broad appeal waiver in Mr. Toliver's plea agreement that encompassed future Sentencing Guideline determinations is unjust, unknowing, and involuntary. But even if this Court ultimately determines that sentencing-related appeal waivers like Mr. Toliver's generally are lawful, there should at least be uniform rules governing their enforcement and interpretation, including whether and when appellate courts should review a challenged sentencing error notwithstanding the existence of an applicable appeal waiver. The Court's guidance is urgently needed to clarify those rules, which impact scores of criminal defendants.

IV. Mr. Toliver's case presents an ideal vehicle to address this issue.

This Court should grant certiorari on the question presented in Mr. Toliver's case because it presents an ideal vehicle for this Court to address the validity and enforceability of sentencing-related appeal waivers. Mr. Toliver's Guidelines range was dramatically increased by the application of commentary that two U.S. Courts of Appeals have deemed invalid and non-binding following this Court's decision in *Kisor*. In both of those cases, the defendants were granted resentencing. Accordingly, enforcement of Mr. Toliver's appeal waiver has not only insulated a significant, impactful sentencing error from correction, but it also has created unwarranted sentencing disparities and prevented development of the law and adjudication of important legal questions. Mr. Toliver's case therefore presents a perfect vehicle for

this Court to weigh in and clarify the validity of appeal waivers that forfeit a defendant's right to challenge Sentencing Guidelines errors.

CONCLUSION

For the foregoing reasons, Mr. Toliver respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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