No._____

IN THE SUPREME COURT OF THE UNITED STATES

KYLE ROSS RIVERS, PETITIONER

V.

UNITED STATES OF AMERICA

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

PHILIP J. LYNCH
Law Offices of Phil Lynch
17503 La Cantera Parkway
Suite 104-623
San Antonio, Texas
(210) 378-3114
LawOfficesofPhilLynch@satx.rr.com

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant, consistent with the Due Process Clause, can waive the right to appeal his sentence knowingly when his purported waiver occurs before the right has accrued.

2. If such pre-accrual sentence-appeal waivers are constitutionally permissible, may a waiver in a written plea agreement be enforced when the district court failed to advise the defendant of the provision and failed to ensure that he understood its meaning and consequences.

.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

U.S. Sentencing Guidelines

Rule

No._____

IN THE SUPREME COURT OF THE UNITED STATES

KYLE ROSS RIVERS, PETITIONER

V.

UNITED STATES OF AMERICA

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

Kyle Ross Rivers asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 9, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

RELATED PROCEEDINGS

United States v. Rivers, U.S. District Court for the Western District of Texas, Number 5:20 CR 00433-FB-1, Judgment entered December 9, 2022.

United States v. Rivers, U.S. Court of Appeals for the Fifth Circuit, Number 22-51082, Judgment entered June 9, 2023.

OPINION BELOW

The unpublished opinion of the court of appeals is Appendix A to the petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 9, 2023. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]"

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 11(b)(1) provides in pertinent part that a district court, during a guilty plea colloquy "must inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence[.]"

STATEMENT

This case presents the Court with the opportunity to address the constitutionality of sentence appeal-waiver provisions and to clarify, if such provisions are found constitutional, the steps a district court conducting a guilty plea colloquy must take to ensure that a criminal defendant understands that an appeal-waiver provision exists and what it means.

Petitioner Kyle Rivers suffers from Autism Spectrum Disorder. The disorder affects social interactions, including by hampering a person's ability to attend to conversations and to engage with others. Persons with Autism Spectrum Disorder often go along, appearing to agree or consent, because the social conventions by which questions are raised or doubts expressed overwhelm them.

Rivers was charged with four offenses relating to the viewing and sharing of internet images containing child pornography. Pursuant to an agreement with the government, Rivers plead guilty to one count of distribution in violation of 18 U.S.C. § 2252A(a)(2). River's plea agreement, as with so many drafted by the government, contained a written provision purporting to waive his right to appeal.

The district court held a guilty plea hearing on Rivers's case. At such hearings, a district court is required by Federal Rule of Criminal Procedure 11(b) to explain to the defendant at least 17 matters about the criminal charges, the potential plea, and the consequences of the plea. Among the matters a district court must cover is any purported appeal-waiver provision contained in the plea agreement in the case. Rule

11(b)(1)(N) requires the court to inform the defendant of "any plea-agreement provision waiving the right to appeal" and to ensure that the defendant understands that provision.

The district court failed to do so in this case. Appendix B. The district court did not even ask Rivers whether he had read or gone over the plea agreement, only if he had thought about his counsel's advice and decided independently to accept the plea agreement. Appendix B. Nor did the court mention the U.S. sentencing guidelines. Appendix B. In fact, the entire plea hearing was so brief that the transcript of it covers a mere 4 and 1/2 pages. Appendix B. The district court, despite the rushed and incomplete proceeding, accepted Rivers's guilty plea. Appendix B.

Following Rivers's guilty plea, a probation officer prepared a presentence report for the district court's consideration at sentencing. The officer recommended a base offense level of 22. *See* U.S.S.G. §2G2.2(a)(2). From there, the officer added many offense-level increases–almost of which apply to most run-of-the-mine § 2252A cases, but are cast as reflecting a higher degree of seriousness–until the base offense level was nearly doubled, to 40, just three levels shy of the highest effective level under the sentencing guidelines. *See* U.S.S.G. Ch.5, Pt. A (comment.(n.2)) (any offense-level calculation that totals over 43, to be treated as 43). At that point, the probation office recommended a three-level reduction to recognize that Rivers had accepted responsibility for his offense. That made the recommended total offense level 37.

Rivers, who was 38 at the time of the report, had no criminal history. He had never even been arrested. A criminal history category of I, with an offense level of 37, yielded an advisory guideline sentence range of 210 to 262 months' imprisonment. The last 22 months of that range exceeded the statutory-maximum 20-year sentence. 18 U.S.C. § 2252A(a)(2); U.S.S.G. §5G1.1(c)(1).

