

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERIC V. BARTOLI, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

STEVEN D. JAEGER, ESQ.
Counsel of Record for Petitioner
HEMMER WESSELS MCMURTRY
250 Grandview Drive, Suite 500
Fort Mitchell, Kentucky 41017
(859) 344-1188
sjaeger@hemmerlaw.com

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QUESTIONS PRESENTED

Mr. Bartoli was initially indicted in 2003 in the United States District Court for the Northern District of Ohio at Akron. A plea agreement was filed July 13, 2016, which reflected the wrong statutory maximum sentences. Neither the AUSA, defense counsel, nor the court recognized this mistake. The district court initially imposed a sentence that exceeds the maximum statutory sentence for Counts Two, Four and Five. During the initial appeal, none of the issues presented by then appellate counsel addressed the illegal sentence. Thus, the Sixth Circuit affirmed Mr. Bartoli's conviction and sentence.

Bartoli filed a petition pursuant to 28 U.S.C. 2255, arguing that he received ineffective assistance of counsel throughout this entire case which resulted in an incorrect and illegal sentence. He also accurately claimed that the case is tainted by prosecutorial confusion or negligence, and erroneous findings by the district court resulting in sentences that exceed statutory maximums. The government conceded that the original sentence was in fact illegal. The court vacated the original sentence and ordered resentencing, but affirmed Mr. Bartoli's conviction.

Upon resentencing, Mr. Bartoli's sentencing hearing was again marked by government misstatements concerning the statutory maximums which were again erroneously adopted by the district court. For a second time, the same district court imposed illegal sentences more than the statutory maximums allowed for Counts Four and Five. Mr. Bartoli sought to withdraw his guilty plea (which was denied), and again appealed to the Sixth Circuit. The appeals Court vacated Bartoli's

sentence, finding “it was imposed in violation of the Ex Post Facto Clause for the second time.” Unfortunately, the court decided to “withhold review of Bartoli’s other habeas claims and cabin relief to his illegal sentencing claim” and thereby allowed his plea bargain to an illegal sentence and conviction to remain.

With this backdrop in mind, this appeal presents the following question to this Court:

Whether a guilty plea should be vacated when the underlying plea bargain contains an error of law (an illegal sentence) at its core.

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PETITION FOR A WRIT OF CERTIORARI

Eric V. Bartoli, the Petitioner, respectfully asks this Court to grant a Writ of Certiorari to review the decision of the Sixth Circuit Court of Appeals (entered August 14, 2023), vacating his sentence and remanding for resentencing, but declining to address and vacate his conviction.

OPINIONS BELOW

The District Court's Original Judgment entered on December 20, 2016, is attached hereto as Appendix "A."

The Sixth Circuit Court of Appeals' Opinion, entered on March 16, 2018, appears as Appendix "B".

The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio, issued on January 03, 2021, appears as Appendix "C" to this Petition.

The Amended Judgment of the United States District Court following resentencing and entered on October 29, 2021, appears as Appendix "D" to this Petition.

The Sixth Circuit Court of Appeals' Opinion vacating his sentence and remanding for resentencing, but failing to address and vacate Bartoli's conviction was issued August 14, 2023, and was not recommended for publication. A copy of the decision appears in Appendix "E" to this petition.

The Sixth Circuit Court of Appeals' entered an Order on September 14, 2023, denying Bartoli's Petition for Rehearing *En Banc*. A copy of the order appears in Appendix "F" to this petition.

JURISDICTION

Defendant, Eric V. Bartoli, pled guilty to violating multiple statutes, including 18 U.S.C. § 371(Conspiracy), 15 U.S.C. 78(j)(b) and 78ff(a) and 17 C.F.R. 240.10b-5 (Securities Fraud), 15 U.S.C. 77e(a) and 77x (Sale of Unregistered Securities), 18 U.S.C. 1343 (Wire Fraud), 18 U.S.C. 1341 (Mail Fraud) and attempted income tax evasion. An Amended Judgment and sentence was entered on October 29, 2021, in the United States District Court, Northern District of Ohio, which contained an

illegal sentence for several counts. He filed a timely appeal to the Sixth Circuit Court of Appeals on November 08, 2021, which concluded the following on August 14, 2023:

We vacate and remand Bartoli's sentence, as it was imposed in violation of the Ex Post Facto Clause for the second time. But as we find neither a certificate of appealability nor reassignment to be appropriate, we withhold review of Bartoli's other habeas claims and cabin relief to his illegal sentencing claim.

Bartoli sought a panel rehearing and rehearing *en banc*, which was denied on September 14, 2023.

