APPENDIX

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
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Case No. 21-5201

FILED: Jul 08, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIEZER ALBERTO JIMENEZ, Petitioner - Appellant, v. UNITED STATES OF AMERICA, Respondent - Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY OPINION

Before: SILER, BUSH, and MURPHY, Circuit Judges

SILER, J., delivered the opinion of the court in which BUSH and MURPHY, J.J., joined. BUSH, J. (pp 8-11), delivered a separate concurring opinion.

SILER, Circuit Judge. Eliezer Alberto Jimenez filed a pro se 28 U.S.C. § 2255 motion challenging his 87-month prison sentence. The district court denied the motion, however, for three related reasons. First, as part of his plea agreement Jimenez waived the right to collaterally attack his sentence on every ground except for ineffective assistance of counsel. Second, in the district court's view, Jimenez's pro se § 2255 motion did not raise an ineffective-assistance claim, so he failed to raise the only claim he preserved. And third, the district court rejected

Jimenez's argument that enforcement of his plea agreement's collateral-attack waiver would work a "miscarriage of justice." We agree with the district court in all three respects, so we affirm.

I.

Jimenez helped transport and launder nearly $300,000 in illegal drug proceeds. The government charged him with conspiracy to launder money, 18 U.S.C. § 1956(h), and he pleaded guilty to that charge. His plea agreement included an expansive waiver of post-conviction rights. With an exception for ineffective-assistance claims, the waiver prohibits Jimenez from collaterally attacking his "guilty plea, conviction, and sentence." Jimenez's plea agreement provides, in relevant part:

> 8. The Defendant waives the right to appeal the guilty plea and conviction. The Defendant waives the right to appeal any determination made by the Court at sentencing with the sole exception that the Defendant may appeal any aspect of the sentence if the length of the term of imprisonment exceeds the advisory sentencing guidelines range as determined by the Court at sentencing. Except for claims of ineffective assistance of counsel, the Defendant also waives the right to attack collaterally the guilty plea, conviction, and sentence.
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> . . .
>
> 14. The Defendant and the Defendant's attorney acknowledge that the Defendant understands this Agreement, that the Defendant's attorney has fully explained this Agreement to the Defendant, and that the Defendant's entry into this Agreement is voluntary.

Prior to sentencing, the probation office compiled its findings and recommendations in a presentence investigation report. The report assessed Jimenez four criminal history points: one point for a 2015 Minnesota state-court conviction, one point for a 2016 Minnesota state-court conviction, and two points for committing the instant offense while serving probation for the 2015 conviction. Paired with an offense level of 25, this yielded a guidelines imprisonment range of 70-87 months.

Jimenez filed a set of pro se objections to the presentence investigation report. As relevant here, he objected to his criminal history score because three of the four points stemmed from his 2015 state conviction, and, at the time of sentencing, he was challenging that conviction in Minnesota's state courts. He believed the district court shouldn't punish him—shouldn't heighten his criminal history score—because of a disputed state-court conviction. Jimenez ultimately withdrew these objections, and the district court sentenced him to 87 months in prison followed by three years of supervised release.

Approximately eight months after Jimenez's federal sentencing, a Minnesota state court vacated his 2015 conviction as obtained "in violation of . . . the laws and constitution of the United States and the State of Minnesota." In response, Jimenez filed a pro se 28 U.S.C. § 2255 motion to modify his sentence, and he attached to that motion a pro se memorandum of law. Citing *Johnson v. United States*, 544 U.S. 295 (2005), he asked the district court to reopen his sentencing, recalculate his guidelines range, and impose a new sentence in light of his newly

diminished criminal history score.[1] The district court denied the motion because Jimenez waived most of his post-conviction rights, including the right to bring a *Johnson* challenge, when he signed a plea agreement with an expansive waiver provision. And even though Jimenez's plea agreement preserved the right to bring a post-conviction ineffective-assistance claim, the district court noted that Jimenez's § 2255 motion lacked the basic features of an ineffective-assistance claim. Most importantly, neither the motion nor its accompanying memorandum provided any allegations explaining how Jimenez's trial counsel performed ineffectively.

Jimenez, now represented by counsel, raises two arguments on appeal. First, he asks us not to enforce his plea agreement's collateral-attack waiver because doing so, he contends, would work a miscarriage of justice. Second, he says the district court erred when it determined his § 2255 motion did not raise a claim for ineffective assistance of counsel.

II.

We have jurisdiction under 28 U.S.C. §§ 1291 & 2253. Both parties have conceded the proper standard of review is de novo. *See* Recording of Oral Arg. at 13:00-14:05; Appellee's Br. at Page 5.

III.

"[S]o long as the waiver is made knowingly and voluntarily," a criminal defendant can waive the right to appeal and collaterally attack his sentence. *See United States v. Beals*, 698 F.3d 248, 255 (6th Cir. 2012). "A defendant may waive any right, even a constitutional one,

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[1] *Johnson* held, in relevant part, "that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." 544 U.S. at 303.

in a plea agreement, if he relinquishes that right knowingly and voluntarily. It follows that a defendant may waive his right to bring future postconviction challenges, which are not constitutionally required, so long as the waiver is knowing and voluntary." *Portis v. United States*, 33 F.4th 331, 334-35 (6th Cir. 2022) (citation omitted).

We find that Jimenez knowingly and voluntarily waived his collateral-attack rights. The terms of the plea agreement and "the colloquy at the change of plea hearing" are highly probative factors in a knowledge/voluntariness inquiry, *United States v. Ferguson*, 669 F.3d 756, 765 (6th Cir. 2012), and both factors suggest a knowing and voluntary waiver took place in this case. The plea agreement that Jimenez signed has a broad and unambiguous waiver provision, and the district court explained the provision—its meaning and its consequences—before accepting Jimenez's guilty plea. Consider the following colloquy.

> THE COURT: Paragraph 8 [of the plea agreement] also states that except for claims of ineffective assistance of counsel, you are waiving the right to attack collaterally the guilty plea, the conviction, and the sentence.
>
> When you give up the right to collaterally attack, as that term is used in this sentence, you're giving up the right to file a separate lawsuit or a separate motion to challenge it. Sometimes that's referred to as a habeas motion or a habeas proceeding.
>
> And with one exception you would not be able to attack collaterally the guilty plea, the conviction, or the sentence. The exception would be a claim of ineffective assistance of counsel. You could still make

> such a claim in a collateral proceeding, but you'd be limited to that claim.
>
> . . .
>
> And do you understand that as well?
>
> JIMENEZ: Yes, Your Honor.

Jimenez was thus well-aware that he was waiving most of his post-conviction rights as a condition of his plea.

A finding of knowledge and voluntariness does not, however, end our inquiry. We have indicated that we will refuse to enforce knowing and voluntary waivers in at least three instances: (1) when a criminal defendant attacks his plea agreement as "the product of ineffective assistance of counsel," *In re Acosta*, 480 F.3d 421, 422 & n.2 (6th Cir. 2007), (2) when a district court sentences a criminal defendant above the statutory maximum, *Vowell v. United States*, 938 F.3d 260, 271 (6th Cir. 2019) (quoting *United States v. Caruthers*, 458 F.3d 459, 471-72 (6th Cir. 2006)), and (3) when a district court punishes a defendant because of the defendant's race, *Ferguson*, 669 F.3d at 764.

None of those exceptions applies here. Exceptions two and three are clearly inapplicable. The district court, after all, sentenced Jimenez well below the statutory maximum of 20 years, and nothing suggests racial discrimination influenced the district court's sentencing decision. The first exception also does not apply because Jimenez explicitly preserved his right to bring an ineffective-assistance claim on collateral attack, so any such claim would fall outside the scope of the waiver.

That said, as the district court explained, Jimenez failed to raise an ineffective-assistance claim in his § 2255 motion. His motion never mentioned ineffective assistance of counsel or the Sixth Amendment right to

counsel, nor did it explain (or even hint at) how his trial counsel performed ineffectively. *See* Recording of Oral Arg. at 10:49-11:10 (Jimenez's counsel conceding "that is not there, Your Honor."). And even though the memorandum accompanying the motion passingly cited *Strickland v. Washington*, 466 U.S. 668 (1984),[2] an unexplained citation "in [a] brief in support of [a] § 2255 motion . . . is wholly insufficient to raise the issue of ineffective assistance of counsel." *Cf. Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000). Because neither Jimenez's § 2255 motion nor the accompanying memorandum (A) listed ineffective-assistance as a ground for relief or (B) stated any facts supporting an ineffective-assistance claim, the ineffective-assistance exception in his plea agreement waiver does not apply here.[3] *See* R. Governing Section 2255 Proceedings 2(b) (explaining how a § 2255 motion must "specify all the grounds for relief available to the moving party" and "state the facts supporting each ground").

Jimenez asks us to recognize a "miscarriage of justice" exception to waiver enforceability, *see*, *e.g.*, *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003) (en banc), but we decline to do so in this case. Jimenez knowingly and voluntarily waived the right to collaterally

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[2] We note that the *Strickland* language in Jimenez's memorandum appears to come from a "form" paragraph cut-and-pasted from another prisoner's pro se filing. The *Strickland* rule material, for example, repeatedly refers to someone named "Kemp" (rather than Jimenez).

[3] We realize Jimenez filed his § 2255 motion pro se. And we recognize that a document filed pro se "is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). But the liberal-construction rule does not "abrogate basic pleading essentials," *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989), such as the requirement that a § 2255 petitioner state the factual bases underpinning every claim for relief.

attack his sentence, and this situation, *i.e.*, a vacated state-court conviction and a diminished guidelines range, was a foreseeable consequence of that waiver. Enforcing the waiver and applying the plea agreement as written does not work a miscarriage of justice.

