No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

RODWICK F. ABADAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

1. Did the Ninth Circuit err when it failed to find that sentencing errors that violated Mr. Abadam's Second Amendment rights can amount to a "miscarriage of justice" allowing appellate review, even if there is a plea agreement containing an appellate waiver?

   A. Application of U.S.S.G. §2D1.1(b)(1) in this case is barred by the Second Amendment.

   B. Sentencing error in this case equates to a "Constitutional violation" and/or "miscarriage of justice" that justifies the disregard of the appellate waiver contained in the plea agreement.

PARTIES

Rodwick F. Abadam is the petitioner. The United States of America is the respondent.

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Petitioner, Rodwick F. Abadam respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The order dismissing appeal entered by the United States Court of Appeals for the Ninth Circuit opinion is captioned as *United States of America v. Rodwick F. Abadam,* No. 22-10254. A copy of the order is attached as Appendix A.

JURISDICTIONAL STATEMENT

The order dismissing appeal was filed on November 14, 2023 by the United States Court of Appeals for the Ninth Circuit [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and is timely under Rule 13.1 of the Rules of Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISION INVOKED

Implicated in this case is the Second Amendment to the United States Constitution, which provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Also implicated in this case is the Fifth Amendment to the United States Constitution, which provides in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty, or property without due process of law . . . .

Also implicated is Section 1 of the Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 3, 2022, an Indictment was filed in CR 22-00009 HG (D. Hawai'i) charging Rodwick Abadam with three counts: Count 1, Distribution of 50 Grams or More of Methamphetamine on or about June 3, 2021 in violation of 21 U.S.C. §§ 841(a)(1), 841 (b)(1)(A); Count 2, Distribution of 50 Grams or More of Methamphetamine on or about September 21, 2021 in violation of 21 U.S.C. §§ 841(a)(1), 841 (b)(1)(A); and Count 3, Distribution of 50 Grams or More of Methamphetamine on or about December 2, 2021 in violation of 21 U.S.C. §§ 841(a)(1), 841 (b)(1)(A).

On June 15, 2022, Mr. Abadam pled guilty to Count 2 of the indictment pursuant to a plea agreement. The Plea Agreement contained the following Factual Stipulations:

> 8. The defendant admits the following facts and agrees that they are not a detailed recitation, but merely an outline of what happened in relation to the charges to which the defendant is pleading guilty:
>
> a. On or about September 21, 2021, within the District of Hawaii, the defendant knowingly and intentionally distributed approximately two pounds and five ounces of methamphetamine to another individual in exchange for $14,000.
>
> b. The methamphetamine was purchased from the defendant by a cooperating individual who then turned it over to law enforcement. The methamphetamine was sent to the Drug Enforcement Administration Laboratory for testing. Laboratory Analysis confirmed it was 99% pure methamphetamine hydrochloride with a new weight of 1,034 grams.

The plea agreement also contained an appellate waiver provision as follows:

13. The defendant is aware that he has the right to appeal his conviction and the sentence imposed. The defendant knowingly waives the right to appeal, except as indicated in subparagraph "b" below, his conviction and any sentence within the Guidelines range as determined by the Court at the time of sentencing, and any lawful restitution order imposed, or the manner in which the sentence or restitution order was determined, on any ground whatsoever, in exchange for the concessions made by the prosecution in this Agreement. The defendant understands that this waiver includes to right to assert any and all legally waivable claims.

a. The defendant also waives the right to challenge his conviction or sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255, except that the defendant may make such a challenge (1) as indicated in subparagraph "b" below or (2) based on a claim of ineffective assistance of counsel.

b. If the Court imposes a sentence greater than specified in the guideline range determined by the Court to be applicable to the defendant, the defendant retains the right to appeal the portion of his sentence greater than specified in the guideline range and the manner in which that portion was determined and to challenge that portion of his sentence in a collateral attack.

c. The prosecution retains its right to appeal the sentence and the manner in which it was determined on any of the grounds stated in Title 18, United States Code, Section 3742(b).

