No. _____

IN THE

Supreme Court of the United States

ANDREW PAYTON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a criminal defendant knowingly and voluntarily forfeit his right to appeal the district court's yet-to-be-made sentencing errors as part of his plea agreement with the government, and, if so, what are the limits on the validity and enforceability of such "appeal waivers"?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Payton*, No. 2:19-cr-214, U.S. District Court for the Eastern District of Louisiana. Judgment entered June 29, 2022.
- *United States v. Payton*, No. 22-30424, U.S. Court of Appeals for the Fifth Circuit. Judgment entered February 13, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules, Regulations, and Other Provisions

Other Authorities

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ANDREW PAYTON,
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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

On February 13, 2023, a panel of the Fifth Circuit Court of Appeals dismissed Mr. Payton's sentencing-related appeal based on an appeal waiver in his plea agreement. A copy of the order is attached to this petition as the Appendix (1a).

JURISDICTION

The Fifth Circuit entered its order of dismissal on February 13, 2023, and no petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13 because it is being filed within 90 days of the Fifth Circuit's final judgment.

FEDERAL STATUTE INVOLVED

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

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

INTRODUCTION

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

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

STATEMENT OF THE CASE

On March 29, 2022, Appellant Andrew Payton pleaded guilty to possessing with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Payton's plea agreement required him to waive all appellate and collateral relief rights except an attack on a sentence imposed in excess of the statutory maximum or a claim of ineffective assistance of counsel. Relevant here, those waivers specifically encompassed his right "to challenge any United States Sentencing Guidelines determinations and their application by any judge to the defendant's sentence and judgment."

In anticipation of Mr. Payton's sentencing, U.S. Probation prepared a Presentence Report (PSR) calculating his advisory Sentencing Guidelines range. Applying the Guideline applicable to drug offenses, U.S.S.G. § 2D1.1, U.S. Probation calculated a criminal history category of V and an adjusted base offense level of 28. With a three-point reduction for acceptance of responsibility, that calculation would have resulted, at most, in an advisory Guidelines range of 100 to 125 months. U.S. Probation concluded, however, that Mr. Payton qualified as a "career offender" under U.S.S.G. § 4B1.1. That harsh sentencing enhancement automatically increases a defendant's base offense level and criminal history category if the defendant has two prior convictions that qualify either as a "controlled substance offense" or a "crime of violence" under the Guidelines' definitions of those terms. U.S.S.G. § 4B1.1(a), (b). In this case, U.S. Probation determined that Mr. Payton had two qualifying "controlled

substance offense" convictions, namely, a 2006 conviction for possession with intent to distribute marijuana and a 2007 conviction for possession with intent to distribute cocaine, both in Louisiana. Thus, U.S. Probation determined that Mr. Payton's offense level should be 34 and his criminal history should be VI, resulting in an advisory Guidelines range of 188 to 235 months, after a three-point offense-level reduction for acceptance of responsibility.

At Mr. Payton's sentencing hearing, the district court adopted the PSR's conclusions about the career offender enhancement and resulting Guidelines range. Although the Court varied downward slightly from that range due to the relative staleness of Mr. Payton's criminal history, the sentence imposed—168 months—remained years higher than the 100-to-125-month range to which Mr. Payton would have been subject had he not been deemed a career offender.

On appeal, Mr. Payton argued that the district court erred in determining that he qualified as a career offender under U.S.S.G. § 4B1.1 based on his prior Louisiana convictions for cocaine and marijuana distribution. Mr. Payton noted that, under binding Fifth Circuit caselaw and straightforward application of the well-known "categorical approach," state drug convictions cannot qualify as predicates for enhancement purposes if the statute of conviction covers a broader range of conduct than the conduct criminalized by the federal Controlled Substances Act (CSA).[1]

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[1] *United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016); *United States v. Gomez-Alvarez*, 781 F.3d 787, 793–94 (5th Cir. 2015); *see also Mathis v. United States*, 579 U.S. 500, 504 (2016).

And Mr. Payton's two state drug convictions were in fact broader than the federal CSA definitions. First, Louisiana's definition of "marijuana" at the time of Mr. Payton's conviction was broader than the CSA's definition of that substance, criminalizing the distribution of hemp, which is expressly excluded from the CSA's reach.[2] Second, Mr. Payton's prior cocaine conviction could not qualify as a controlled substance offense either, because Louisiana's definition of "cocaine" at the time of his conviction included the cocaine-derived substance, Ioflupane, which the CSA also expressly excludes.[3]