We recognize that other circuit courts decline to enforce valid appeal or collateral-attack waivers when doing so would result in a "miscarriage of justice." And they take varying approaches to identify the circumstances that meet this standard. *Compare United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001), *with Andis*, 333 F.3d at 891-92. Yet this circuit debate would not affect the outcome here. No matter the standard, Jimenez identifies no circuit court that has found a miscarriage of justice in his circumstances—when a court subsequently vacates a prior conviction used to enhance a defendant's advisory guidelines range.

* * *

AFFIRMED.

BUSH, Circuit Judge, concurring. I join today's opinion in full. I write separately to explain some additional points about why the district court's judgment must be affirmed. The parties briefed this case on the assumption that we should determine the availability of a miscarriage-of-justice exception to Jimenez's collateral-attack waiver first, and, only if we found such an exception unavailable, determine whether Jimenez raised an ineffective-assistance claim. In my view, those arguments should be considered in reverse order. Jimenez contends on appeal that his plea agreement *itself*, particularly its collateral-attack waiver, may have been the product of ineffective assistance. *See, e.g.*, Appellant's Br. at 44. And if that were true, it would likely render the waiver unenforceable. *See, e.g.*, *Portis v. United States*, 33 F.4th 331, 335 (6th Cir. 2022). So if Jimenez had validly raised an ineffective-assistance claim, we would have had no occasion to weigh a miscarriage-of-justice exception to an otherwise-*enforceable* collateral-attack waiver. We instead would have demurred on the miscarriage-of-justice issue and remanded the ineffective-assistance claim to the district court for a hearing on Jimenez's § 2255 motion. The district court then could have taken evidence on whether Jimenez received ineffective assistance during his plea bargaining. And only if it turned out that Jimenez received *effective* assistance (and thus that the waiver is enforceable) would we have needed to examine a potential miscarriage-of-justice exception.

Today, however, we properly consider that exception because Jimenez never raised an ineffective-assistance claim where it mattered: his *pro se* § 2255 motion and accompanying memorandum of law. Indeed, those documents articulate nothing like Jimenez's new theory on appeal: that he would not have agreed to the waiver if he had received effective counsel. *Nowhere* in his § 2255

motion—written on the standard-form § 2255 template available to prisoners—did he mention *Strickland*, "ineffective assistance," or anything that his lawyer should have done but failed to do during any phase of the proceeding. *See generally* Mot., R. 201. And that was despite the explicit, repeated instruction in the template to "state the specific facts that support your claim." *See, e.g.*, *id.* at 4. In reality, Jimenez wanted a straightforward sentence reduction under *Johnson v. United States*, 544 U.S. 295, 303 (2005), which is why his § 2255 motion never even suggested ineffective assistance.

Realizing that fact, Jimenez's appellate counsel contends that the ineffective-assistance argument was preserved not in Jimenez's original motion, but in the accompanying memorandum of law. *See* Appellant's Br. at 49. As the district court recognized, however, Jimenez's memorandum of law comes no closer to stating an ineffective-assistance claim. True, it recites the *Strickland* standard amongst a hodgepodge of other collateral-attack caselaw. But like the motion, the memorandum makes no attempt to link that caselaw to any act or omission of Jimenez's lawyer during his plea bargaining, sentencing, or any other phase of the proceeding. *Cf.* R. Governing Section 2255 Proceedings Rule 2(b)(1)-(3). And no surprise there. Jimenez plainly lifted that legal-standard section from the petition of another prisoner named Kemp. As a result, it included accurate but irrelevant propositions about, for instance, Kemp's rights at trial. *See, e.g.*, Mem. at 6, R. 201-1 ("Further, Kemp must show that counsel's errors were prejudicial and deprived him of a 'fair trial,' or in other words, a trial whose result is reliable."). It said nothing about the defectiveness of Jimenez's plea.

Indeed, we pressed counsel at oral argument about what within this cut-and-paste contained anything specific

to Jimenez's case indicating ineffective assistance. Recording of Oral Arg. at 9:56-10:20. But counsel could muster no explanation for these odd and irrelevant portions of the legal-standard section (other than Jimenez having cribbed the *Strickland* boilerplate from petitioner Kemp). *Id.* And counsel likewise conceded that neither Jimenez's memorandum nor his motion contains any specific allegation about how his lawyer rendered ineffective assistance.[1] *See id.* at 10:49-11:10.

It is true, of course, that Jimenez initially filed those documents *pro se*, and so they must be afforded a liberal construction. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But the liberal-construction rule is not a liberal-invention rule. It does not require the district court to

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[1] Much too late, Jimenez's counsel on appeal suggested that the ineffective assistance really occurred when Jimenez's old lawyer supposedly advised Jimenez that seeking modification of his federal sentence based on the potential vacatur of his 2015 state conviction would be pointless. Indeed, Jimenez now claims that his counsel below believed a vacatur of the state conviction could reduce Jimenez's sentence only if the vacatur occurred *before* the federal sentencing, and that so long as Jimenez's criminal history was accurate at the time of his sentencing, future vacatur of the state conviction could never be used to reduce the corresponding federal sentence. At least this is the inference Jimenez's appellate counsel draws from Jimenez's former counsel's remark in a brief below that "[t]he Court is now aware through documents received by the probation officer and filed with the Court, that there is a legal challenge going on to the above mentioned conviction, but that in itself has no legal significance unless it is resolved prior to the sentencing." *See* Appellant's Br. at 9-10, 44. Yet far from a smoking gun, it is not at all clear from this comment that Jimenez's former counsel somehow advised Jimenez that vacatur of the state conviction could *never* lead to post-conviction relief. Rather, counsel's comment at the time was actually correct—that the mere possibility that Jimenez's conviction might be vacated some time *after* the federal sentencing was not itself sufficient to seek a reduction of the federal sentence *during* the sentencing.

lawyer on behalf of the movant or to conjure unevidenced claims from thin air. *See, e.g.*, *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *Coleman v. Shoney's Inc.*, 79 F. App'x 155, 157 (6th Cir. 2003) (quoting *United States v. Reed*, 167 F.3d 984, 993 (6th Cir. 1999)); *Payne v. Sec'y of Treas.*, 73 F. App'x 836, 837 (6th Cir. 2003). Here, therefore, the district court properly determined that Jimenez never raised an ineffective-assistance claim.

Moreover, Jimenez waived his right, unambiguously and in open court, to bring *any* collateral attack other than for ineffective assistance. Jimenez thus necessarily knew that the exact claim he now seeks to press—a mere sentence-reduction request—was subject to the waiver. *See United States v. Ferguson*, 669 F.3d 756, 765 (6th Cir. 2012). And as to that claim, the fact remains that Jimenez's vacated conviction implicates *only* his advisory guidelines range—not the sentencing range set by statute, and thus not the lawfulness of his sentence. *See* 18 U.S.C. §§ 1956(a), (h). Indeed, the district court today could lawfully reimpose the precise sentence Jimenez received. *See id.* I agree that in these circumstances, no miscarriage-of-justice exception is available.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA, Plaintiff, v. ELIEZER ALBERTO JIMENEZ, Defendant	Criminal Action No. 5: 18-074-DCR and Civil Action No. 5: 20-366-DCR **MEMORANDUM OPINION AND ORDER**

*** *** *** ***

Defendant Eliezer Alberto Jimenez has filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [Record No. 201] Jimenez contends that a Minnesota conviction which increased his criminal history score at sentencing has now been vacated and would no longer be countable under the United States Sentencing Guidelines. *See* U.S.S.G. §§ 4A1.1(d); 4A1.2 n.6. As a result, Jimenez asserts that he is entitled to be resentenced under a recalculated Guidelines range.

In *Johnson v. United States*, 544 U.S. 295 (2005), the Supreme Court held that the "vacatur of a prior state conviction used to enhance a federal sentence" is a new "fact[]" that "can start the 1–year limitation period" for filing a § 2255 motion. Although Jimenez contends that *Johnson* entitles him to relief, the limitations period is not implicated by his petition. Nevertheless, courts applying *Johnson*, including the United States Court of Appeals for

the Sixth Circuit, have concluded that claims based on vacated state convictions used to enhance a federal sentence are cognizable under § 2255. *See Watt v. United States*, 162 F. App'x 486, 503 (6th Cir. 2006).

The problem for Jimenez is that he waived his right to collaterally attack the sentence. [Record No. 114, p. 5] The Sixth Circuit generally enforces valid collateral-attack waivers, even when their enforcement affects constitutional rights. *See United States v. Fleming*, 239 F.3d 761, 763–64 (6th Cir. 2001). However, Jimenez suggests that the Court should disregard the waiver to "avoid injustice[]," invoking an exception to the enforceability rule not expressly recognized by the Sixth Circuit. [Record No. 210, p. 4; *see* Record No. 212, pp. 8-10.]