Defense counsel objected to some of the recommended guideline adjustments, and he objected that guidelines §2G2.2 systematically overstated the sentence required for persons convicted of non-production pornography offenses because its adjustments, formulated before computers were common, applied to essentially every defendant and thus failed to distinguish the more sophisticated, more culpable offenders from the less culpable offenders, such as Rivers. *See* U.S. Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics Offender Based: Fiscal Year 2020* 42 (2021), *available at* https://www.ussc.gov/research/data-reports/guideline/2020-guideline-applicationfrequencies (last visited April 18, 2023)); *Compare United States v. Dorvee,* 616 F.3d 174, 183-87 (2d Cir. 2010) (child pornography guideline routinely results in ranges so high as to be at odds with the parsimony command of § 3553) *with United States v. Miller,* 665 F.3d 114, 119-21 (5th Cir. 2011) (rejecting argument that child-pornography guidelines should not be presumed reasonable).

Defense counsel also filed a sentencing memo arguing that a below-guideline sentence was required under the parsimony clause of 18 U.S.C. § 3553(a). *Cf. Dean v. United States,* 581 U.S. 62, 67 (2017) (emphasizing primacy of parsimony). Counsel

informed the district court that, after his arrest, Rivers had undergone a psychological examination and been diagnosed with Autism Spectrum Disorder. That diagnosis was relevant both to the reasons why Rivers had offended and to the sentence that his offense warranted. The diagnosis shed light on why, throughout his life, Rivers had struggled to fit in and to understand social cues, struggles that had resulted in him being excluded and bullied. The disorder also contributed to delayed social and sexual development. The emotional and social challenges faced by persons on the Autism Spectrum leave them more vulnerable to exploitation; it is common for persons who have Autism Spectrum Disorder to retreat to a virtual engagement with the world through computers, where they encounter new and often unexpected hazards. The Autism diagnosis was relevant to the appropriate sentence because Rivers's difficulties understanding social cues and adjusting to changing circumstances posed a risked that, in prison, he would be targeted and taken advantage of by others. Defense counsel argued that the Autism diagnosis and several other factors demonstrated that a within-guidelines sentence was greater than necessary.

At sentencing, Rivers told the district court "My life has been painful. I've been ignored, harassed, physically abused, emotionally scared and self-hating for not achieving some unspoken level of normal. He's too quiet. He doesn't socialize right. He's in his own world. When I did interact, it was done wrong. He has no friends." Appendix C . His "self-worth was nonexistent," because being "treated harshly and unable to maneuver the social puzzle of making friends, social cues or reading a room"

had left him "isolated." Appendix C. Rivers told the district court that, when he first began to participate in the chat room, it was a way of socializing, a way of being with other guys. Appendix C. He understood the images as a part of the on-line milieu, a condition of having that social connection. His autism disorder had made it difficult for him to understand then that children were harmed by the images. He had grown to understand now what had been going on in the chat group was wrong and he understood why it was wrong. Appendix C.

Letters before the court spoke of Rivers's kindness and helpfulness, including one from his supervisor at his job at the Autism Treatment Center where he had worked with autistic children. The district court acknowledged that "he is a low risk for recidivism. But that's not what we're here about. We're here about punishment for what's happened from here back." Appendix C. It sentenced Rivers to 210 months' imprisonment.

Rivers appealed. He argued that the 210-month sentence was greater than necessary to achieve the goals of federal sentencing under the parsimony clause of 18 U.S.C. § 3553(a), because a lesser sentence would have reflected the seriousness of his offense, would have protected the public, would have provided both specific and general deterrence, and would have been just. *See* 18 U.S.C. 3553(a)(2)(A)-(C). Most importantly, he argued, neither the sentencing guidelines nor the district court had accounted for the relevant history and circumstances of his offense–his autism and the struggles and isolation it brought.

The government moved to dismiss Rivers's appeal. It cited the appeal-waiver provision in the plea agreement Rivers had signed. Rivers opposed that motion, contending that the appeal-waiver provision should not be enforced. He pointed out that the district court had completely failed to comply with Rule 11(b)(1)(N) because it had not informed Rivers of the appeal-waiver and its effect at the guilty plea hearing. He argued that, while compliance with the Rule is always required, compliance in his case was particularly important because of his autism. The Fifth Circuit dismissed the appeal. Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AND UNDER WHAT CIRCUMSTANCES AN ANTICIPATORY WAIVER OF SENTENCE-APPEAL RIGHTS IN A PLEA AGREEMENT IS VALID.