On August 1, 2022, the draft PSR was filed. It calculated a base offense level of 36 for the drug amounts. Additionally, the draft PSR imposed a 2-level increase under U.S.S.G. §2D1.1(b)(1), noting,

> . . . According to USSG §2D1.1, Application Note 11(A), this enhancement should be applied unless it is "clearly improbable" that the weapon was connected with the offense. . . . In this case, on 01/25/2022, investigators recovered two semiautomatic pistols and ammunition, along with $100,000.00 in U.S. currency, from the defendant's safe, which was located at his girlfriend's residence. It is noted that the defendant stopped at this residence immediately prior to distributing approximately 1 pound of methamphetamine to the UC on 12/02/2021, and immediately prior to a

> scheduled 2-pound methamphetamine transaction with the UC on 01/25/2022. Further, a canine sniff alerted to the odor of narcotics on the safe. Additionally, the pistols were "ghost guns" that did not have serial numbers or registrations, even though the defendant was permitted to legally purchase firearms.
>
> Moreover, the presentence investigation revealed that the defendant was unemployed for the past 20 years, and the defendant agreed to forfeit the $100,000.00 as drug proceeds. Consequently, it is not clearly improbable that the two firearms were connected with the instant offense. *See United States v. Willard*, 919 F.2d 606, 609-10 (9th Cir. 1990) (holding that firearms and drugs need not be found in proximity to each other to support a dangerous weapon enhancement; rather, appropriate considerations include the number and kind of weapons and the length and extent of the defendant's involvement in selling drugs). Therefore, a 2-level increase is applied. **+2**

On August 23, 2022, Mr. Abadam filed his *Statement To Draft Presentence Report* under seal. In that document, Mr. Abadam made two objections/statements: First, he objected to the addition of two points pursuant to USSG §2D1.1 for his possession of a firearm in regard to the offense. Second, he stated, "Should the Court determine that the relationship of the firearms to the underlying offense was clearly improbable then Mr. Abadam should be afforded the benefit of 'Safety Valve' 18 U.S.C. §3553(f); USS[G] 5C1.2."

On September 7, 2022, the final PSR was filed. It again calculated a base offense level of 36. It rejected the Defendant's objection to the U.S.S.G. §2D1.1(b)(1) enhancement, but did not address Mr. Abadam's request for safety valve relief. It also added a 2-point increase under USSG §3C1.1 (obstruction of justice) for Mr. Abadam leaving Sand Island Treatment Center without authorization prior to sentencing. With a base offense level of 36, plus adding two 2-point enhancements,

minus 3 points for acceptance of responsibility, the final PSR calculated a new total offense level of 37 and a criminal history category of I. The statutory provisions were noted to be 10 years to life imprisonment. The Guideline provisions were 210 to 262 months. The PSR recommended a downward variance to an 180-month sentence.

On September 29, 2022, Mr. Abadam was sentenced. At that hearing, the following discussion took place:

> THE PROBATION OFFICER- Your Honor, I just wanted to check on the record that the defendant's -- it seems obvious, but the defendant's objection to the 2-level enhancement for the possession of the firearm was overruled by the Court?
>
> THE COURT: Yes.
>
> THE PROBATION OFFICER- And that 2D1.1(b)(1) does apply --
>
> THE COURT: Yes.
>
> THE PROBATION OFFICER- -- as it did? And then also I'm not sure if I missed it, but I'm not sure if the Court declared on the record the total offense level and the criminal history category. So the total offense level --
>
> THE COURT: If I did miss that, which is certainly possible, the court finds that the total offense level is 37 and the criminal history category is 1.
>
> And I have reviewed the question that was raised with respect to the guns, and as I said earlier, I have adopted the conclusions of the probation officer's presentence report. And I want to note that the burden is on the defendant to prove that it was clearly improbable that he possessed a firearm in connection with the offense, and the court has found that there is -- that burden has not been carried. The evidence before the court makes it probable that he did have those guns in connection with the offense, and so that is the finding of the court. . . .

The court did not address Mr. Abadam's request for safety valve relief.

The Court granted a downward variance and imposed a sentence of 180 months incarceration, supervised release for five years, a special assessment of $100.00, along with an order of forfeiture of $100,000 seized in connection with this case.