The matter was referred to United States Magistrate Judge Hanly A. Ingram, who recommends that the motion be denied due to the waiver provision of the defendant's plea agreement. [Record No. 212] However, because the motion raises an issue not directly addressed by the Sixth Circuit, he also recommends that a Certificate of Appealability be issued. [Record No. 212] The United States filed an objection to the latter recommendation, contending that Jimenez's waiver bars the requested relief under binding Sixth Circuit precedent. [Record No. 218]

Counsel was appointed to assist Jimenez in filing objections to the recommended disposition. [Record No. 212] Two objections were proffered. First, counsel contends that the government and Magistrate Judge Ingram overlooked a claim for ineffective assistance of counsel (which would not be barred by the waiver) in his petition. [Record No. 219, pp. 2-7] The alleged ineffective assistance was trial counsel's recommendation at

sentencing that he withdraw a *pro se* objection to his Presentence Investigation Report. [*Id.*] Alternatively, he argues that enforcing the waiver would amount to a miscarriage of justice. Therefore, the waiver should be excused. [*Id.* at pp. 7-8]

I. PROCEDURAL HISTORY

On February 7, 2019, a federal grand jury returned an Indictment charged Jimenez with conspiracy to commit money laundering related to drug trafficking in violation of 18 U.S.C. § 1956. He originally pleaded not guilty, and attorney Benjamin P. Hicks was appointed to represent Jimenez. [Record Nos. 83, 86]

On July 2, 2019, Hicks moved to allow Jimenez to change his plea. [Record No. 109] After granting the motion, [Record No. 110], the Court received a letter dated June 26, 2019, in which Jimenez described "dissatisfaction with counsel's performance." [Record Nos. 111, 112] The Court converted the re-arraignment hearing into a hearing addressing Jimenez's concerns regarding his attorney. [*See* Record No. 111.] During the hearing held July 12, 2019, Jimenez reported that "all issues in the letter ha[d] been resolved to his satisfaction," and he renewed his request for re-arraignment. [Record No. 116]

The tendered written plea agreement acknowledged that the government could prove the facts underlying the alleged offense beyond a reasonable doubt. [Record No. 114] In paragraph 8, Jimenez waived the right to appeal the plea, conviction, and sentence. He further agreed that, "[e]xcept for claims of ineffective assistance of counsel, [he] also waive[d] the right to attack collaterally the guilty plea, conviction, and sentence." [*Id.*] During the re-arraignment hearing, the Court questioned Jimenez and concluded that "the waiver provisions of the written Plea

Agreement [was] knowingly and intelligently made[,] and that the defendant [understood] the consequence of the waivers." [Record No. 116] The undersigned accepted Jimenez guilty plea and scheduled a sentencing hearing for October 18, 2019. [*Id.*]

The criminal history section of Jimenez's Presentence Investigation Report ("PSR") included a Minnesota drug conviction that resulted in a term of probation extending into the relevant period of the charged conduct. [Record No. 213, p. 15] The offense was assigned one criminal history point. And because Jimenez "committed the instant offense while under a[] criminal justice sentence," his criminal history score was increased by two points under the guidelines, placing him in criminal history category III. *See* U.S.S.G. § 4A1.1(d). The resulting guideline range was 70 to 87 months. [Record No. 213, p. 19]

On October 3, 2019, Jimenez filed *pro se* objections to his PSR. [Record No. 140] In part, he contended that the Minnesota conviction should not be counted because he had filed a collateral attack to challenge the conviction on August 14, 2019. [*See* Record No. 140-1.] However, on October 10, 2019, attorney Hicks filed a motion to withdraw one of Jimenez's *pro se* objections that is not relevant here. [Record No. 141] However, the motion further stated that Jimenez was aware his post-conviction challenge would have "no legal significance unless it [wa]s resolved prior to the sentencing" hearing. [*Id.* at p. 2] Hicks further advised Jimenez that, even if the prior conviction was vacated, the fact that he committed the instant offense while on probation could still be counted against him. [*Id.* at pp. 1-2]

During the sentencing hearing held on October 18, 2019, Jimenez orally withdrew the remaining objections

based on the pending collateral attack. [*See* Record Nos. 143, 216.] The relevant discussion proceeded as follows:

> MR. HICKS: The Court has been made aware of the appellate procedure going on, but I'm suggesting to [the defendant] that those two objections also be withdrawn. Because as I stated right now, it has no legal significance. But you can either agree to it or not.
>
> (Defendant and counsel conferring.)
>
> MR. HICKS: Mr. Jimenez, do you want to withdraw the two objections pertaining to the criminal history point being assigned for the conviction that's being reviewed by an appellate court, and two points for being under court supervision at the time of this offense? Do you want to withdraw those two objections?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Thank you. Those objections will also be withdrawn.
>
> . . .
>
> [THE COURT:] With regard to the criminal history section, information has been provided with regard to the conviction set forth in paragraph 45, which also results in not only a point for that conviction, but it's a recency score as well, that would increase the total score by two points.
>
> That conviction, while it may be subject to a post-conviction motion, would still be countable under the guidelines under Section 4A1.2.
>
> I would call the parties' attention specifically to the Application Notes contained in, I believe Application Note 6 as well as 10 may apply to those issues. And again, those matters are properly assessed points.

> . . .
>
> [THE COURT:] The Court will also sustain the motion filed by counsel to withdraw the objections. We've gone through each of those and I will sustain the motion as well. But I would note for the record that I've also made separate findings that the guidelines are properly calculated.

[Record No. 216, pp. 5-7] Jimenez was sentenced to 87 month term of imprisonment, to be followed by three years of supervised release.[1] [Record No. 145]

Jimenez filed the current motion on August 26, 2020, seeking a reduction of his term of incarceration based on the now-vacated Minnesota conviction. [Record No. 201-1, pp. 7-12] As a result, he contends that his sentence is now unconstitutional. [*Id.* at p. 8] The government briefly responded that Jimenez waived the right to collaterally attack his sentence.[2] [Record No. 207] Jimenez replied with a number of arguments seeking to excuse the waiver. [Record No. 210]

II. THE MAGISTRATE JUDGE'S RECOMMENDED DISPOSITION

Magistrate Judge Ingram recommended that Jimenez's motion be denied. [Record No. 212] He began by noting that Jimenez's motion did not argue that "his plea was not knowing and voluntary or that his plea

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[1] The undersigned concluded that a sentence at the top of the guidelines range was necessary to reflect the seriousness of the offense and deter Jimenez from future criminal activity based upon his past conduct. [Record No. 216, pp. 25-26]

[2] The government also contended that "Jimenez fail[ed] to meet his burden of proving his prior state conviction was vacated" because his original petition included only a portion of the Minnesota order. [Record No. 207, p. 3] This argument has since been abandoned, and it is unnecessary for the Court to address it further.

resulted from ineffective assistance of counsel." [*Id.* at p. 2] The latter conclusion stemmed from the fact that Jimenez "cite[d] the legal standards for an ineffective-assistance claim" but failed to "point[] to any deficient performance on the part of his attorney." [*Id.*]

Magistrate Judge Ingram next concluded that Jimenez had proven by a preponderance of the evidence that his Minnesota conviction was "vacated 'on the ground that the conviction was obtained in violation of [Jimenez's] rights under the laws and constitution of the United States and the State of Minnesota.'" [*Id.* at pp. 4-5 (quoting Record No. 201-2)] Thus, if Jimenez were sentenced today, the conviction presumably would not increase his criminal history points. [*Id.* at p. 5 (citing U.S.S.G. § 4A1.2 n.6, n.10)]

Magistrate Judge Ingram next concluded that Jimenez had proven by a preponderance of the evidence that his Minnesota conviction was "vacated 'on the ground that the conviction was obtained in violation of [Jimenez's] rights under the laws and constitution of the United States and the State of Minnesota.'" [*Id.* at pp. 4-5 (quoting Record No. 201-2)] Thus, if Jimenez were sentenced today, the conviction presumably would not increase his criminal history points. [*Id.* at p. 5 (citing U.S.S.G. § 4A1.2 n.6, n.10)]

Turning to whether this development entitles Jimenez to resentencing, the Magistrate Judge first noted the defendant's reliance on *Johnson* and its progeny would seemingly entitle Jimenez to relief. [Record No. 212, pp. 5-6 (citing *Johnson*, 544 U.S. at 302; *Watt*, 162 F. App'x at 503)] However, he acknowledged that a knowing and voluntary waiver is fully enforceable in the Sixth Circuit. [Record No. 212, p. 7] The defendant in *Johnson* had not executed a waiver, but at least one court has held

that an exception to the general rule of enforcement of valid waivers exists when a federal sentence is predicated on a vacated state conviction. [*Id.* (citing *United States v. Foley*, 273 F. Supp. 3d 562 (W.D. Pa. 2017)] The court in *Foley* found that enforcing a waiver against a defendant in such a situation would amount to a "miscarriage of justice" because it would not accord with "the terms of the bargain that the parties contemplated at the time [the defendant] originally pled guilty." *Foley*, 273 F. Supp. 3d at 570-71.

Considering the persuasive weight of this holding, Magistrate Judge Ingram noted that, unlike the Third Circuit, the Sixth Circuit has not adopted the miscarriage-of-justice exception to an otherwise valid collateral-attack waiver. [Record No. 212, pp. 8-10] The only exception recognized by the Sixth Circuit concerns sentences above the statutory maximum penalty. [*Id.* at p. 10 (citing *Vowell v. United States*, 938 F.3d 260, 268 (6th Cir. 2019)] And here, Jimenez was sentenced well below the statutory maximum. [*See* Record No. 114, ¶ 4.] Thus, Magistrate Judge Ingram concluded that the motion is barred by the waiver and recommended that the motion for collateral relief be denied. [Record No. 212, p. 11]

Considering whether a Certificate of Appealability should issue, the Magistrate Judge surveyed "several unpublished decisions from the Sixth Circuit" that suggest a miscarriage-of-justice exception. [*Id.* at pp. 11-14] And from these unpublished decisions, he concluded that it is possible an exception could be recognized in an appropriate case. [*Id.* at p. 14] Further, if the exception is recognized, the Magistrate Judge reasoned that it could be applied to Jimenez based on the holdings in *Foley* and *Watt*. [*Id.* (citing 273 F. Supp. 3d at 570-71; 162 F. App'x at 503)] Accordingly, he recommended that a Certificate of Appealability issue.