.

The right to appeal a federal criminal sentence is created and guaranteed by statute, 18 U.S.C. § 3742. Plea bargains in federal court now commonly include a provision that requires the defendant to waive his sentence-appeal right. Yet the appeal-waiver provisions are entered into long before any potential sentencing error occurs, and the waivers are anticipatorily done in a complex system of sentencing statues and guidelines that carry significant potential for misapplication and misunderstanding. *Cf. Molina-Martinez v. United States,* 578 U.S. 189, 193-94 (2016). When a defendant signs a plea agreement waiving his sentence-appeal rights, he cannot know whether his attorney will misunderstand or misargue the applicable law, whether the prosecutor will overreach in asserting the applicability of an upward adjustment, or whether the court will err, factually or legally, in applying the guidelines or selecting a sentence.

This Court has never decided whether the right to appeal from a sentence can knowingly be waived in a pre-sentence plea agreement. The Court's waiver precedent in other areas of criminal law suggests that the right cannot be so waived, because9 rights cannot knowingly be waived before they can be meaningfully understood. The courts of appeals began approving and enforcing sentence-appeal waivers without fully accounting for this aspect of the Court's waiver precedent.

In the late 1990s, the Federal Rules of Criminal Procedure were amended to recognize the growing practice of prosecutors insisting upon and including sentence-appeal waivers in the plea agreements they drafted. The amended rules did not weigh in on the propriety of the practice. *See* Fed. R. Crim. P. 11 (advisory comm. Notes, 1999). The amended rules did set out an advisement that had to be made by the district court when an appeal-waiver waiver provision was present. *See* Fed. R. Crim. P. 11(b)(1)(N). The district court, in its exceedingly brief plea colloquy in this case, did not comply with the required advisement.

Petitioner's case presents the Court with the opportunity to decide whether sentence-appeal waivers are constitutionally valid, and if so, under what conditions they are knowingly and voluntarily made and thus enforceable. It also presents an opportunity for the Court to delineate the responsibilities of the district courts in meeting the requirement of Rule 11(b)(1)(N).

A. Due Process Requires Knowledge of the Right to be Waived.

The Fifth Circuit dismissed Rivers's appeal of his sentence, enforcing the appeal-waiver provision written into Rivers's plea agreement. The dismissal in Rivers's case was one of many entered by the Fifth Circuit since it first approved sentence-appeal waiver provisions in plea agreements in *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992).

The *Melancon* court reasoned that, because defendants can waive constitutional rights by pleading guilty, they may also waive statutory rights, including the right to appeal a sentence. This reasoning is not limited to the Fifth Circuit; it imbues the

decisions of other courts of appeals. *See, e.g., United States v. Khattack*, 273 F.3d 557, 560 (3d Cir. 2001); *United States v. Wiggins*, 905 F.2d 51, 52–54 (4th Cir. 1990); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

Over the years, the Fifth Circuit has read sentence-appeal waivers more and more expansively, going so far as to hold that language waiving appeal and post-sentencing review also operated to bar appeal of a motion to modify conditions of supervised release that was filed after the defendant had served his term of imprisonment. *United States v. Scallon*, 683 F.3d 680, 683 (5th Cir. 2012). The Fifth Circuit's broad construction of sentence-appeal waivers highlights the serious questions about whether the defendant can knowingly give up rights that he does not yet possess and that he cannot appraise accurately or intelligently. For example, the waiver in *Scallon* made no mention of motions to modify, which Congress has specifically provided for by statute as part of its policy decisions about how best to assist defendants in rejoining society. *See* 18 U.S.C. § 3583(e). Construing sentence-appeal waivers made in presentence plea agreements as broadly as the Fifth Circuit has appears to be contrary to public policy, as well as this Court's precedent.