On October 5, 2022, Mr. Abadam timely appealed to the Ninth Circuit Court of Appeals. On August 30, 2023, Mr. Abadam filed his opening brief, raising two issues:

> A. Is Mr. Abadam's appeal barred due to the appellate waiver provision of the plea agreement?
>
> B. If it is not, should this case be remanded for resentencing as the trial court: (i) improperly added 2 points for being in possession of a firearm pursuant to USSG § 2D1.1(b)(1) and (ii) improperly failed to award Defendant a reduction for qualifying for "safety valve" reduction?

See Def. OB at page 5-6 (22-10254 Docket #18).

In this brief, Mr. Abadam argued that appellate review was available in this case despite the appeal waiver provision in the plea agreement due to the violation of Defendant's Second Amendment rights. In support, Mr. Abadam cited the applicable two-step standard of review for firearm restrictions as set out in *New York State Rifle &Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), which provided, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command." *Bruen,* 597

U.S. at 16 (citation omitted).

Mr. Abadam acknowledged that the Ninth Circuit in *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023) held that applying an enhancement under U.S.S.G. § 2D1.1(b)(1) was consistent with the Second Amendment. *Alaniz*, 69 F.4th at 1129. However, Mr. Abadam argued that *Alaniz* was wrongly decided for a number of reasons, including (1) the cases cited by *Alaniz* were not historical analogues to the case at bar- an enhancement for possession of a firearm while committing a federal drug offense; (2) that *Alaniz* failed to address whether the application of U.S.S.G. §2D1.1(b)(1) as applied to a specific defendant 'is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms;' (3) the Guidelines themselves first appeared in 1987 and are certainly not, on their own, 'longstanding' for purposes of demarcating the scope of a constitutional right and (4) U.S.S.G. §2D1.1 penalizes firearm possessors in that they receive a higher guideline range than those who do not possess such weapons and thus violates such a possessor's right to equal protection.

Mr. Abadam argued that because the district court's erroneous U.S.S.G. §2D1.1 enhancement was Constitutional in nature and arose to a miscarriage of justice, the enhancement under U.S.S.G. § 2D1.1(b)(1) should be reversed. Further, the denial of the "safety valve" reduction should also be reversed as it was

apparently based on the firearm enhancement applied under §2D1.1(b)(1).[1]

On September 29, 2023, the Government filed its *Motion For An Order Dismissing Appeal And Memorandum In Support of Motion,* arguing in part,

> Abadam's argument is foreclosed by this Court's decision in *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023), in which it held that U.S.S.G. §2D1.1(b)(1) is constitutional because "it clearly comports with a history and tradition of regulating the possession of firearms during the commission of felonies involving a risk of violence." 69 F.4th at 1129. *Alaniz* addresses the very enhancement Abadam challenges and has already rejected the arguments Abadam is trying to relitigate.

See No. 22-10254, Docket #28, pages 7-8.

On October 14, 2023, Mr. Abadam filed his Response, reiterating his arguments indicated that *Alaniz* was wrongly decided and that the facts of this case warrant looking past the appellate waiver to grant relief. *See* No. 22-10254, Docket #30. On November 14, 2023, the Ninth Circuit granted the Government's Motion to Dismiss. The entire order is as follows:

> Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 28) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Contrary to appellant's contention, the district court's application of a sentencing enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) did not render his sentence unconstitutional under the Second Amendment. *See United States v. Alaniz*, 69 F.4th 1124, 1130 (9th Cir. 2023) (holding that § 2D1.1(b)(1) is constitutional under the two-part test set forth by *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)). Moreover, even if

[1] *See United States v. Medbery*, 835 Fed.Appx. 927, 928 (9th Cir. 2021)(Mem. Op.)("The district court erred in concluding that Defendant was ineligible for 18 U.S.C. § 3553(f)'s 'safety valve' because he had received U.S.S.G. § 2D1.1(b)(1)'s firearm enhancement").

this court recognized a miscarriage of justice exception to the enforcement of an appellate waiver, no such exception applies here.

See No. 22-10254, Docket #34.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit erred when it failed to find that sentencing errors that violated Mr. Abadam's Second Amendment rights can amount to a "miscarriage of justice" allowing appellate review, even if there is a plea agreement containing an appellate waiver.

A. Application of U.S.S.G. §2D1.1(b)(1) in this case is barred by the Second Amendment.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This Court has recently clarified the test to determine if a law violates the Second Amendment: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " *Bruen*, 597 U.S. at 16 (citation omitted).