III. THE PARTIES' OBJECTIONS

As noted above, Jimenez makes two primary objections. First, he contends that his motion "should have been construed as containing an ineffective assistance of counsel claim." [Record No. 219, p. 3] He notes that "approximately half" of the memorandum filed in support of the motion "set[] forth" his understanding of the ineffective-assistance-of-counsel analysis under *Strickland v. Washington*, 466 U.S. 688 (1984). [*Id.*] Although Jimenez failed to provide any factual arguments in support of counsel's alleged ineffectiveness, he objects that the leniency owed to *pro se* filers required the Magistrate Judge to address the claim. [*Id.*]

In support of the allegedly overlooked claim, Jimenez argues that Hicks' assistance was unconstitutionally ineffective because, despite acknowledging the ongoing collateral attack on the Minnesota conviction, Hicks failed to seek a continuance of the sentencing hearing until the state challenge was resolved. [Record No. 219, p. 4] Jimenez also contends that Hicks "failed to preserve this very specific and nuanced issue for any potential, future collateral attack" by suggesting that the Minnesota challenge had no legal significance. [*Id.* at pp. 4-5] If Hicks had "preserved this one issue as an exception to the waiver on collateral attacks," Jimenez claims that he could have more effectively challenged his sentence. [*Id.* at p. 5] In summary, Jimenez argues that his counsel's failure to either seek a continuance or "negotiate a narrow exception to the waiver . . . constitutes deficient performance under *Strickland*." [*Id.* at pp. 6-7]

Alternatively, Jimenez argues that enforcing the waiver would amount to a miscarriage of justice. On this point, he cites the same cases as the Magistrate Judge but reaches a contrary conclusion. He contends that not

reducing his increased sentence would amount to a clear miscarriage of justice. [Record No. 219, p. 8] And to prevent an unjust result, he suggests that the Court disregard the waiver. [*Id.*]

Jimenez contends that, if he were resentenced under either theory, all three criminal history points should be eliminated" from the guidelines calculation, resulting in a non-binding range of 57 to 71 months.

The United States objects only to Magistrate Judge Ingram's conclusion that a Certificate of Appealability is warranted. It notes that, "[i]n all of the cases in the Recommended Disposition in which relief was granted, there was no appellate or collateral relief waiver," or the defendant's right to be resentenced was conceded. [Record No. 218, p. 3] Further, it suggests that there is no indication that Jimenez's case is the appropriate case for recognizing a miscarriage-of-justice exception. The United States argues that such an exception would be "limited to consideration of an illegal sentence," such as the current exception for sentences above a statutory maximum. [*Id.* at p. 4]

The government further notes that Jimenez's sentence was not illegal because it was well below the statutory maximum, within the correct Guidelines range at the time of sentencing and supported by the sentencing factors of 18 U.S.C. § 3553(a). [Record No. 218, p. 5] It also notes that Jimenez chose to attack the state conviction *after* pleading guilty to the federal crime, indicating that he was aware the conviction would impact his sentence. [*Id.*]

Finally, the government contends that *Foley* is an outlier because the underlying convictions at issue had been obtained in violation of the defendant's right to counsel, and the defendant consented to the waiver "'in

the most general terms.'" [Record No. 218, p. 6 (quoting 273 F. Supp. 3d at 571)] It argues that whatever persuasive value *Foley* may have, it is "not analogous" to the present matter and does not necessitate issuance of a Certificate of Appealability. [*Id.* at pp. 6-7]

IV. STANDARD OF REVIEW

Under § 2255, a prisoner sentenced by the Court may file a motion

> claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

28 U.S.C. § 2255. A "challenge to the enhancement of a federal sentence based on a void state conviction" is a cognizable non-constitutional claim under § 2255. *Watt*, 162 F. App'x at 503.

When a Magistrate Judge is designated to submit proposed findings of fact and a recommendation for disposition, 28 U.S.C. § 636(b)(1) empowers the Court to "accept, reject, or modify, in whole or in part," the recommendation. For issues that neither party objects to, "[t]he statute does not on its face require any review at all." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). But where a party files an objection, the Court "shall make a *de novo* determination of those portions of the . . . recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

V. LEGAL ANALYSIS

A. INEFFECTIVE ASSISTANCE

Jimenez argues that the government and the Magistrate Judge overlooked an ineffective-assistance-of-counsel claim in his petition. But having reviewed the petition, the Court finds the objection unfounded. A "conclusory statement in [a petitioner's] brief in support of [a] § 2255 motion . . . is wholly insufficient to raise the issue of ineffective assistance of counsel." *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000) (petitioner merely stated that "counsel's failure to raise the issue either at sentencing or on direct appeal constitutes ineffective assistance of counsel"). Here, Jimenez's statements concerning counsel's obligations were less than conclusory. He merely stated in a section of his memorandum entitled "Cognizable Issues Under § 2255" the standard for ineffective-assistance claims under *Strickland* and its progeny. [*See* Record No. 201-1, pp. 4-6.] The "Argument" section of Jimenez's brief contains no reference to Hicks's assistance.[3]

Further, later filings of a petitioner may be indicative of intent to state an ineffective assistance claim. *See Elzy*, 205 F.3d at 886. Here, Jimenez's reply to the government's response in opposition to his petition includes the following passage, which the Court quotes in full to explain its interpretation:

> The government concludes that nor does Jimenez allege that his counsel provided ineffective

[3] Other potential avenues of relief under § 2255 are mentioned in Jimenez's cognizable issues section but omitted from his argument. For example, he notes that a defendant may be entitled to an evidentiary hearing despite the fact that he did not request one, and he repeatedly refers to counsel's obligations "at trial" despite pleading guilty. [Record No. 201-1, pp. 4-6]

> assistance. Therefore, his claim should be denied. Obviously, the government is out of context on his allegation. How is it, that Jimenez can present that his attorney rendered ineffective assistance by not challenging his enhancement based on the use of his prior Minnesota conviction when said conviction was declared unconstitutional near one year after Jimenez was sentenced on July 12, 2019. Government's response is simply out of context.

[Record No. 210, p. 3] The Court construes this as a clarification by Jimenez that he is *not* raising an ineffective-assistance-of-counsel claim. The first two sentences relay Jimenez's understanding of the government's position: that the waiver bars Jimenez's petition because it does not raise an ineffective-assistance claim. Jimenez then suggests that this argument is "out of context," which the Court believes he means irrelevant, because he is not raising an ineffective-assistance claim. The next sentence explains why: Jimenez states that counsel could not have rendered ineffective assistance by not foreseeing that the conviction would be vacated "near one year after Jimenez was sentenced." And if the Court had any doubts about the issue Jimenez intended to raise in his petition, the next paragraph clarifies that "[t]he question here is whether the waiver stands post the awaken [sic] of a new fact, a fact not available to the defendant at the time of signing the waiver." [Record No. 210, p. 3] Thus, Jimenez's petition raises the single issue of whether to excuse the waiver.

The Court's obligation to liberally construe *pro se* filings does not change its conclusion. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976). In an objection to the recommended disposition, appointed counsel argues that Jimenez raised an ineffective assistance claim under the lenient standards applied to *pro se* filings. [Record No.

219, p. 3] Counsel acknowledges that Jimenez failed to "flesh out any factual arguments" in favor of such a claim or point to any deficient performance by Hicks. [*Id.*] But counsel suggests that a "cursory review of the docket" would have revealed the constitutionally-defective performance upon which Jimenez allegedly intended to rely. [*Id.* at pp. 3-4]

However, counsel's objection does not address the fact that Jimenez *affirmatively indicated* his intent not to raise an ineffective-assistance claim. The Court is not required to construe a 2255 motion as raising a claim that a defendant does not wish to raise, and objections are not a proper vehicle for raising new grounds of relief. Thus, the Court concludes that Jimenez's petition raises the sole issue of whether the waiver bars his collateral attack.

B. ENFORCEABILITY OF THE WAIVER

A defendant "may waive any right, even a constitutional right, by means of a plea agreement." *Fleming*, 239 F.3d at 763–64 (quotation omitted). A waiver is valid and enforceable against nearly any asserted right, as long as it is entered into knowingly and voluntarily by the defendant. *See Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001) (citing *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987)). The Sixth Circuit applies "traditional contract law principles" to plea agreements because they are contractual in nature. *United States v. Harris*, 473 F.3d 222, 225 (6th Cir. 2006). "[A] plea agreement, like any other contract, allocates risk. By waiving the right to appeal, a defendant assumes the risk that a shift in the legal landscape may engender buyer's remorse." *United States v. Morrison*, 852 F.3d 488, 490 (6th Cir. 2017) (citation omitted). Courts presume that, in return for the defendant's assumption of the risk, he or she receives "a means of gaining concessions from

the government." *United States v. Toth*, 668 F.3d 374, 379 (6th Cir. 2012). Thus, a knowing and voluntary plea agreement presumably reflects the bargain the parties were willing to accept, and courts within the Sixth Circuit generally enforce the agreements.

An exception exists, however, for sentences that are "illegal", which means "statutorily excessive based on a subsequent change in the law." *Vowell v. United States*, 938 F.3d 260, 267-68 (6th Cir. 2019). This is because a "a claim that a sentence is statutorily excessive . . . is separate and distinct from a claim that the waiver was agreed to unknowingly or involuntarily." *Id.* at 267. In *Vowell*, a subsequent change in law rendered a defendant's sentence greater than the statutory maximum penalty. *Id.* at 268 (explaining that the defendant's fifteen-year sentence exceeded the new maximum ten-year penalty).