That precedent establishes that a waiver is the intentional "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 (1993). The right to appeal a sentence has not accrued at the time a presentence "waiver" of the right is made in a plea agreement. This fact demonstrates the flaw in the analogy the courts of appeals

have made between a sentence-appeal waiver and the waiver of constitutional rights that occurs when a defendant pleads guilty. The rights waived during a guilty plea are known and possessed at the time they are relinquished: "[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 is satisfied in these circumstances because the defendant knows what he has and thus knows what he is relinquishing. *Cf. Johnson,* 304 U.S. at 464; *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

Due process requires that waivers be made knowingly. Stated conversely, no valid waiver can be made without knowledge of the right to be waived. *Cf. Newton v. Rumery*, 480 U.S. 386, 390–91 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment when right to sue had accrued). Sentence-appeal waivers lack the essence of a valid waiver—a known and accrued right. Because sentence-appeal waivers are made at the time of the guilty plea, the defendant does not and cannot know what he is actually relinquishing. Although the courts of appeals have acknowledged that "[t]he basic argument against presentence waivers of appellate rights is that such waivers are anticipatory," *United States v. Teeter,* 257 F.3d 14, 21 (1st Cir. 2001), most of them have avoided that issue. *See, e.g. United States v. Guillen,* 561 F.3d 527, 529-30 (D.C. Cir. 2009). They have begged the question what the defendant must know to make an anticipatory appeal waiver valid

by conclusory declarations that it is enough if "the record [shows] that [the defendant] knows what he is doing and his choice is made with eyes open[.]" *Guillen,* 561 F.3d at 530 (quoting *United States v. Cunningham,* 145 F.3d 1385, 1391 (D.C. Cir. 1998)). The problem is that the defendant does not know "what he is doing." He is instead giving up unknown, at the time, rights. *Cf. Melancon*, 972 F.2d at 572 (right waived is not simply a general, abstract appellate right) (Parker, J., concurring).

But this question of what is being done and what constitutes an informed, eyes-open choice has been largely swept aside in most circuits. They have simply approved waivers because they have occurred without addressing how, or if, an eyes-open choice to waive a right whose content is not known can be made in a sentencing system as complex and individualistic as guideline sentencing under the parsimony principle. *Cf. Molina-Martinez v. United States,* 578 U.S. 189, 193-94 (2016) (recognizing complexity of guidelines can mean errors are unnoticed by defense lawyers, prosecutors, and sentencing judges).

The right to appeal a sentence arises only when specific errors occur during or in connection with the imposition of specific sentence, including the imposition of an unreasonable sentence, the error that Rivers sought to raise on appeal. *See* 18 U.S.C. § 3742 (setting forth sentences that may be appealed); *United States v. Booker,* 543 U.S. 220, 261-63 (2005) (appeal right arises when court imposes an unreasonable sentence). The "waiver" of sentence-appeal rights made in a plea agreement of the type Rivers signed purports to occur long before sentence is imposed, long before in almost every case, the guidelines applicable to his offense are determined, long before

a presentence report has been drafted to apprise the defendant of what he may actually be giving up. *See also Melancon*, 972 F.2d at 572 (right waived is not simply a general, abstract appellate right) (Parker, J., concurring). A defendant cannot therefore have sufficient knowledge of what he is ceding when sentence-appeal rights are waived anticipatorily. Because he cannot, sentence-appeal waivers fail to meet the waiver requirements imposed by the due process clause. *Cf. Johnson*, 304 U.S. at 464 (waiver is an intentional relinquishment of known right).

The Second Circuit has been most attuned to the problems raised by sentence-appeal waiver provisions. It has instead indicated a preference for plea agreements that set out a guideline-sentence range beyond which the defendant cannot be imprisoned. *See United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999) (refusing to enforce sentence-appeal waiver in agreement that did not contain stipulated sentence range); *United States v. Martinez-Rios*, 143 F.3d 662, 668–69 (2d Cir. 1998) (same). The Second Circuit has observed that, without a stipulated sentence range, it is questionable whether a defendant can knowingly waive his right to appeal his sentence. *United States v. Rosa*, 123 F.3d 94, 101 (2d Cir. 1997). The stipulated range protects a defendant from being left "entirely to the mercy of the sentencing court" and without recourse from a sentence he could not have anticipated. *Rosa*, 123 F.3d at 98–99; *see also United States v. Coston*, 737 F.3d 235, 237 (2d Cir. 2013) (in deciding whether to enforce waiver, court will consider "whether the sentence was reached in a manner plea agreement did not anticipate.") Whether such a prophylactic rule results in a waiver consistent with due process is not clear.