Mr. Bartoli now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Article I, § 9, cl. 3. of the United States' Constitution, which provides in relevant part that, "No bill of attainder or *ex post facto* law shall be passed." It also involves the 5th Amendment to the United States Constitution granting a right to due process and the 6th Amendment granting the right to the effective assistance of counsel.

18 U.S.C. 1341, 1343 (1994) set the relevant statutory maximum sentence for securities fraud at ten (10) years and the statutory maximum sentence for wire and mail fraud at five (5) years.

STATEMENT OF THE CASE

Eric Bartoli established Cyprus Funds, Inc., an open-end mutual fund in 1995. Cyprus was not registered with the SEC or exempt from required registration. An Indictment was returned by a federal grand jury on October 15, 2003, alleging

criminal conduct between 1995 and 1999. The alleged criminal conduct included conspiracy, the sale of unregistered securities, wire and mail fraud, money laundering, and attempted income tax evasion. Bartoli was charged with engaging in the scheme to defraud investors by various means and diverting investment funds. He is also charged with attempting to avoid his income tax responsibilities.

A Criminal Designation Form recited the statutory penalties for each count. The sentence listed on the Criminal Designation Form for Count Two exceeded the lawful statutory maximum, listing it as twenty (20) years instead of the correct ten (10) year maximum. Prior to the Sarbanes-Oxley Act, the relevant statutory maximum sentence for securities fraud was ten (10) years and the statutory maximum sentence for wire and mail fraud was five (5) years. 18 U.S.C. 1341, 1343 (1994), both amended by Pub. L. 107-204, Title IX 903(b), 116 Stat. 805 (2002). Under the *Ex Post Facto* Clause, a court is required to apply the penalties in place at the time of the relevant conduct.

At arraignment, Bartoli initially entered a plea of not guilty. Penalties or other consequences were not mentioned.

A Plea Agreement was filed July 13, 2016. It provided that the 1998 Sentencing Guidelines Manual in use at the time of completion of the offense will be used to compute the sentence. The terms of the agreement did not correctly reflect the statutory maximum sentences. The document, prepared by the government, changed the maximum penalties stated in the Criminal Designation Form for Counts Four

and Five from a five (5) year maximum to a twenty (20) year maximum, both more than the actual statutory maximum.

Despite the erroneously stated maximums for Counts Two, Four, and Five, the agreement was signed by all counsel and by Bartoli at the recommendation of his district court counsel. During the change of plea hearing, the district court incorrectly informed Bartoli of the maximum sentence he faced, parroting the maximum incorrect lengths of time set forth in the plea agreement. The court's explanation of the maximum penalties were not corrected by either the AUSA or defense counsel.

Defense counsel filed a Sentencing Memorandum that did not discuss the incorrect maximum sentences set forth in the Plea Agreement. The government filed a response, but also failed to recognize or correct the incorrect statutory maximums stated in the plea agreement. Additionally, the PSR misstated the sentencing options when it reflected that potential twenty (20) year maximum sentences were available for Counts Two, Four and Five.

Sentencing occurred on November 09, 2016. The following sentences were imposed:

Count One (18 U.S.C. § 371 – Conspiracy)	- 5 years;
Count Two (15 U.S.C. § 78(j)(b) and 78ff(a); 17 C.F.R. § 240.10b-5 - Securities Fraud)	- 20 years;
Count Three (15 U.S.C. § 77e(a) and 77x Sale of Unregistered Securities) -	- 5 years;
Count Four (18 U.S.C. § 1343 – Wire Fraud)	- 20 years;
Count Five (18 U.S.C. §1341 – Mail Fraud)	- 20 years; and
Counts Eight, Nine, Ten (Attempted Income Tax Evasion)	- 5 years each.

The total sentence was 240 months imprisonment, consisting of twenty (20) years for Counts Two, Four and Five to be served concurrently with sixty (60) months for Counts One, Three, Eight and Ten. The sentences for Counts Two, Four and Five were incorrect because they exceed the maximum statutory sentences which applied to Bartoli's behavior in the period from 1995 to 1999. The maximum statutorily allowed sentence for Count Two was ten (10) years and for Counts Four and Five were five (5) years each. Again, neither the AUSA nor defense counsel objected to those sentences. Despite being represented by counsel, Bartoli did not know to object.

Bartoli filed a Notice of Appeal on December 22, 2016. In this first appeal, none of the issues presented by appellate counsel or counsel for the government addressed the illegal sentences that exceeded statutory maximums. As a result, Bartoli's convictions and sentences were affirmed by the Sixth Circuit in *United States v. Bartoli*, 728 Fed. Appx. 424 (6th Cir. 2018).