Some circuits acknowledge a broader exception. In these circuits, a knowing and voluntary plea agreement containing an appellate waiver is only "presumptively valid," and courts remain free to disregard them "if denying a right of appeal would work a miscarriage of justice." *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *see also United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001) (collecting cases and acknowledging that "an unusual circumstance . . . amounting to a miscarriage of justice may invalidate [a] waiver"). Rather than identify specific errors contemplated by the exception, they have identified the following considerations:

> 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.

Teeter, 257 F.3d at 26.

Applying these considerations, the United States District Court for the Western District of Pennsylvania excused a collateral-attack waiver in an analogous situation. *Foley*, 273 F.Supp.3d at 571. The "unusual facts of th[e] case" included the following: "the inclusion in Foley's criminal history calculation of two relatively minor offenses . . . which have since been vacated or resolved in his favor"; the resulting fact that Foley was "sentenced in accordance with a guidelines range that was . . . greater than it should have been"; the fact that the prior convictions were obtained in violation of Foley's right to counsel; the lack of the sentencing judge's explanation of the waiver during his plea colloquy; and Foley's prior attack on his trial counsel's effectiveness. *Id.* at 570-72. These "unique circumstances" led the court to conclude that "enforcement of the collateral waiver provision would result in a miscarriage of justice." *Id.* at 571.

Jimenez urges the Court to excuse the waiver based on this exception. He relies on *Watt*, in which the Sixth Circuit reasoned that "it would be a miscarriage of justice to enhance Watt's federal sentence on the basis of state convictions which have been vacated because they were void." 162 F. App'x at 503. The government contends that neither *Watt* nor any other Sixth Circuit decision has addressed the current situation because the defendants in those cases had not executed a valid waiver. [Record No. 218, p. 3]

The Court agrees with the Magistrate Judge that the waiver bars Jimenez's motion. [*See* Record No. 212, p. 11.] No miscarriage-of-justice exception to otherwise valid collateral attack waivers has been recognized by the Sixth

Circuit, and this Court is bound to enforce the general rule. Further, even if such an exception had been recognized, it is unclear whether it would apply to this case. The circuits applying the exception have provided considerations for its application, but the Sixth Circuit may be inclined to delineate the circumstances in different terms.

For this reason, *Foley* is also unpersuasive. Even if the Sixth Circuit adopted the Third Circuit's exception and its considerations, Jimenez's case is not identical to Foley's. The most important difference is that Jimenez did not assent to the plea agreement in only general terms. *See Foley*, 273 F.Supp.3d at 571. Instead, Jimenez acknowledged that he understood the waiver provision and its consequences, and the Court independently confirmed that it was knowingly and intelligently made. [Record No. 116]

Therefore, Jimenez's motion is doomed by the waiver. He expressly waived his "right to attack collaterally the guilty plea, conviction, and sentence." [Record No. 114] The Court found that he entered the agreement knowingly and voluntarily. He does not argue that his sentence is illegal, nor could he. Under the Sixth Circuit's general rule, he is bound by the terms of the written plea agreement.

C. CERTIFICATE OF APPEALABILITY

A Certificate of Appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "[A] substantial showing of the denial of a right includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were

adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (quotation omitted).

As noted previously, Magistrate Judge Ingram recommended that a Certificate of Appealability be issued. This recommendation was based on a series of unpublished opinions that make it "reasonably possible the Sixth Circuit could formally recognize and describe the miscarriage-of-justice exception in an appropriate case." [Record No. 212, p. 14] One panel of the Sixth Circuit collected the unpublished cases in 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 Fed. 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"); *United States v. Hower*, 442 Fed. App'x 213, 215 (6th Cir.2011) (noting that "[no] miscarriage of justice [will] occur if the sentence is not reviewed" (citing [*United States v.*] *Gwinnett*, 483 F.3d [200], [] 203 [(6th Cir. 2007)])); *United States v. Jones*, 425 Fed. App'x. 449, 456 (6th Cir.2011) (describing the defendant's miscarriage-of-justice argument as "correct regarding the well-settled principle [that sentencing cannot be at the district court's whim]" but finding that "his ... challenges do not rise to the level that this principle contemplates" (*citing* [*United States v.*] *Caruthers*, 458 F.3d [459], [] 471 [(6th Cir. 2006)])).

United States v. Mathews, 534 F. App'x 418, 425 (6th Cir. 2013).

In each of these cases, the court either refused to adopt the exception because it found that the argument failed on the merits, or it implied that a waiver would not be enforced if it would result in a miscarriage of justice. *See Lee*, 464 F. App'x at 458 ("enforcing [Lee's] appellate-waiver provision will not result in a miscarriage of justice"); *United States v. Weld*, 619 F. App'x 512 (6th Cir. 2015) (an erroneous Guidelines calculation is "not a miscarriage of justice"). Most recently, a panel of the Sixth Circuit stated that "[w]e have never expressly recognized such an exception in a published decision, although we have implicitly recognized it in numerous unpublished decisions." *United States v. Middlebrooks*, No. 19-5856, 2020 WL 4516003, at *1 (6th Cir. Feb. 13, 2020).

Few clear conclusions can be drawn from these nonbinding decisions. The Magistrate Judge drew from them a willingness to adopt the exception in an appropriate case. [Record No. 212, p. 14] However, the government argues that any exception would be defined similarly to the current exception for illegal sentences. [Record No. 218, p. 4] Implicit in this argument is the suggestion that Jimenez's case is not the proper vehicle for recognizing such an exception. [*See id.* at pp. 5; 6-7.]

The question raised by Jimenez's motion "is adequate to deserve encouragement to proceed further." *See Slack*, 529 U.S. at 475. Jimenez's sentence was based on a fact that the Supreme Court deemed important enough to renew the limitations period for bringing a § 2255 motion. *Johnson*, 544 U.S. at 302. The Sixth Circuit has made clear that, in the absence of a waiver, Jimenez's circumstance triggers resentencing. *Watt*, 162 F. App'x at 503. And it has expressed a willingness to adopt exceptions to the general rule of enforceability of waivers in "limited circumstances." *Matthews*, 534 F. App'x at

424-25 (noting that "other circuits primarily use a miscarriage-of-justice rationale" to identify circumstances "under which an appellate waiver may be ignored").

It is true that the Sixth Circuit may refuse to recognize such an exception in Jimenez's case. For example, the court has held that the illegal-sentence exception does not extend to sentences imposed under an erroneous guidelines range where a defendant executed a valid waiver. *Weld*, 619 F. App'x at 513. This is because "[a] district court's supposed misreading of the demands of the guidelines is the sort of error anticipated by [an] appellate waiver[]." *Mathews*, 534 F. App'x at 426. Further, Jimenez's case differs from a situation in which an unanticipated change in the law rendered a sentence excessive. In this case, Jimenez's Minnesota challenges were pending at sentencing. [*See* Record No. 216, pp. 5-7.] His acknowledgement of the waiver's consequences should have informed him of his obligations under the agreement. *See Harris*, 473 F.3d at 226.

However, whether Jimenez's case is the appropriate vehicle for applying the exception is not for this Court to decide. Even if he ultimately is not entitled to benefit, the question remains whether an exception to the general rule exists in a situation analogous to Jimenez's. And courts are discouraged from considering the merits of a challenge when weighing the need for a Certificate of Appealability. *Miller-El*, 537 U.S. at 331 ("a [Certificate of Appealability] ruling is not the occasion for a ruling on the merit of petitioner's claim"). Because clarity surrounding these considerations potentially would be beneficial to Jimenez and future litigants, the undersigned agrees Magistrate Judge Ingram that a Certificate of Appealability should issue.

VI. CONCLUSION

Based on the foregoing analysis and discussion, it is hereby

ORDERED as follows:

1. The Magistrate Judge's Recommended Disposition [Record No. 212] is **ADOPTED** and **INCORPORATED** by reference.

2. Defendant/Movant Eliezer Alberto Jimenez's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 [Record No. 201] is **DENIED**. His claims are **DISMISSED**, with prejudice, and his collateral proceeding is **STRICKEN** from the Court's docket.

3. A Certificate of Appealability shall issue to Defendant/Movant Eliezer Alberto Jimenez on the sole question of whether a defendant may obtain resentencing *via* a 2255 collateral attack, after a state conviction is set aside resulting in a lower criminal history score, despite a written waiver of collateral-attack rights in a plea agreement.

4. The Clerk of Court is directed to forward a copy of this Memorandum Opinion and Order to the United States Court of Appeals for the Sixth Circuit.

Dated: January 5, 2021.

_____/s/_____
Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA, Plaintiff/ Respondent, v. ELIEZER ALBERTO JIMENEZ, Defendant/ Movant.	)	No. 5:18-CR-74-DCR-HAI-10 RECOMMENDED DISPOSITION & ORDER

*** *** *** ***

Federal prisoner Eliezer Alberto Jimenez was convicted upon a plea of guilty in 2019 of conspiracy to commit money laundering. D.E. 116. He was sentenced by judgment entered October 18, 2019, to 87 months of imprisonment and three years of supervised release. D.E. 145. Jimenez did not appeal. His plea agreement contains the following waiver provision:

> The Defendant waives the right to appeal the guilty plea and conviction. The Defendant waives the right to appeal any determination made by the Court at sentencing with the sole exception that the Defendant may appeal any aspect of the sentence if the length of the term of imprisonment exceeds the advisory sentencing guidelines range as determined by the Court at sentencing. Except for claims of ineffective assistance of counsel, the Defendant also waives the

> right to attack collaterally the guilty plea, conviction, and sentence.

