No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY LEE STAPLETON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After learning of the objective evidence (body camera video footage) documenting an unlawful warrantless search and seizure, the defendant moved to withdraw his plea on the grounds that his trial counsel failed to file a meritorious motion to suppress. The question is:

Whether an appellate court should review on the merits the denial of a motion to withdraw a guilty plea notwithstanding a purported waiver of appeal, as most federal circuits would do as falling under a miscarriage of justice, or whether, as the Fifth, Ninth and Eleventh Circuits do, fail to recognize a miscarriage of justice exception to appellate waivers.

LIST OF PARTIES

The caption of the case on the cover page contains the names of all the parties.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.)

United States v. Randy Lee Stapleton, No. 5:18-cr-00302-PA

United States Court of Appeals (9th Cir.)

United States v. Randy Lee Stapleton, No. 19-50266

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PETITION FOR WRIT OF CERTIORARI

Randy Lee Stapleton respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Ninth Circuit dismissing his appeal and affirming the judgment on the basis of an appellate waiver contained in a plea agreement without regard to whether it risked a miscarriage of justice.

OPINIONS BELOW

The order of the Ninth Circuit dismissing Mr. Stapleton's appeal based on the appeal waiver in his plea agreement was unpublished. App. 1a. The United States District Court did not issue a written order denying Mr. Stapleton's motion to withdraw his plea.

JURISDICTION

The Court of Appeals entered an order granting the Government's motion to dismiss Mr. Stapleton's appeal on July 13, 2022. App. 1a. A timely request for reconsideration was denied October 27, 2022. App. 3a. No other judgment issued. Pursuant to this Court's Rule 13.1, a petition for writ of certiorari is due not later than January 25, 2023. This petition is timely filed before that date and this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

The Fifth Amendment to the United States Constitution provides in part that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Federal Rule of Criminal Procedure 11 provides in relevant part that "A defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2).

STATEMENT OF THE CASE

Before Randy Stapleton was allowed to change his plea from not guilty to guilty, his lawyer was asked whether the plea was induced by any illegally obtained evidence. She replied "Not that I am aware of." R.T. 6/9/19, at 30. In fact, Mr. Stapleton had not been shown, and was unaware that, the searching officer's body camera video contradicted her claim of having ever performed a brief "pat down" frisk of Mr. Stapleton's outer clothing, and confirmed that upon encountering him she asked "What do you have on you?" and then immediately plunged both her hands into Mr. Stapleton's front and back pockets simultaneously before he even answered, removing everything from his pockets including miscellaneous papers, retail store cards, and receipts, none of which could plausibly have been confused with a potential

weapon.

The arresting officer's body-worn camera footage also documented that her arrest report not only grossly embellished several material facts regarding her interaction with Mr. Stapleton, but also fabricated false and inflammatory purported incidents out of whole cloth. Notwithstanding these falsehoods, a reasonable defense attorney would have recognized that the officer's own narrative contained no "specific and articulable facts" purporting to justify a frisk, *Terry v. Ohio*, 392 U.S. 1, 21 (1968), even if the officer had only conducted a frisk before searching inside Mr. Stapleton's pockets.

In addition to the miscellaneous items retrieved, the officer also seized $11 in cash and less than 18 grams of methamphetamine from Mr. Stapleton. Within two months of being indicted, Mr. Stapleton agreed to plead guilty to possessing methamphetamine for sale. 18 U.S.C. § 841.

The district court denied Mr. Stapleton's subsequent motion to withdraw his plea that, he declared, was precipitated by his subsequent discoveries of the body camera video footage. Rather than address the significance of the evidence that prompted the motion or apply Rule 11's "fair and just reason" standard, the district court dismissed the proffered explanation, declaring – without a hearing – Mr. Stapleton's proffered explanation was "not credible" and he simply had a "change of heart." R.T. (7/8/19), at 12-13.

Mr. Stapleton appealed to the Ninth Circuit, challenging the denial of his motion to withdraw his plea, especially without an evidentiary hearing, when the uncontradicted established that Mr. Stapleton was unaware of the videos documenting the warrantless search and contradicting the searching officer's narrative report. Mr. Stapleton also challenged his attorney's failure to recognize that, even with its embellishments and misrepresentations, the searching officer's narrative failed to justify even the limited pat down that she claimed to have conducted. Mr. Stapleton subsequently moved for leave to file an amended opening brief confirming that the arguments raised on appeal called into question whether the plea was voluntary, knowing and intelligent.

By operation of law, independent of any plea agreement, a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional right that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Generally, after pleading guilty, a defendant "may only attack the voluntary and intelligent character of the guilty plea [such as] by showing that the advice he received from counsel was not with the standards" of reasonably competent defense counsel." *Id.* Mr. Stapleton's plea agreement contained a caveat that "with the exception of an appeal based on a claim that defendant's guilty plea was involuntary, by pleading guilty defendant is waiving and giving up any right

to appeal defendant's conviction." C.R. 26, at 13.