For some courts, the validity of waivers was bolstered by the adoption of Federal Rule of Criminal Procedure 11(c)(6). *See Teeter*, 257 F.3d at 22 (passage of rule cited as one of several reasons waivers are enforceable); *United States v. Redmond*, 22 Fed. App'x 345, 346 (4th Cir. 2002) (same). Rule 11(b)(1)(N) requires district courts to advise defendants of the existence and the terms of appeal waivers during the plea colloquy. The rule could not, of course, state that compliance with the advice requirement renders a defendant's acquiescence a knowing and voluntary waiver. That is a question for the Court. The Advisory Committee explicitly refrained from endorsing appeal waivers: "[T]he Committee takes no position on the underlying validity of [appeal] waivers." Fed. R. Crim. P. 11, advisory Committee Notes (1999 Amendments). The Court should now decide whether anticipatory waivers of sentence-appeal rights are permitted.

B. The Court Should Provide Guidance as to what Circumstance Must be Shown for a Waiver of Sentence-Appeal Rights to Be Knowing.

If sentence-appeal waivers are permitted, the Court should also decide what marks a sentence appeal waiver as knowing and voluntary and determine what level of compliance with Rule 11(b)(1)(N) is required of the district courts. Early on, the Fifth Circuit correctly observed, that a sentence-appeal waiver provision "gives up [a] very valuable right[.]" *United States v. Baty,* 980 F.2d 977, 979 (5th Cir. 1992). Because of that, the court stated that "a defendant's waiver of [his] right to appeal deserves and, indeed, requires the special attention of the district court." *Baty,* 980 F.2d at 979.

Federal Rule of Criminal Procedure 11 was amended in 1999 to formalize special attention to appeal-waiver provisions. The rule, initially promulgated as Rule 11(c)(6) and now found at Rule 11(b)(1)(N), aimed to provide a standard that, if complied with, would, through specific attention to a waiver provision, show that defendant had knowingly and voluntarily waived his appeal rights. Rule 11(b)(1)(N) states that a district court "must inform the defendant of, and determine that the defendant understands . . . (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Unfortunately, as Rivers's case shows, the district courts do not always give the required special attention to the waiver provision, see Appendix B, and the courts of appeals nonetheless dismiss based on the mere presence of a waiver provision in the written plea agreement, see Appendix A. This practice undermines the efficacy of Rule 11 and the fairness of the criminal justice system.

Although Rule 11(b)(1)(N) provides a clear and simple principle, the Fifth Circuit does not enforce compliance with that principle. See Appendices A and B; *United States v. Bond,* 414 F.3d 542, 543-44 (5th Cir. 2005) (dismissing on written agreement). Even those courts that have taken a warier approach to sentence-appeal waiver provisions than the Fifth Circuit has, do not apply Rule 11 as the operative question in determining whether a particular waiver is valid. Instead, the courts have ventured a number of standards by which appeal waivers might be evaluated. Most of these standards defer to an agreement's written waiver language unless that

language violates basic principles of fairness.[1] *See, e.g., United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (waiver invalid if sentence exceeds statutory maximum or if based on constitutionally impermissible factor, such as race); *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (waiver invalid if enforcement would result in miscarriage of justice); *United States v. Black*, 201 F.3d 1296, 1302 (10th Cir. 2000) (waiver invalid if sentence tainted by racial bias or exceeds statutory maximum, or if plea agreement entered into without effective assistance of counsel); *see also United States v Snider,* 180 F. Supp.3d 780, 792 n.21 (D. Or. 2016) (recounting circuit's differing approaches to appeal-waiver provisions). These concerns are important ones, but they are concerns about the limits of a valid and knowing waiver, not about compliance with the federal rules or the existence of a knowing waiver by a defendant.

The Fifth Circuit precedent since *Melancon* not only defers to written sentence-appeal-waiver provisions, but it also tilts toward overreading the government-drafted provisions in favor of the drafting party, even when the defendant has not been advised of the meaning and scope of the waiver enforced. *See, e.g., Scallon*, 683 F.3d at 683 (agreeing with prosecutor that sentence-appeal waiver gave up right to ask later for modification of supervised release conditions). This deference to appeal-waiver provisions and concomitant declination to hold the district courts to their

[1] Non-compliance with the Rule 11(b)(1)(N) advisement calls for invalidation and non-enforcement of the waiver as a remedy. A waiver that is otherwise compliant and valid may have its scope limited by a court of appeals as a remedy. In neither case, though the waiver advisement is located in Rule 11, is the proper remedy (or question for the court of appeals) for an entire guilty plea be vacated because a sentence-appeal waiver was not addressed by a district court.

obligations under Rule 11 appears contrary to the letter and spirit of Rule 11. The Fifth Circuit's practice shows that the Court should clarify the role, and perhaps necessity, of Rule 11(b)(1)(N) in determining whether a particular sentence-appeal waiver is valid, as well as to delineate any other necessary standards that apply to determine whether and when to enforce sentence-appeal waiver provisions.