D.E. 114 at 5 ¶ 8.

Jimenez has now filed a *pro se* motion under 28 U.S.C. § 2255 seeking to vacate his sentence, accompanied by a memorandum and exhibit. D.E. 201. He argues that a prior state conviction for second-degree drug possession from Hennipen County, Minnesota has been vacated. Because that conviction heightened his sentencing Guidelines Range, Jimenez argues he is entitled to be resentenced. *Id.* The government responded in opposition. D.E. 207. The government argues that (1) Jimenez has not proven his prior state conviction was vacated and (2) the waiver of Jimenez's collateral-attack rights in his plea agreement bars him from raising this claim. *Id.* Jimenez replied. D.E. 210. The Court recommends that the § 2255 motion be denied on account of the waiver, but also recommends that a certificate of appealability issue.

The Court does not interpret Jimenez's filings as arguing that his plea was not knowing and voluntary or that his plea resulted from ineffective assistance of counsel. Although Jimenez cites the legal standards for an ineffective-assistance claim in his memorandum (D.E. 201-1 at 5-6), he nowhere points to any deficient performance on the part of his attorney.

I.

Under § 2255, a federal prisoner may seek habeas relief because his sentence violates the Constitution or federal law, the federal court lacked jurisdiction to impose such a sentence, or the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255. To prevail on a § 2255 motion alleging constitutional error, a defendant must

establish that the error had a "substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). A § 2255 movant bears the burden of proving his or her allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam).

The Court recognizes that Jimenez is proceeding *pro se*, without the assistance of an attorney. The Court construes *pro se* motions more leniently than motions prepared by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Castro v. United States*, 540 U.S. 375, 381-83 (2003).

Jimenez asks to be resentenced because a prior state drug conviction, which affected his Guidelines Range, has been vacated. D.E. 201 at 4. As Jimenez and the government explain, because Jimenez was on probation for that conviction when he committed the federal crime, he received three points on that conviction, which raised his criminal history category from I to III. D.E. 201-1 at 7-8; D.E. 207 at 2-3.

Prior to his sentencing in this case, Jimenez filed a *pro se* objection to the Presentence Report. D.E. 140. He stated that he was challenging the Hennepin County conviction and asked that it not be considered in calculating his criminal history score. *Id.* at 2. The Probation Office noted Jimenez's objection, opined that the conviction should still be counted despite the pending challenge, and modified paragraph 45 of the PSR to note that "[s]ince the initial disclosure of the presentence report, the defendant submitted documents to the Probation Office indicating that a Motion for Post-Conviction Relief was filed in this case."

Jimenez's motion is accompanied by a memorandum (D.E. 201-1) and a copy of the first page of a multi-page order from the District Court of Hennepin County, Minnesota (D.E. 201-2). The order is styled "Order to Vacate Conviction." It states:

> The above-entitled matter came before the Honorable Paul R. Scoggin on the motion of the parties on June 9, 2020.
>
> . . . .
>
> Based on all the files, records, and proceedings herein, and the parties' written submissions, the Court enters the following Order.
>
> **FINDINGS OF FACT**
>
> 1. Petitioner filed a *pro se* petition for postconviction relief under Minn. Stat. § 590 on August 14, 2019.
>
> 2. On June 9, 2020, the parties jointly filed a Notice of Motion and Joint Motion to Vacate Conviction. The parties are jointly requesting to vacate Petitioner's conviction for second-degree possession of cocaine.
>
> 3. The parties move this Court to vacate Petitioner's conviction on the ground that the conviction was obtained in violation of Petitioner's rights under the laws and constitution of the United States and the State of Minnesota.

Id. As noted, the order in this Court's record lacks all pages following the first page. The Court has consulted the public online docket for Hennepin County, Minnesota, case 27-CR-15-21700. The public docket does not provide access to individual orders, but it does characterize the conviction as "vacated" as of "6/09/2020," and the Court takes judicial notice of this fact.

II.

The government argues first that Jimenez "fails to carry his burden of showing that his prior conviction was vacated." D.E. 207 at 1. The government points out that "Jimenez failed to submit the order [vacating his conviction] in its entirety" and "the page he submitted doesn't officially vacate the prior conviction and does not contain the ruling or the signature of a judge." *Id.* at 3.

If the government's argument is that Jimenez's Minnesota cocaine-possession conviction has not been vacated, that calls into question whether the government has fully considered the matter and honestly assessed the facts. As noted, a cursory search of the public docket indicates the conviction was "vacated" on June 9, just as Jimenez describes. The Court knows from experience that prisoners like Jimenez often have difficulty in obtaining and maintaining possession of legal records such as the order at issue. Here, Jimenez's claim—that this conviction has been vacated—is consistent with the public Minnesota docket and with the attached exhibit, which facially is the first page of an "Order to Vacate Conviction." Taken together with Jimenez's sworn petition, the evidence is sufficient to find by a preponderance of the evidence that the conviction in question was in fact vacated. Further, the state court order (which is consistent with the public docket and Jimenez's sworn habeas application) describes the conviction as being vacated "on the ground that the conviction was obtained in violation of Petitioner's rights under the laws and constitution of the United States and the State of Minnesota." D.E. 201-2. It therefore facially appears that the conviction would not currently be countable in the criminal history calculation under the

Guidelines.[1] The question then becomes whether Jimenez can obtain resentencing via this § 2255 motion.

III.

Throughout his memorandum, Jimenez points to the Supreme Court's opinion in *Johnson v. United States*, 544 U.S. 295 (2005). D.E. 201-1. The Court in *Johnson* held that, when a prior state conviction is vacated following a federal sentencing, the state court ruling can constitute a new "fact" that triggers a one-year window for filing a

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[1] Note 6 to USSG § 4A1.2 states:

> **Reversed, Vacated, or Invalidated Convictions.—**Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).
>
> Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

According to Note 10, some jurisdictions have procedures whereby "previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted.

habeas corpus petition under 28 U.S.C. § 2255(f)(4).[2] Timeliness is not at issue in this case, as Jimenez's motion is timely under § 2255(f)(1).

It appears clear from *Johnson* and its progeny that Jimenez would be entitled to resentencing were it not for the potential barrier created by the waiver in his plea agreement.

For example, in *Watt v. United States*, 162 F. App'x 486 (6th Cir. 2006), the petitioner's prior state convictions that supported a career-offender Guidelines enhancement were vacated eight years following his federal conviction. The Sixth Circuit held the claim was "cognizable under § 2255 now that the state courts have set aside his state convictions." *Watt*, 162 F. App'x at 503 (citing *United States v. Steverson*, 230 F.3d 221, 226 n.4 (6th Cir. 2000); *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). The Court concluded "it would be a miscarriage of justice to enhance Watt's federal sentence on the basis of state convictions which have been vacated because they were void." *Id.*

Eleven years later, the court in *United States v. Braswell*, 704 F. App'x 528 (6th Cir. 2017), interpreting *Watt*, explained that a federal prisoner who obtains relief in state court on underlying convictions can then "seek § 2255 relief from the federal sentence enhancement that had been predicated on those convictions." *Braswell*, 704 F. App'x at 544.

In *United States v. Ware*, No. 2:14-CR-40-DLB-REW, 2016 WL 8793508 (E.D. Ky. Feb. 18, 2016), the §

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[2] Under section 2255(f)(4), "A 1-year period of limitation shall . . . run from . . . the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

2255 petitioner "submitted evidence showing that California courts (1) reduced a prior felony . . . to a misdemeanor . . . and (2) either reduced another prior felony . . . to a misdemeanor or dismissed the case entirely[.]" The government conceded the petitioner was "entitled to be resentenced." *Ware*, 2016 WL 8793508, at *19. The district Court granted resentencing under *Johnson*. *Id.* at 19-20; *see also Cuevas v. United States*, 778 F.3d 267, 272 (1st Cir. 2015) (finding that the vacatur of a petitioner's state predicate convictions was an "exceptional" situation that could be addressed under § 2255 to avoid a "miscarriage of justice"); *Talley v. United States*, No. 1:08-CR-57-CLC-SKL, 2015 WL 13501179, at *4 (E.D. Tenn. Oct. 26, 2015) ("[I]t would be a miscarriage of justice to enhance Petitioner's sentence on the basis of state convictions which were later vacated because they were void. Petitioner is entitled to relief pursuant to 28 U.S.C. § 2255, and he shall be resentenced without consideration of the vacated convictions.").

The government's brief nowhere interacts with or even mentions *Johnson* and the cases interpreting its ruling. The government is correct that a knowing and voluntary waiver of collateral-attack rights is generally enforceable (*see* D.E. 207 at 1-2). The general rule in this Circuit is that

> [a] waiver provision in a plea agreement is binding so long as it is made knowingly and voluntarily. *See, e.g.*, *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995). A valid waiver precludes a defendant from bringing any type of claim not excluded by the agreement. *See Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001) (discussing waiver of a collateral appeal).

United States v. Brice, 373 F. App'x 561, 562 (6th Cir. 2010). But this rule is not universally without exception. *See Echeverria-Ruiz v. United States*, No. 3:09-CR-179-CRS, 2017 WL 1505121, at *12-14 (W.D. Ky. Feb. 14, 2017) (discussing the exceptions to this waiver rule in the federal system).

IV.

The pivotal question for Jimenez is whether his *Johnson* claim is the kind of claim that can survive an otherwise valid waiver. "*Johnson* did not address resentencing where the defendant has waived all rights of appeal or collateral attack in a plea agreement." *United States v. Sabater*, 441 F. App'x 68, 71 n.2 (3d Cir. 2011).