Over Mr. Stapleton's objections that the language of the plea agreement did not waive his appeal beyond what was waived by operation of law,[1] that Mr. Stapleton's claims were exempted from any waiver, and that enforcing an appellate waiver would work a miscarriage of justice, the Ninth Circuit Court of Appeals granted the Government's motion to dismiss Mr. Stapleton's appeal. App. 1a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are Split Over Whether an Appeal May Proceed, Notwithstanding an Appellate Waiver, If the Errors Would Risk a Miscarriage of Justice, Including Ineffective Assistance of Counsel

This Court has recognized that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019).

Most all the federal courts of appeals have recognized an exception to appellate waivers for cases involving a miscarriage of justice. *United States v. Teeter*, 257 F.3d 14, 21-27 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 559-63 (3d Cir. 2001); *United States v. Adams*, 814 F.3d 178, 182

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1. Mr. Stapleton argued that the language in the plea agreement, both independently and in context, demonstrated that the language the Government relied upon merely advised Mr. Stapleton of the consequences of his plea rather than effectuated an independent appellate waiver beyond what occurred by operation of law.

(4th Cir. 2016); *United States v. Adkins*, 743 F.3d 176, 192-93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). They have recognized that "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." *Guillen*, 561 F.3d at 530. And they have reasoned that because courts "construe the agreement against a general background understanding of legality . . . [they] presume that both parties to the plea agreements contemplated that all promises made were legal, and that . . . the district judge will act legally in executing the agreement." *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996) (parenthesis omitted).[2]

The Ninth Circuit, however, has refused to adopt a similar exception, dismissing other courts' formulations of it as "nebulous." *United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011) ("This court does recognize certain exceptions to valid appellate waivers, but a nebulous 'miscarriage of

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2. Although the Second Circuit does not use the rubric of miscarriages of justice, it endorses as grounds for voiding an appellate waiver the grounds other circuits characterize as falling within the miscarriage exception. *United States v. Burden*, 860 F.3d 45, 50 (2d Cir. 2017); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2013) ("A violation of a fundamental right warrants voiding an appeal waiver."); *United States v. Hernandez*, 242 F.3d 110, 113-14 (2d Cir. 2001) (appellate waiver "is not enforceable where the defendant claims that the plea agreement was entered into without effective assistance of counsel.").

justice' exception is not among them.") (internal citation omitted), citing *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996). Rather than assessing the nature and quality of the errors raised in the appeal, in the Ninth Circuit, "the *sole test* of a waiver's validity is whether it was made knowingly and voluntarily." *United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000) (emphasis added). The Fifth and Eleventh Circuits have similarly refused to endorse a miscarriage exception. *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020) ("Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a 'miscarriage of justice' exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it."); *United States v. Cabezas*, 797 F. App'x 415, 419 (11th Cir. 2019) ("To the extent that Cabezas argues that a miscarriage of justice would result from enforcement of his sentence appeal waiver, we have not adopted a 'miscarriage of justice' exception.").

While the circumstances that can give rise to a miscarriage of justice may be "infinitely variable," *Teeter*, 257 F.3d at 25 n.9, the exception is generally understood as limited to a narrow range of potential issues:

> [A]n appeal waiver will not prevent a defendant from challenging (1) a sentence based on "constitutionally impermissible criteria, such as race"; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of "some minimum of civilized procedure" (such as if the parties stipulated

> to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement.

Adkins, 743 F.3d at 192-93 (internal quotations omitted).

These are all circumstances where an inflexible appellate waiver that could evade any judicial oversight would raise grave concerns over the "fundamental legitimacy of the judicial process." *Adkins*, 743 F.3d at 193.

The Ninth Circuit's refusal to countenance any miscarriage of justice exception is squarely at odds with the First Circuit's justification for the exception that, if denying an appeal based on a plea agreement's appellate waiver "would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver." *Teeter*, 257 F.3d at 25.

Appellate waivers are rationalized as generally bringing about finality "in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)." *Teeter*, 257 F.3d at 25. In other words, "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." *Guillen*, 561 F.3d at 529. Since "such waivers are made before any manifestation of sentencing error emerges, appellate courts *must* remain free to grant relief from them in egregious cases." *Teeter*, 257 F.3d at 25 (emphasis added).

The refusal to recognize any meaningful opportunity for judicial review

adversely impacts the quality of justice administered in the trial courts. Academics have recognized the moral hazard that appellate waivers provide district judges who "know the sentence is virtually unreviewable and therefore lack incentives to observe proper sentencing practices." Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 347 (2015). As this case demonstrates, however, the broad enforcement of appellate waivers also relieves judges from the incentive to ensure *all* post-plea proceedings, including a motion to withdraw the plea, strictly adhere to standard legal practice.