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[2] Hemp and marijuana are both cannabis sativa plants, but they "differ in the amount of the cannabinoid known as delta-9-tetrahydrocannabinol, or THC, they contain, with hemp containing insufficient THC—the principal psychoactive component of the cannabis plant—to produce the 'high' associated with the ingestion of marijuana." Michael D. Moberly, *Old Macdonald Hid A Farm: Examining Arizona's Prospects for Legalizing Industrial Hemp*, 20 Drake J. Agric. L. 361, 362–63 (2015). The flowers of "industrial hemp plants . . . contain only a trace amount of the THC contained in marijuana varieties grown for psychoactive use." *Hemp Indus. Ass'n v. DEA*, 357 F.3d 1012, 1013 n.2 (9th Cir. 2004). Prior to 2014, the CSA did not differentiate between hemp and other cannabis plants, instead banning cannabis of any kind by listing "Marihuana" and "Tetrahydrocannabinols" as Schedule I controlled substances and by defining marijuana without differentiating between cannabis sativa plants based on THC concentration. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1236, 1249 (1970) (schedule I(c)(10), (17)); 21 U.S.C. § 812(c) (2012) (Schedule I(c)(10), (17)); 21 U.S.C. § 802(16) (2015). By contrast, Louisiana law in effect at the time of Mr. Payton's conviction contained no such carveout, rendering it facially broader than the applicable CSA definition. *See* La. R.S. § 40:961 (effective through Jul. 31, 2019) ("'Marijuana' means all parts of plants of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination, or cannabidiol when contained in a drug product approved by the United States Food and Drug Administration."); *see also State v. Broadway*, 920 So. 2d. 960 (La. App. 2006) (marijuana prosecution for cultivation of a hemp plant).

[3] In 2015, the Attorney General modified the regulatory drug schedules to specifically exclude Ioflupane from the federal list of cocaine-related substances criminalized by the CSA. 21 C.F.R. § 1308.12(b)(4); 80 Fed. Reg. 54715-01. As a result, Ioflupane is not considered a federally "controlled substance," as defined in the CSA. By contrast, Louisiana law at the time of Mr. Payton's conviction did not exempt Ioflupane from its cocaine definition, which was only amended in 2016 to exclude that

In raising those issues, Mr. Payton recognized that his plea agreement contained broad appeal waivers forfeiting his right "to appeal or contest his . . . sentence" and "to challenge the manner in which his sentence was determined." Mr. Payton noted, though, that the Fifth Circuit could not enforce appeal waivers on its own accord, *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006), and that the government had the discretion to choose whether to enforce the waiver, *United States v. Davis*, 530 F.3d 318, 320-21 (5th Cir. 2008). Mr. Payton urged the government to decline to do so in his case, pointing out that the error on appeal nearly doubled his applicable Guidelines range and resulted in a fourteen-year sentence.

Nonetheless, the government moved to dismiss based on the broad appeal waiver in his plea agreement. Mr. Payton opposed dismissal, arguing that sentencing appeal waivers like the one in his case are bad policy, harmful to the integrity of the criminal process, and inherently unknowing and involuntary. He acknowledged, however, that his challenges to the waiver's validity were foreclosed under Fifth Circuit precedent. A Fifth Circuit panel dismissed Mr. Payton's claims without reaching the merits of the issues raised in his brief.

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substance from the statute's reach. *Compare* La. R.S. § 40:964, Schedule II(A)(4) (effective Aug. 15, 2006 to Aug. 14, 2008) ("Coca leaves, cocaine, ecgonine and any salt, isomer, salt of an isomer, compound, derivative, or preparation of coca leaves, cocaine or ecgonine and any salt, isomer, salt of an isomer, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine."), *with* La. R.S. § 40:964, Schedule II(A)(4) (current) ("Coca leaves, and any salt, compound, derivative, or preparation of coca leaves (including cocaine ecgonine and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, *except that the substances shall not include:. . . Ioflupane, with and without radioisotopes*." (emphasis added)).

REASONS FOR GRANTING THE PETITION

As this Court has repeatedly held:

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

Gall v. United States, 552 U.S. 38, 50 (2007); *see also Rita v. United States*, 551 U.S. 338, 347–48 (2007). "Neither the Federal Government nor federal courts are immune from making mistakes." *Grzegorczyk v. United States*, 142 S. Ct. 2580, 2581 (2022) (Sotomayor, J., Breyer, J., Kagan, J., and Gorsuch, J., dissenting from the denial of certiorari). In this case, the district court made a grave, impactful mistake in calculating Mr. Payton's sentence, subjecting him incorrectly to the harsh, career offender sentencing enhancement and thereby adding years to his sentence. That resulted in a fundamentally flawed proceeding and an improperly determined sentence.

Nonetheless, Mr. Payton was prevented from even litigating these errors on appeal due to the broad, boilerplate sentencing appeal waiver in his plea agreement. Although this Court has suggested possible limits on the reach of appeal waivers, it has not yet fully examined their legality or clarified restrictions on their enforcement. *See Garza v. Idaho*, 139 S. Ct. 738, 744–45 (2019) (recognizing that "no appeal waiver serves as an absolute bar to all appellate claims" and that "all jurisdictions appear to treat at least some claims as unwaiveable"). For a number of reasons, this Court should provide that necessary clarification now.