The Court has uncovered an analogous case in another jurisdiction where relief was granted under *Johnson* despite a collateral-attack waiver. The court in *United States v. Foley*, 273 F. Supp. 3d 562 (W.D. Pa. 2017), held that a § 2255 petitioner should be resentenced—despite a valid waiver of his collateral-attack rights—when two prior state convictions had been vacated after he was sentenced:

> Here, our consideration of the relevant factors compels the conclusion that enforcement of Foley's § 2255 waiver would result in a miscarriage of justice. The "error" in this case involves more than simply a "run of the mill" misapplication of a sentencing guideline or "garden variety" sentencing error. To the contrary, it concerns the inclusion in Foley's criminal history calculation of two relatively minor offenses that apparently were obtained in derogation of Foley's Sixth Amendment rights to counsel, and which have since been vacated or resolved in his favor. As Judge McLaughlin previously observed, "[d]iscounting either one of the offenses . . . would

> have reduced his total criminal history points and resulted in a lower Criminal History Category rating, thus producing a different guidelines range." Under these circumstances, the error is significant and the injustice clear. . . . As Foley points out, the government can have no legitimate interest in preserving a sentence that is now clearly erroneous and not in keeping with the terms of the bargain that the parties contemplated at the time Foley originally pled guilty.

Foley, 273 F. Supp. 3d at 570-71(record citation omitted).

One critical aspect of the *Foley* ruling was that it was based on the Third Circuit's "miscarriage of justice" exception to the enforcement of valid collateral-attack-right waivers. *Id.* "The Third Circuit Court of Appeals has held that collateral review waiver provisions in a plea agreement, if knowingly and voluntarily entered, are valid and enforceable, *unless enforcement would result in a miscarriage of justice*." *Id.* at 570 (emphasis added) (citing *United States v. Mabry*, 536 F.3d 231, 237 (3d Cir. 2008)).

However, "the Sixth Circuit has not directly adopted the Third Circuit's miscarriage of justice [exception]." *United States v. Hardin*, No. 5:09-CR-11-JMH, 2013 WL 2183390, at *3 (E.D. Ky. May 20, 2013), *aff'd*, 595 F. App'x 460 (6th Cir. 2014). The prisoner in *Hamilton v. United States*, No. 3:09-CR-02-TBR, 2012 WL 246472 (W.D. Ky. Jan. 26, 2012), collided with this very issue:

> Hamilton urges th[e] Court to disregard his § 2255 waiver because its enforcement would result in a miscarriage of justice. However, unlike other courts of appeals, the Sixth Circuit has not yet adopted an exception to the enforcement of appellate waivers in plea agreements where to do so would be a

> miscarriage of justice. *See United States v. Bafna*, 424 Fed. Appx. 528 (6th Cir. 2011) ("But Bafna says we should broaden our exception to enforcement of appellate waivers, to include cases where the sentence amounts to a miscarriage of justice. The First Circuit follows this approach. *See United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001). This case does not present the question whether to adopt that approach, because there was no miscarriage of justice here."). For example, the Third Circuit has held that enforcement of a § 2255 waiver where constitutionally deficient lawyering prevented the defendant from filing a direct appeal as permitted by his plea agreement would result in a miscarriage of justice. *United States v. Shedrick,* 493 F.3d 292, 298 (3d Cir. 2007). . . .
>
> Unfortunately for Hamilton, the Sixth Circuit has limited its exception to the enforceability of collateral attack waivers to claims challenging the validity of the guilty plea itself. As Hamilton's claim of ineffective assistance of counsel for failing to file a direct appeal does not attack the validity of the guilty plea or the waiver, the Court must conclude that his collateral attack waiver is enforceable. Therefore, Hamilton is not entitled to the relief he seeks.

Hamilton, 2012 WL 246472, at *7, *rev'd on other grounds*, 566 F. App'x 440 (6th Cir. 2014).

Based on its published opinions, it appears the Sixth Circuit continues to enforce valid collateral-attack waivers, even in cases with similarities to Jimenez's. The Sixth Circuit explained to another § 2255 petitioner:

> A voluntary plea agreement "allocates risk," and "[t]he possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." [*United States v.*

> *Morrison*, 852 F.3d 488, 490 (6th Cir. 2017)] (quoting *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005)). "By waiving the right to appeal, a defendant assumes the risk that a shift in the legal landscape may engender buyer's remorse." *Id.* (citing *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005)). . . . [S]ubsequent [legal] developments in [the petitioner's favor] "do[ ] not suddenly make [his] plea involuntary or unknowing or otherwise undo its binding nature." *Bradley*, 400 F.3d at 463. We, therefore, enforce Slusser's waiver and need not reach the merits of his challenge.

Slusser v. United States, 895 F.3d 437, 440 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1291 (2019).

Of course, Jimenez's case does not involve a change in the law like Slusser's case. The petitioner in *Slusser* sought resentencing in the wake of the Supreme Court's decision invalidating the residual clause of the Armed Career Criminal Act. *Slusser*, 895 F.3d at 439. Jimenez's case involves the vacatur of a prior state court conviction—a circumstance the Supreme Court has characterized as the generation of a new "fact." *Johnson v. United States*, 544 U.S. 295, 306-08 (2005).

But the point stands that the Sixth Circuit has not endorsed—in a published and precedential opinion—a "miscarriage of justice" exception to a valid collateral-attack waiver. "A valid waiver precludes a defendant from bringing any type of claim not excluded by the agreement." *United States v. Brice*, 373 F. App'x 561, 562 (6th Cir. 2010) (citing *Davila*, 258 F.3d at 451).

> The Sixth Circuit consistently notes that enforcing waivers of the right to appeal or the right to collaterally attack a conviction or sentence "makes good sense" and is supported by sound public policy

> because the waiver of appellate rights "gives a defendant a means of gaining concessions from the government." *United States v. Toth*, 668 F.3d 374, 379 (6th Cir. 2012) (citing *United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001)); *see also United States v. Morrison*, 852 F.3d 488, 490 (6th Cir. 2017) (it is "sound judgment that a plea agreement, like any other contract, allocates risk."); *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005) (strongly encouraging the government to promptly file a motion to dismiss the defendant's appeal where the defendant waived his appellate rights as part of plea agreement).

Smith v. United States, No. 3:13-CR-83-CRS-DW-2, 2017 WL 6046144, at *3 n.2 (W.D. Ky. Oct. 13, 2017), *report and recommendation adopted*, 2017 WL 6045453 (W.D. Ky. Dec. 6, 2017).

To be clear, the Sixth Circuit has recognized one exception to the waiver rule that is related to sentencing, but it is not applicable here. The court recently explained that a sentence above the *statutory* maximum can be collaterally attacked despite a collateral-attack waiver. *Vowell v. United States*, 938 F.3d 260, 268 (6th Cir. 2019) ("[W]e hold that a defendant or petitioner may challenge his sentence as being statutorily excessive based on a subsequent change in the law, even if the waiver was otherwise knowing and voluntary."); *see also Daniels v. United States*, No. 3:16-CV-1551-AAT, 2019 WL 4167325, at *4 (M.D. Tenn. Sept. 3, 2019) (discussing the interplay between *Vowell* and *Slusser*). Here, Jimenez faced a statutory maximum penalty of 20 years (*see* D.E. 114 at 3 ¶ 4), and he received a sentence of 7.25 years (*see* D.E. 145). *Vowell* therefore does not directly apply to Jimenez's case.

Based on the binding precedents this Court must apply, including *Davila v. United States*, 258 F.3d 448 (6th Cir. 2001), Jimenez's collateral attack waiver remains enforceable and his § 2255 motion should be denied.

V.

Despite the foregoing analysis, several unpublished decisions from the Sixth Circuit indicate that, in an appropriate case, the Sixth Circuit might override a collateral-attack waiver in the face of a miscarriage of justice.[3] For this reason, a certificate of appealability should issue.

An early suggestion of this exception occurs in *United States v. Lee*, 464 F. App'x 457 (6th Cir. 2012), where the appellate panel found that "despite Lee's arguments to the contrary, his guilty plea was knowing and voluntary . . . and enforcing his appellate-waiver provision will not result in a miscarriage of justice or undermine the proper functioning of the federal courts." *Lee*, 464 F. App'x at 458. The implication is that a waiver position will not be enforced if a miscarriage of justice would result.

The defendants in *United States v. Mathews*, 534 F. App'x 418 (6th Cir. 2013), argued that their appeal waiver should be disregarded because a miscarriage of justice had occurred. The Sixth Circuit explained:

> Under "limited circumstances," even a knowingly-entered, otherwise-valid appellate waiver will not bar

[3] A district court in Washington surveyed the case law and concluded that the Ninth Circuit is the only federal Circuit that does not acknowledge the miscarriage-of-justice exception. *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1337 & nn.4-5 (W.D. Wash. 2016) (collecting cases, including *United States v. Mathews*, 534 F. App'x 418 (6th Cir. 2013)).

a defendant's challenge to her sentence. *United States v. Ferguson*, 669 F.3d 756, 764 (6th Cir. 2012). In *Caruthers*, we held that an appellate waiver cannot bar an appeal on the ground that the sentence exceeds the statutory maximum. *Id.* at 471 (collecting cases). We examined a variety of rationales—jurisdiction, due process, miscarriage of justice, and unconscionability—for the holding, but ultimately declined to choose one. *Id.* at 472. We have also recognized racial discrimination as warranting review on the merits, despite the presence of an appellate waiver. *See Ferguson*, 669 F.3d at 764.