Despite the sound position taken by many of its sister Circuits, however, the Ninth Circuit here declined to address petitioner's argument that it should not enforce the appellate waiver because doing so would result in manifest injustice. In refusing to acknowledge the miscarriage of justice exception and invoking the appellate waiver to dismiss Mr. Stapleton's appeal, the Ninth Circuit's decision elevates expediency over the fair administration of justice.

The conflict between the courts of appeals over this question, which is basic, vitally important, and implicated in nearly every federal criminal case, is firmly entrenched. There is no realistic prospect that this conflict will resolve itself unless and until this Court intervenes. Whether these waivers are unenforceable when their enforcement would result in a miscarriage of

justice is warranted and the time is ripe for doing so.

II. The Issue Is of National and Systemic Importance

The existence of a miscarriage of justice exception to appellate waivers is an issue of national importance that warrants this Court's attention and intervention.

Plea agreements are the means by which virtually all criminal cases are resolved. The "reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 169-70 (2012). "Ninety-seven percent of federal convictions . . . are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* at 144 (emphasis original), quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

Having been granted the imprimatur by all the circuits, appellate waivers are included in nearly every plea agreement throughout the federal courts. A practice this widespread, that results in the waiver of such significant rights, often resulting in prolonged deprivations of liberty that would otherwise be subject to judicial review, is worthy of this Court's attention. The federal reporter contains innumerable cases involving defendants who pled guilty who have sought review of a post-plea, pre-

judgment order that they did not foresee at the time of the plea. Even the number of cases not officially reported and contained only in the Federal Appendix is likely to be a minuscule fraction of the instances where this issue arises. Instead, the vast majority of such cases are likely resolved with a summary order by a motions panel that goes unnoticed by everyone except the parties involved. The large number of cases impacted by this issue reinforces the need for this Court's timely intervention, especially because the disparate treatment of miscarriages of justice across the circuits continues to result in unequal treatment based solely on where cases happen to arise.

The ubiquity of plea agreements throughout the federal criminal justice system demands confidence in the fairness of outcomes achieved through the plea process. And, as guilty pleas have now become "the criminal justice system," appellate waivers are an equally ubiquitous component of those pleas. Standardization and greater uniformity is therefore absolutely central to the fair and equitable administration of criminal law in this country.

III. This Case Is a Good Vehicle for Resolving this Important Question

No factual or procedural obstacle will obscure this Court's ability to resolve the question presented. Mr. Stapleton invoked the miscarriage of justice exception recognized by other circuits in opposition to the

Government's motion to dismiss his appeal. The motions panel acknowledged and rejected its applicability.

The Ninth Circuit panel below hypothesized that no miscarriage of justice was implicated. App. 2a. Perhaps the Ninth Circuit panel contemplated only the similarly-named doctrine tied to factual innocence in habeas cases, *Schlup v. Delo*, 513 U.S. 298, 321-27 (1995), but the other circuit courts that endorse a miscarriage of justice exception recognize that an appellate waiver will not be enforced where "the plea proceedings were tainted by ineffective assistance of counsel." *E.g.*, *Teeter*, 257 F.3d at 25 n.9; *Adkins*, 743 F.3d at 142-43; *Khattak*, 273 F.3d at 562; *United States v. DeRoo*, 223 F.3d 919, 923-24 (8th Cir. 2003); *Hahn*, 359 F.3d at 1327; *Guillen*, 561 F.3d at 530. Indeed, it is sufficient that the defendant has made a "colorable" claim of ineffective assistance to bypass the waiver and merit judicial review. *Guillen*, 561 F.3d at 530, citing *Hahn*, 359 F.3d at 1327 and *Teeter*, 257 F.3d at 25 n.9. Mr. Stapleton adequately established the evidentiary foundation establishing his plea counsel's inadequacy; no reason would have justified an appellate court's recognition of it as implicating a miscarriage of justice if his appeal arose in the majority of circuits.

There being no denying that counsel's failure to recognize viable arguments for suppressing critical evidence amounts to at least a colorable instance of ineffective assistance, the appellate court should have denied the

Government's motion to dismiss and required a resolution on the merits of Mr. Stapleton's challenge to the denial of his motion to withdraw his plea.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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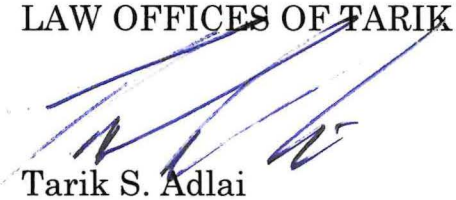

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