First, as commentators and judges alike have observed, the widespread and compulsory forfeiture of appellate rights—especially those regarding yet-to-be-made sentencing errors—raises serious policy and fairness concerns, implicating not only the fundamental rights of huge swaths of criminal defendants, but also the health of the criminal process as a whole. Second, broad waivers like the one in Mr. Payton's case are inherently unknowing and involuntary and therefore are legally dubious. Finally, the circuits are split over the limits on and exceptions to the enforcement of appeal waivers, leading to confusion, unpredictability, and disparate treatment of similarly situated individuals. Absent intervention by this Court, important legal issues regarding the proper application of the Sentencing Guidelines will continue to be insulated from appellate scrutiny in the vast majority of criminal cases, and fundamental sentencing errors by district courts will continue to go unchecked.[4] Clarification from this Court is urgently needed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

court would erroneously apply an enhancement that would incorrectly add years to his sentence.

Appellate courts have sidestepped these issues by reasoning that because defendants may waive *constitutional* rights, they also may waive the statutory right to appeal a sentence. *See, e.g.*, *Andis*, 333 F.3d at 889 ("[T]he right to appeal is not a constitutional right but rather purely a creature of statute. . . . Given that the Supreme Court has allowed a defendant to waive constitutional rights, we would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." (internal quotation marks and citations omitted)); *Khattak*, 273 F.3d at 561 ("The ability to waive statutory rights, like those provided in 18 U.S.C. § 3742, logically flows from the ability to waive constitutional rights."); *United States v. Teeter*, 257 F.3d 14, 21–22 (1st Cir. 2001) ("[T]he idea of permitting presentence waivers of appellate rights seems relatively tame because the right to appeal in a criminal case is not of constitutional magnitude.").

But the analogy courts have drawn between waiving the right to appeal future sentencing decisions and waiving constitutional rights is flawed. The constitutional rights waived by a guilty plea are known at the time they are waived:

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

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

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

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

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

Nor are agreements like Mr. Payton's "voluntary." U.S. Attorney's Offices like the one in the Eastern District increasingly *require* appellate waivers or else defendants are not permitted to plead guilty pursuant to an agreement at all. That is true even when, as in most cases, the appeal waivers play no part in the plea-bargaining process. In other words, these are not specific, bargained-for relinquishments of rights in exchange for some benefit. Instead, defendants have no choice in the matter and receive nothing in return. In fact, when defense attorneys have attempted to push back on boilerplate provisions in the Eastern District, prosecutors have stated in no uncertain terms that they are not permitted to modify the template agreement. The defendants are then left with only two options: sign an agreement waiving rights that were never part of the deal or suffer the consequences of declining the plea offer entirely.

III. There is a circuit split over how to enforce appeal waivers, resulting in inconsistent treatment of criminal appellants.

Although appellate courts generally will enforce appeal waivers, the limits those courts have set on waivers and the situations in which courts refuse to enforce them varies wildly by circuit. As one commentator observed, "[i]n the absence of Supreme Court precedent guiding the enforcement of appeal waivers, . . . various courts of appeal have created their own limits and exceptions to their enforcement." Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event of Superseding Supreme Court Law: The Durham Rule As Applied to Appeal Waivers*, 18 Fla. Coastal L. Rev. 113 (2016). That means a defendant in one circuit may be permitted to proceed with an appeal—and potentially have a sentencing error

remedied—while an identically situated defendant in another circuit will be deprived of that right entirely.

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

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

> (1) reliance by the court upon an impermissible factor such as race in imposition of the sentence; (2) ineffective assistance of counsel in connection with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful and

> seriously affects the fairness, integrity, or public reputation of judicial proceedings.

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

> the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.

Khattak, 273 F.3d at 562.

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

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

IV. This case is a good vehicle for this Court to address appeal waivers.

This Court should also grant certiorari in this case because Mr. Payton's circumstances present a good vehicle for this Court to address the validity and enforceability of sentencing-related appeal waivers. First, Mr. Payton fully preserved these arguments in opposition to enforcement of his appeal waiver below, and, thus, these issues are cleanly presented for this Court's consideration. Moreover, the underlying error barred from consideration here was particularly impactful: it added years to Mr. Payton's sentence. Accordingly, enforcement of Mr. Payton's appeal waiver had serious consequences and resulted in a dramatically higher sentence than he likely would have received had the error been corrected. Additionally, his appeal raised critical questions about application of the categorical approach to drug predicates and, more broadly, the widely applied career offender enhancement. Thus, enforcement of Mr. Payton's appeal waiver also inhibited development of caselaw impacting defendants across the country.

Mr. Payton's case therefore presents a good vehicle for this Court to weigh in and clarify the validity of appeal waivers that forfeit a defendant's right to challenge unforeseen sentencing errors.

CONCLUSION

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

Respectfully submitted,

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