While we have not elaborated on the criteria by which we identify the "limited circumstances" under which an appellate waiver may be ignored, other circuits primarily use a miscarriage-of-justice rationale. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007); *United States v. Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004); *United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *United States v. Jordan*, 438 Fed. Appx. 180, 181 (4th Cir. 2011).

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 Fed. Appx. 457, 458 (6th Cir. 2012) (per curiam) (enforcing appellate waiver in part because doing so "will not result in a miscarriage of justice"); *United States v. Hower*, 442 Fed. Appx. 213, 215 (6th Cir. 2011) (noting that "[no] miscarriage of justice [will] occur if the sentence is not reviewed" (citing *Gwinnett*, 483

> F.3d at 203)); *United States v. Jones*, 425 Fed. Appx. 449, 456 (6th Cir. 2011) (describing the defendant's miscarriage-of-justice argument as "correct regarding the well-settled principle [that sentencing cannot be at the district court's whim]" but finding that "his . . . challenges do not rise to the level that this principle contemplates" (citing *Caruthers*, 458 F.3d at 471)).

Mathews, 534 F. App'x at 424-25. The *Mathews* court did not rule on the waiver issue because it determined the claim failed on the merits. *Id.* at 425; *see also United States v. Mutschler*, 152 F. Supp. 3d 1332, 1337 & nn.4-5 (W.D. Wash. 2016) (collecting cases supporting the miscarriage-of-justice exception, including *Mathews*).

The miscarriage-of-justice exception has appeared in several other unpublished Sixth Circuit decisions following the discussion in *Mathews*. First, the panel in *United States v. Weld*, 619 F. App'x 512 (6th Cir. 2015), citing *Mathews*, found that an "erroneous guidelines calculation . . . is not a miscarriage of justice that will void an appellate waiver." *Weld*, 619 F. App'x at 513. This statement implies that a miscarriage of justice, whatever that constitutes, could void an appeal waiver. In *Weld*, the defendant also argued that her sentencing enhancement was "*unconstitutional* as applied to her," and the Court addressed the issue for plain error despite her appeal waiver. *Id.*

Second, the panel in *United States v. Allen*, 635 F. App'x 311 (6th Cir. 2016), citing *Mathews*, said, "To the extent we recognize a miscarriage-of-justice exception to the enforcement of appeal waivers . . . the enforcement of [the] appeal waiver in this case would not result in any miscarriage of justice." *Allen*, 635 F. App'x at 315. A district court later observed that *Mathews* and *Allen* "are

at best inconclusive as to whether a collateral attack waiver may be set aside due to a 'miscarriage of justice,' and they provide no clues as to the limits of what constitutes a miscarriage of justice." *United States v. Wall*, 230 F. Supp. 3d 771, 774-75 (E.D. Mich. 2017). The same court described *Weld* as an "outlier" opinion that "decline[d] to explain the court's decision to set aside the waiver" and the *Wall* court considered *Weld* to be inconsistent with earlier published cases. *Id.* at 775.

Third, the panel in *United States v. Riggins*, 677 F. App'x 268, 270 (6th Cir. 2017), stated that one of the "limited circumstances" where an appeal waiver is void "is where the enforcement of the appellate-waiver provision will 'result in a miscarriage of justice or undermine the proper functioning of the federal courts.'" *Riggins*, 677 F. App'x at 270 (quoting *Lee*, 464 F. App'x at 458). The *Riggins* court observed that "the miscarriage of justice exception has only been recognized by this Court in unpublished opinions." *Id.* at 270 n.2. Ultimately, the *Riggins* Court held that the "erroneous Guideline calculation" alleged in that case would not rise to the level of a miscarriage of justice. *Id.* at 271.

Fourth and most recently, a Sixth Circuit panel in a direct appeal case stated:

> [The defendant's] argument could be construed as asserting that, absent an appeal, a miscarriage of justice will occur. We have never expressly recognized such an exception in a published decision, although we have implicitly recognized it in numerous unpublished decisions. *See United States v. Mathews*, 534 F. App'x 418, 424-25 (6th Cir. 2013) (collecting cases). Even so construed, however, Middlebrooks cannot establish a miscarriage of justice.

United States v. Middlebrooks, No. 19-5856, 2020 WL 4516003, at *1 (6th Cir. Feb. 13, 2020); *see also Echeverria-Ruiz v. United States*, No. 3:09-CR-179-CRS, 2017 WL 1505121, at *12-14 (W.D. Ky. Feb. 14, 2017) (stating that a miscarriage of justice could void a collateral-attack waiver, but finding no such miscarriage was argued to exist); *O'Bryan v. United States*, No. 3:13-CR-147-CRS-DW, 2017 WL 1684535, at *5-6 (W.D. Ky. Feb. 15, 2017) (same), *report and recommendation adopted*, 2017 WL 1684528 (W.D. Ky. May 1, 2017); *United States v. Kennedy*, No. 15-20094, 2018 WL 10483519, at *2 (E.D. Mich. July 13, 2018) (stating that "courts do recognize an exception where the enforcement of an appellate-waiver provision would result in a miscarriage of justice," and citing *Lee*, *Weld*, and *Allen*).

Based on these unpublished opinions, it seems reasonably possible the Sixth Circuit could formally recognize and describe the miscarriage-of-justice exception in an appropriate case. It is also possible that this exception, if recognized, could apply to Jimenez for the reasons articulated by the Pennsylvania district court in *United States v. Foley*, 273 F. Supp. 3d 562, 570-72 (W.D. Pa. 2017). That court found it was a serious constitutional problem and a miscarriage of justice when "[f]undamentally, Foley's sentence was based upon a criminal history calculation that included convictions which have since been vacated or functionally expunged." *Id.* at 572; *see also Watt v. United States*, 162 F. App'x 486, 503 (6th Cir. 2006) (describing the same situation as a "miscarriage of justice").

Here, Jimenez was sentenced at the top of his Guidelines Range of 70 to 87 months. Had the Minnesota conviction not been countable, resulting in a criminal history category of I, his Guidelines Range would have been 57-71 months. The Minnesota court's order indicates

the state conviction was vacated because it was unconstitutional, supporting a claim that a miscarriage of justice exists. Accordingly, the Court recommends that a certificate of appealability issue so that Jimenez can pursue a possible change or clarification in the law.

VI. Conclusion

The undersigned **RECOMMENDS** that Jimenez's 28 U.S.C. § 2255 motion (D.E. 201) be **DENIED.** Under the existing binding case law, it appears that his collateral-attack waiver is valid and enforceable.

The undersigned further **RECOMMENDS** that a Certificate of Appealability issue. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See also* Rule 11 of the Rules Governing Section 2255 proceedings. This standard is met if the defendant can show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

The pivotal issue here is whether, once a prior state conviction is vacated, a prisoner may obtain resentencing despite the prisoner's waiver of his collateral-attack rights in his plea agreement. Such a situation could constitute what courts describe as a miscarriage of justice. As described herein, while the Sixth Circuit has not recognized a miscarriage-of-justice exception in a published case, other Circuits and some judges in this Circuit do recognize it. If the Sixth Circuit were to endorse a "miscarriage of justice" exception to the waiver rule, Jimenez might well obtain relief.

Also, this is a developing area of the law. For example, just last year, the Sixth Circuit clarified in *Vowell* that an otherwise valid collateral-attack waiver can be overcome if a subsequent change in the law caused the petitioner's sentence to be above the statutory maximum. If presented with the facts of this case, it is conceivable that the Sixth Circuit would follow other Circuits and adopt the miscarriage-of-justice exception. Reasonable jurists could therefore disagree about the outcome, and it would be appropriate to encourage Jimenez to appeal.

This case does not warrant an evidentiary hearing, and Jimenez has not requested one.

Any objection to or argument against denial of the § 2255 motion must be asserted **before the District Judge** in response to this Recommended Disposition. The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Recommended Disposition, issued under subsection (B) of the statute. *See also* Rules Governing Section 2255 Proceedings, Rule 8(b). Within **fourteen days** after being served with a copy of this decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, *de novo*, by the District Court. Failure to make a timely objection consistent with the statute and rule may, and normally will, result in waiver of further appeal to or review by the District Court and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019).

In addition, **IT IS HEREBY ORDERED THAT:**

(1) To facilitate review, the Clerk of Court **SHALL FILE UNDER SEAL** Jimenez's Presentence Report.

(2) The Clerk of Court **SHALL APPOINT COUNSEL** for Jimenez from the Lexington CJA panel via random draw. Because this case hinges on a nuanced legal issue, the Court appoints counsel to assist Jimenez with respect to objections and to represent Jimenez in any additional proceedings in this District. A court may appoint counsel for an indigent habeas petitioner when "the interests of justice so require." 28 U.S.C. § 2254(h); 18 U.S.C. § 3006A(a)(2)(B). In exercising this discretion, courts "should consider the legal complexity of the case, the factual complexity of the case, and the petitioner's ability to investigate and present his claims, along with any other relevant factors." *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994). Because this case turns on a precise issue of developing law, the legal complexity is such that the interests of justice weigh in favor of appointment of counsel.

This the 3rd day of December, 2020.

Signed By:
_____/s/_____
Hanly A. Ingram
United States Magistrate Judge

APPENDIX D

No. 21-5201

FILED: Sep 9, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIEZER ALBERTO JIMENEZ, Petitioner - Appellant, v. UNITED STATES OF AMERICA, Respondent - Appellee.	)	ORDER

BEFORE: SILER, BUSH, and MURPHY, Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[*] Judge Thapar recused himself from participation in this ruling.

ENTERED BY ORDER OF THE COURT

_____/s/_____
Deborah S. Hunt, Clerk