Bartoli filed a "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct" his Sentence on August 13, 2019. Bartoli asserted he received ineffective assistance of counsel at both the district and appellate court levels, resulting in the erroneous imposition of an incorrect sentence. He sought a dismissal of all charges with prejudice arguing that his plea agreement cannot be based on an illegal sentence. The Government conceded that Bartoli's sentence should be vacated and that there must be resentencing because statutory maximums were exceeded at the original sentencing.

On February 12, 2020, the District Court granted the motion to vacate the sentence, ordering that Bartoli be transferred to the Northern District of Ohio for resentencing.

Bartoli filed an Emergency Motion for an Expedited Writ of Mandamus on March 02, 2020, docketed in the Sixth Circuit as Case 20-3244. District Judge John Adams responded, asking that the petition be denied because of the 2255 petition. Bartoli's request for the writ was denied.

Bartoli filed a supplement to the § 2255 *pro se* motion May 14, 2020, through his newly appointed counsel. Arguments included multiple ineffective assistance of counsel claims, a violation of speedy trial rights, and breach of the plea agreement.

Bartoli filed his motion for withdrawal of his guilty plea on October 06, 2020. His request argued that the plea agreement should be set aside because it contained three illegal sentences, his counsel was ineffective by not discovering them, and counsel and the court had misinformed him of the consequences of his plea.

The district court entered a Memorandum Opinion and Order on January 03, 2021. In that, the Judge recognized that:

As indicted, Bartoli's criminal conduct occurred between 1995 and 1999. Because Bartoli's criminal conduct concluded prior to enactment of the Sarbanes-Oxley Act, Bartoli faced a ten-year statutory maximum sentence for the Securities Fraud charge and a five-year statutory maximum sentence each for the Wire Fraud charge and the mail fraud charge.

Bartoli's first ground for relief – *Ex Post Facto* Clause violations – was granted in part and denied in part. The original sentence was vacated, but the conviction remained. The second, third and fifth grounds were denied (speedy trial violations,

illegal extradition, and prosecutorial misconduct, respectively). The fourth ground (ineffective assistance of counsel at sentencing) was also denied. However, in ruling, the court reiterated its agreement with the parties that use of the Sarbanes-Oxley Act's heightened maximum sentences violated the *Ex Post Facto* Clause and disadvantaged Bartoli at sentencing. Unfortunately, the court denied Bartoli the right to withdraw his plea.

A resentencing hearing was ultimately held on October 29, 2021. Bartoli was resentenced as follows:

Count One (18 U.S.C. § 371 – Conspiracy)	- 5 years;
Count Two (15 U.S.C. § 78(j)(b) and 78ff(a); 17 C.F.R. § 240.10b-5 - Securities Fraud)	- 10 years;
Count Three (15 U.S.C. § 77e(a) and 77x Sale of Unregistered Securities) -	- 5 years;
Count Four (18 U.S.C. § 1343 – Wire Fraud)	- 10 years;
Count Five (18 U.S.C. §1341 – Mail Fraud)	- 10 years; and
Counts Eight, Nine, Ten (Attempted Income Tax Evasion)	- 5 years each.

The sentence for Count Five, now for the first time, was ordered to be served consecutively to the other sentences. The total sentence was still 240-months. The sentence remained incorrect and illegal because statutory maximums for Counts Four and Five were again exceeded. Bartoli also claimed that if legal sentences were imposed, such were already completely served.

Two Notices of Appeal were filed. Bartoli appealed “the Court’s decisions and sentencing of October 29, 2021.” Defense counsel filed an appeal of the “final judgment and sentence” as well. Both were filed November 08, 2021. This time, the Sixth Circuit again vacated Bartoli’s sentence, finding “it was imposed in violation

of the Ex Post Facto Clause for the second time.” Unfortunately, the Court decided to also “withhold review of Bartoli’s other habeas claims and cabin relief to his illegal sentencing claim,” thereby allowing his plea bargain to an illegal sentence and conviction to remain in place. Bartoli has been incarcerated since 2013.

This Petition follows.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court’s decision to vacate and remand for resentencing, without also vacating the illegal plea bargain supporting it, was wrong, and creates a clear conflict among the courts of appeals. The issue presented is an important one to the integrity of the Federal system and, for the reasons set forth below, this Court should grant this Writ of Certiorari to correct an obvious Constitutional injustice.

I. The Decision of the Sixth Circuit Court of Appeals Creates a Conflict with Decisions of Other Courts of Appeal.

Here, the Sixth Circuit panel decided to allow Bartoli’s conviction to remain despite that conviction being based on ineffective assistance of counsel that leads to a guilty plea underlined by an illegal sentence. With its decision in this case, the Sixth Circuit separates its doctrine from that of other Federal Circuit Courts about whether a defendant can enter a plea bargain to an undisputed illegal sentence.