U.S.S.G. §2D1.1(b) provides in part, "Specific Offense Characteristics . . . (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels."

Whether U.S.S.G. § 2D1.1(b) runs afoul of the Second Amendment was recently addressed by the Ninth Circuit in *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023).

In *Alaniz*, the Court held that the "plain text" first step of the *Bruen* test was apparently satisfied in regard to U.S.S.G. § 2D1.1(b). "Alaniz argues that U.S.S.G. § 2D1.1(b)(1) violates his Second Amendment right by punishing him for lawfully possessing firearms. We assume, without deciding, that step one of the *Bruen* test is met." *Id.* at 1128-29. The *Alaniz* panel continued, "But we find § 2D1.1(b)(1) constitutional under step two because it clearly comports with a history and tradition of regulating the possession of firearms during the commission of felonies involving a risk of violence." *Alaniz*, 69 F.4th at 1129. The *Alaniz* panel believed that the "historical tradition" was "well-established," holding,

> Notably, several States enacted laws throughout the 1800s that increased the severity of punishment for certain felonies when weapons were possessed, but not necessarily used, during the commission of the crime. *See, e.g., Commonwealth v. Hope*, 39 Mass. (22 Pick.) 1, 9-10 (1839) (analyzing an 1805 statute that aggravated burglary to the first degree when a defendant possessed a weapon); *People v. Fellinger*, 24 How. Pr. 341, 342 (N.Y. Gen. Term 1862) (same); *State v. Tutt*, 63 Mo. 595, 599 (1876) (same); *United States v. Bernard*, 24 F. Cas. 1131, 1131 (C.C.D.N.J. 1819) (discussing a New Jersey statute that punished the possession and exhibition of a firearm during the robbery of a postal worker).

Id. at 1129.

Respectfully, none of these cases are historical analogues for an enhancement for possession of a firearm while committing a federal drug offense. For example,

the court in *People v. Fellinger* was concerned the validity of a verdict for a greater offense than the defendant was charged with, and noted that the "offense has been so altered by our statute from the common law, that, to find the degree of the offense, it is necessary that the words or substance of the statute should be used in the description, and if not, then the indictment is fatally defective[.]" *Fellinger*, 24 How. at 344. The statute in question apparently called for a higher range of punishment, if "there shall be a human being in the house, and that the offense be committed in the night time and with intent to commit a crime, but also connects with it the mode by which burglary is effected to be by breaking into the house, either armed or with a confederate." *Id.*

The 1862 *Fellinger* decision was made 83 years after the Second Amendment was ratified in 1791,[2] and does not shed light on the framer's intent or the state of the law at that time. Other cases cited in *Alaniz* reference statutes, enacted years after the formation of our country, by various states concerning offenses that may be more serious if violence, or being armed, occurs. *See State v. Tutt*, 63 Mo. 595, 599 (1876)(Decision of Missouri Supreme Court 85 years after ratification of Second Amendment cited to New York case listing multiple ways of committing burglary in the first degree, including "being armed with some dangerous weapon"); *United*

[2] *See Wolford v. Lopez*, 2023 WL 5043805 at page 12 (D. Haw. 8/8/23)("Ratified in 1791, the Second Amendment reads: 'A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' U.S. CONST. amend. II").

States v. Bernard, 24 F. Cas. 1131, 1131 (C.C.D.N.J. 1819)(One paragraph opinion, stating in full: "In this case of Bernard and others, indicted and found guilty of robbing the mail near New Brunswick (Trenton, N.J. 1819, before WASHINGTON, Circuit Justice), the principle was recognized that the possession and exhibition of dangerous weapons in effecting the robbery of the mail was within the 2d clause of the 19th section of the at of congress of April 30th, 1810 [2 Stat. 598]"). However, none of these cases refer to statutes that were in place at the time of the Second Amendment's ratification. Nor, do they have anything to do with drugs or conspiracy of any kind. They are simply not analogues of USSG § 2D1.1.[3] Respectfully, *Alaniz* was wrongly decided and should be overruled.