C. Rivers's case is a good vehicle through which to address the issues presented.

The issues presented are important to the individual criminal defendant and to the integrity of, and public confidence in, the federal criminal justice system. Rivers's case presents an excellent vehicle through which to address the issues. It clearly presents the constitutional and rule-based questions, and the circumstances of his case exemplify both why proper explanation of an appeal-waiver provision is necessary and remind us that many persons who come into the system have challenges that make a full explanation by the district court taking the plea a necessity if our system is to do justice to all.

Pleas resolve the overwhelming majority of cases in the criminal justice system. *Missouri v. Frye,* 566 U.S. 133, 143-44 (2012); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Plea bargain agreements are treated as contractual in nature, *Santobello v. New York*, 404 U. S. 257, 262–63 (1971), but they are "unique contracts" because "they implicate the deprivation of human freedom[.]" *United States v. Mankiewicz*, 122 F.3d 399, 403 n.1 (7th Cir. 1997). When a defendant agrees to enter a plea of guilty, he forgoes all the rights and protections that he would have at a trial

and, in most cases, agrees to accept a term of imprisonment. If the plea agreement contains a sentence-appeal waiver provision, he also gives up the right to challenge the lawfulness of that imprisonment.

Rule 11(b)(1)(N) was meant to ensure that such a significant surrender of rights was informed, intended, and understood. The failure of the Fifth Circuit to enforce Rule 11(b)(1)(N) calls into question the validity and enforcement of sentence-appeal-waiver provisions and casts our system of pleas in a negative light, making it appear that expedited proceedings and finality outweigh compliance with plainly stated rules. *Cf. Frye,* 566 U.S. at 143-44 (observing that centrality of pleas to system requires defense counsel to meet their obligations fully and faithfully).

The record in this case shows that the district court never explained the appeal-waiver provision's existence or import to Rivers, despite the clear requirements of Rule 11(b)(1)(N). The guilty plea hearing in this case was quite brief. It covers less than 4 and 1/2 pages of transcript. In a litany of matters mentioned in that time the court told Rivers

> If you do plead guilty, you're giving up your rights to have that trial, the right to require the government to prove this charge beyond a reasonable doubt, not to the Court, but to 12 citizens who would have to decide that unanimously. The witnesses would be brought here for you to confront, not just a written summary. Mr. Kimmelman would cross-examine those witnesses against you. You could testify if you wanted to, but you always have the right to remain silent. *If the jury did convict you, you would have the right to appeal, directly and by habeas corpus.*
>
> *Do you understand all of those rights that you have?*

Appendix B (emphasis added).

The district court did not tell Rivers that his plea agreement contained an appeal-waiver provision. The district court did not tell Rivers what an appeal was. Nor did the district court explain that the right to appeal a sentence imposed after entry of a guilty plea ordinarily exists. The district court did not explain that the plea agreement purported to give up that right; its colloquy left the impression that the right was automatically forgone if one did not go to trial. The district court made no effort to determine whether Rivers understood he was giving up his appeal rights. The district court did not even ask Rivers if he had read the plea agreement. Appendix B. All of this contradicted the letter and spirit of Rule 11(b)(1)(N). The Fifth Circuit was unbothered by this disregard.

The failure to comply with Rule 11(b)(1)(N) occurred in a case involving a defendant who especially needed the explanations the rule requires. Rivers has Autism Spectrum Disorder. His autism, as it does with many who suffer from the disorder, has manifested in part as a tendency to go along to get along in the hope that acceding will lead to acceptance. *See* Appendix C. His condition created a heightened risk that he merely acceded to the existence of an appeal-waiver provision in the plea agreement. In that he exemplifies many haled into the federal criminal justice system, who have physical, psychological, intellectual, or emotional struggles

that demand we follow the rules we set. Those conditions make it critical that a district court actually explain a sentence-appeal waiver and actually determine that the defendant understands and wishes to make that waiver.

Rule 11(b)(1)(N) contemplated that the judge–the neutral, learned authority figure in the courtroom, the one without an agenda to advance–would take the time to ensure that appeal rights were not lost because of misunderstanding, lack of comprehension, or neglect. Without such care and adherence to the requirement, a system of pleas that relies on knowing decisions and informed waivers becomes impossible. The Court should grant certiorari.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: July 14, 2023.