Other Circuits have ruled that when a Defendant acts on the faulty advice of counsel and agrees to plead guilty after being incorrectly informed about an illegal sentence, the plea bargain is illegitimate and must be vacated. The Third Circuit

declared that “a defendant cannot bargain for an illegal sentence.” *Baker v. Barbo*, 177 F. 3d 149, 155 (3d Cir. 1999). Shortly after, the Eighth Circuit followed and ruled that there can be no plea bargain to an illegal sentence. See *United States v. Greatwalker*, 285 F. 3d 727, 729-730 (8th Cir. 2004). Like in this case, the defendant in *Greatwalker* received an illegal sentence that was agreed to by the parties in a Plea Agreement. The court explained:

Even when a defendant, prosecutor, and court agree on a sentence, the court cannot give the sentence effect if it is not authorized by law. Thus, when a defendant has entered a plea bargain contemplating an illegal sentence, the defendant is generally entitled to withdraw the guilty plea. *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2004), citing *Smith v. United States*, 321 F.2d 954, 955-56 (9th Cir. 1963).

The Eighth Circuit ruled that following that withdrawal, the defendant should be returned to his initial position. (*Id.*). The Court vacated Greatwalker’s conviction on his guilty plea, vacated his illegal sentence, and remanded for further proceedings. This same outcome was denied Bartoli by the Sixth Circuit.

The Ninth Circuit also allowed that “[g]enerally... a defendant who has entered into a plea bargain contemplating an illegal sentence may withdraw his guilty plea.” *Johnson v. Uribe*, 682 F.3d 1238, 1245 (9th Cir. 2012); see also *Smith v. United States*, 321 F.2d 954, 955-56 (9th Cir. 1963). The Ninth Circuit further explained that:

It is well-established that “in some situations it may be that resentencing alone will not be full redress for the constitutional injury...”

The Sixth Amendment violation here caused the entire plea negotiation process between Johnson and the prosecution to be conducted based on an erroneous sentencing calculation, weighted against Johnson. As a result, he

is entitled to be returned to that pre-plea stage and proceed under the correctly-calculated sentencing range. *Johnson v. Uribe*, 682 F. 3d at 1245.

Again, the Sixth Circuit has twice failed to recognize this relief, and thus, has sparked a breakdown in Circuit uniformity. Review by this Court must be granted to resolve the conflict between the Sixth Circuit's holding in this case and the prior rulings of the other Circuits, and provide Bartoli the relief to which he is entitled.

II. The Sixth Circuit's decision is incorrect.

The Sixth Circuit's decision below is incorrect. After all, established precedent from this Court requires that to satisfy due process, at a minimum, the defendant must have a "sufficient awareness of the relevant circumstances and likely consequences" of his plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). For a plea to be intelligent and knowing, the district court must ensure a defendant is aware of the direct consequences of his guilty plea. *Boyd v. Yukins*, 99 Fed. Appx. 699, 702-03 (6th Cir. 2004). Generally, a proper plea colloquy by the district court cures misunderstandings the defendant may have about the plea's consequences. *Ewing v. United States*, 651 Fed. Appx. 405, 410 (6th Cir. 2016) citing *Ramos v. Rogers*, 170 F.3d 560, 565 (6th Cir. 1999). None of this happened in this case.

Instead, Bartoli was continuously ill-advised by his 2016 counsel, by the government, and by the district court throughout these proceedings. He did not know the true consequences of his plea when signing the plea agreement, when entering his guilty plea, or when he was twice sentenced. When the errors were discovered, he sought to withdraw the guilty pleas. The district court denied the motion. The court

emphasized that the plea can be withdrawn only after plain error review because Bartoli had not raised it previously before the district court or on appeal. Relying on *United States v. Kennedy*, 493 Fed. Appx 615, 616 (6th Cir. 2012), the district court concluded that Bartoli failed to establish that the error affected his substantial rights because he failed to demonstrate he would not have entered the plea but for the error. This finding is wrong, and completely contradicts the record below.

There is no question on the face of this record that defense counsel, the AUSA, and the court on multiple occasions failed to correct the errors referencing statutory maximums and Bartoli's sentence. There is also no question that Bartoli's rights were substantially affected by the misstatements of the court and ineffective performance of his counsel during this case. When a plea is not voluntary, intelligent, and knowing, it is "undoubtedly an impairment on defendant's substantial rights" and "for the plea to be voluntary, the defendant must understand the direct consequences of a plea, which includes the maximum and minimum sentences that may be imposed." *United States v. Hogg*, 723 F.3d 730, 739 (6th Cir. 2013).