Further, recent cases from other circuits bring *Alaniz* into question. In *Range*

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[3] The same is true for other cases cited in *Alaniz* that focus on the possession of weapons in regard to public affrays. *See Simpson v. Tennessee*, 13 Tenn. 356, 358 (Tennessee 1833)("[I]t seems certain, that in some cases, there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offense at common law, and is strictly prohibited by many statutes")(citation omitted); *State v. Huntly*, 25 N.C. 418, 423 (N.C. 1843)("[I]t is to be remembered that the carrying of a gun per se constitutes no offense. . . . It is the wicked purpose- and the mischievous result- which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such a manner as naturally will terrify and alarm, a peaceful people"); *O'Neill v. State,* 16 Ala. 65 (Alabama 1849) ("An affray is the fighting of two or more persons in some public place, but not quarrelsome words merely, will constitute this offense. . . . It is probable, however, that if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offense, without coming to actual blows").

v. Attorney General, 69 F.4th 96 (3rd Cir. 2023), a convicted felon filed a declaratory action that he be allowed to purchase a firearm. This was denied by the district court and was affirmed by a panel of the Third Circuit. *En banc*, the Third Circuit reversed, holding that, despite his prior false statement to obtain food stamps conviction, Range remained among "the people" protected by the Second Amendment. *Range*, 69 F.4th at 98. As noted above, the Second Amendment similarly applies to a person who receives an enhancement for possession of a firearm under § 2D1.1. *See Alaniz*, 69 F.4th at 1128-1129 ("Alaniz argues that U.S.S.G. § 2D1.1(b)(1) violates his Second Amendment right by punishing him for lawfully possessing firearms. We assume, without deciding, that step one of the *Bruen* test is met").

The Third Circuit noted, "After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. 142 S.Ct. at 2134-35. If it does, the government now bears the burden of proof: it 'must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.' *Id.* at 2127." *Range*, 69 F.4th at 101. "To preclude Range from possessing firearms, the Government must show that § 922(g)(1), as applied to him, 'is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.' *Id.* at 2127.") *Range*, 69 F.4th at 103. That was not done in Mr. Abadam's case.

The *Range* court further noted that the 1961 enactment of § 922(g)(1) did not

satisfy the Government's burden as it was not " 'longstanding' for purposes of demarcating the scope of a constitutional right." *See Range*, 69 F.4th at 104. If a 1961 statute is not " 'longstanding' for purposes of demarcating the scope of a constitutional right," then the Federal Sentencing Guidelines, which first appeared in 1987[4] certainly cannot be 'longstanding' for purposes of demarcating the scope of a constitutional right."

In *United States v. Daniels*, No. 22-60596 (5th Cir. 2023), the Fifth Circuit reversed a conviction of a defendant convicted of 18 U.S.C. § 922(g)(3), which made it unlawful for an individual to be an "unlawful user" of a controlled substance. In examining statutes outlawing drunkenness while using a firearm, the Fifth Circuit noted that,

> "Between 1868 and 1883, three states prohibited carrying firearms while intoxicated: Kansas, Missouri, and Wisconsin.[17] Missouri's law was challenged under the state constitution but was upheld by the Missouri Supreme Court. *State v. Shelby*, 2 S.W. 468 (Mo. 1886). The opinion acknowledged that the state constitution "secure[d] to the citizen the right to bear arms in the defense of his home, person, and property." Id. at 469. But the court reasoned that if the state could regulate the "manner in which arms may be borne," there is "no good reason . . . why the legislature may not do the same thing with reference to the condition of the person who carries such weapons." Id. The ban on intoxicated carry was therefore "in perfect harmony with the constitution." Id.
>
> Those laws come closer to supporting § 922(g)(3), but they are notably few. The *Bruen* Court doubted that three colonial-era laws could suffice to show a tradition, let alone three laws passed eighty to ninety years after the Second

[4] *See* USSG Introduction and Authority Chapter 1, Part A ("Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000").

Amendment was ratified. *See* 142 S.Ct. at 2142.

Daniels, 22-60596 at 14-15.