In the Sixth Circuit, the Court reviews plea agreements as if they were contracts and employs traditional principles of contract law. *United States v. Lukse*, 286 F.3d 906, 909 (6th Cir. 2002). More plainly, "plea agreements are contractual in nature. In interpreting and enforcing them, this Court uses traditional principles of contract law." *Id.*; See also *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991). The Sixth Circuit's decision is wrong because it failed to apply these standards to Bartoli's plea agreement. If the Court correctly applied contract principles to Bartoli's plea

agreement, then it would have determined that performance based on an illegal sentence in excess of the statutory maximum, was impossible. As the Sixth Circuit directed, “when a defendant agrees to a sentence that is not permitted by law, courts have found the plea bargain is illegitimate.” *Pickens v. Howe*, 549 F. 3d 377, 381 (6th Cir. 2008), citing *United States v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002); *Baker v. Barbo*, 177 F.3d 149, 155 (3d Cir.), *cert. denied*, 528 U.S. 911, 120 S. Ct. 261, 145 L. Ed. 2d 219 (1999); *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973). Thus, the illegal plea agreement was void from its inception.

It is important to note that when addressing Bartoli’s over-sentencing in 2016, the district court found “no question that the application disadvantaged Bartoli as he was sentenced to a statutory maximum penalty for each count that was longer than that which he actually faced.” Certainly, then, the same must be true when Bartoli was resentenced again by the same district court to more than the statutory maximums for a second time in 2021. Nevertheless, the district court did not cure any misstatements in the Plea Agreement or otherwise about the plea consequences, and instead confirmed them without correction and imposed another illegal sentence. Likewise, the Sixth Circuit has twice failed to vacate Bartoli’s plea and conviction.

Without full knowledge of the correct sentence he faced, Bartoli’s guilty plea should not have been accepted in the first place because it was not intelligent or knowing. Because it was based on an illegal sentence, it should have been set aside pursuant to Bartoli’s motion to withdraw the plea filed as a part of the §2255 proceedings. Instead of opting for a simple resentencing, the district court should

have set aside the guilty plea and dismissed the charges. Its failure to do so, and the Sixth Circuit Court of Appeals refusal to do so now, calls for review by this Court.

III. This Case Presents a matter of significant importance.

The errors in the sentencing maximums upon which Bartoli is sentenced and the ineffective assistance of counsel and ineffective oversight by the trial and appellate courts “are so rank that they should have been apparent to the... judge without objection... The errors strike at the fundamental fairness, honesty, or public perception of the [proceeding].” *United States v. McIntyre*, 445 Fed. Appx 830, 831 (6th Cir. 2011), citing *United States v. Causey*, 834 F.2d 1277, 1281 (6th Cir. 1987). As such, this case involves a question of exceptional importance, i.e., whether an error of law pertaining to an illegal sentence forming the foundation of a plea bargain, can stand to form the basis of a constitutional guilty plea. This is more complicated especially when that plea is reached with the ineffective assistance of counsel coupled with erroneous assertions by the government and the court about the possible consequences throughout the proceedings. Existing case law makes clear that this is not permitted.

In addition, Court’s recognize that plea bargaining:

is a fundamental part of our criminal justice system as presently structured. It produces prompt adjudication of many criminal prosecutions, thus reducing the period of pre-trial detention for those unable to make bail and permitting more extensive consideration of the appropriate disposition. These benefits flow, however, from the defendant's waiver of almost all the constitutional rights we deem fundamental. There must accordingly be safeguards to insure that the waiver is knowledgeable and voluntary, *Machibroda v. United States*, 368 U.S. 487 (1962). See *Correale v. United States*, 479 F. 2d 944, 947 (1st Cir. 1973).

This issue is especially important in light of the fact that more than 95 percent of all federal criminal cases, and more than 95 percent of all state felony cases, are resolved by plea agreements. Indeed, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). Allowing the district court and Sixth Circuit's rulings in this case to remain will undermine such safeguards and allow the plea-bargaining process to be tainted. As such, this Court should grant review to address this crucial issue before it.

CONCLUSION

For all the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,



STEVEN D. JAEGER (KBA 92085)
HEMMER WESSELS MCMURTRY
250 Grandview Drive, Suite 500
Fort Mitchell, Kentucky 41017
(859) 344-1188
sjaeger@hemmerlaw.com
Counsel of Record for Petitioner

Submitted: November 16, 2023