The *Alaniz* court relied upon "laws throughout the 1800s that increased the severity of punishment for certain felonies when weapons were possessed, but not necessarily used, during the commission of the crime," citing to State decisions in Massachusetts in 1839, New York in 1862, Missouri in 1876 and New Jersey in 1819. *Alaniz*, 69 F.4th at 1129. However, following *Bruen* and *Daniels,* such post-colonial 19th Century decisions are inadequate to establish whether §2D1.1(b)(1) enhancement "is consistent with this Nation's historical tradition of firearm regulation."

In the present case, the Government presented no evidence, that, as applied to Mr. Abadam, a historical tradition existed that would justify Defendant's penalty under USSG §2D1.1 for possessing these firearms. Indeed, no evaluation was made of this issue in PSRs, by the parties or by the trial court. Due to this failure, plain error occurred. Remand is necessary for the Government to shoulder its burden in regard to the *Bruen* factors. *See United States v. Chester*, 628 F.3d 673, 468 (4th Cir. 2010), *recognized as abrogated on other grounds*, *United States v. Hill*, 2023 WL 8238164 at *5 (E.D. Va. 11/28/23)(The Fourth Circuit remanded case "to afford the government an opportunity to shoulder its burden and [the defendant] an opportunity to respond" to challenge to §922(g)(9)).

Additionally, USSG §2D1.1 penalizes firearm possessors in that they receive

a higher guideline range than those who do not possess such weapons. Such disparate treatment is a violation of Defendant's guarantee of equal protection and due process under the law and also raises the sentencing error in this case to a "Constitutional" level warranting a disregard of the appellate waiver in this case. *See generally Baxstrom v. Herold,* 383 U.S. 107, 111 (1966)("[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made").[5]

B. Sentencing error in this case equates to a "Constitutional violation" and/or "miscarriage of justice" that justifies the disregard of the appellate waiver contained in the plea agreement.

While the term "appellate waiver" is a "useful shorthand" for clauses in plea agreements, "it can misleadingly suggest a monolithic end to all appellate rights. In fact, however, no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). For example, appellate waiver in a plea agreement will not be enforced if to enforce it would result in a "miscarriage of justice." *See United States v. Wells*, 29 F.4th 580, 583-584 (9th Cir.

[5] *See also United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139 (9th Cir. 2023)("The Fifth Amendment provides that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.' U.S. CONST. amend. V. The Supreme Court has determined that 'the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.' *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)").

2022)("[W]hen the language of a plea agreement is clear and '[a]bsent some miscarriage of justice,' we 'will not exercise [the] jurisdiction to review the merits of [an] appeal if we conclude that [the defendant] knowingly and voluntarily waived the right to bring the appeal')(citation omitted); *United States v. Teeter,* 257 F.3d 14, 25 (1st Cir. 2001)("Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver. As a subset of this premise, we think that the same flexibility ought to pertain when the district court plainly errs in sentencing")(footnoted omitted).

Further, Constitutional violations have been held not to be barred by appellate waiver. *See Wells*, 29 F.4th at 587 ("[W]e conclude that a waiver of the right to appeal a sentence does not apply if (1) the defendant raises a challenge that the sentence violates the Constitution; (2) the constitutional claim directly challenges the sentence itself; and (3) the constitutional challenge is not based on any underlying constitutional right that was expressly and specifically waived by the appeal waiver as part of a valid plea agreement")(footnote omitted).

Here, as indicated *supra*, the application of a two-level enhancement for possession of a firearm under U.S.S.G. §2D1.1 in this case is Constitutional error – thus warranting appellate review, even in the presence of an appellate waiver. Further, to allows such an enhancement would result in a "miscarriage of justice" as

a person is being enhanced in violation of his Second Amendment rights. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018)("In the ordinary case . . . the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings").

Because to enforce the appellate waiver in this case would amount to a "miscarriage of justice," and/or a Constitutional violation, the plea agreement's waiver of appeal provision in this case should be disregarded. Respectfully, certiorari should be granted this Court should determine that the application of U.S.S.G. §2D1.1(b)(1)/denial of safety valve reduction was error in this case, or in the alternative, to remand to the trial court for the Government to present evidence that U.S.S.G. §2D1.1(b)(1) was, as to this defendant, part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.

CONCLUSION

Pursuant to Sup.Ct. Rule 10(c), because the Ninth Circuit in *Alaniz* has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, this Court should grant certiorari.

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Respectfully submitted,

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