No._____

IN THE SUPREME COURT OF THE UNITED STATES

MICHEAL LEE VILLAMONTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

In the present case, the Ninth Circuit concluded – consistent with an approach that only the Fifth Circuit has adopted – that it would not recognize a miscarriage of justice exception to the appellate waiver doctrine in federal criminal cases. Contrarily, however, at least two federal courts of appeals – the First Circuit in United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001), and the Third Circuit in United States v. Khattak, 273 F.3d 557 (3d Cir. 2001), have recognized broad miscarriage of justice exceptions to the doctrine.

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioner's request to recognize a miscarriage of justice exception to the appellate waiver doctrine conflict with the First Circuit's rule in Teeter and the Third Circuit's rule in Khattak?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Central District of California, United States of America v. Micheal Lee Villamonte, No. 2:19-cr-00568-AB-1. The district court entered judgment on January 12, 2023.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Micheal Lee Villamonte, No. 23-50013. The Ninth Circuit entered judgment on August 18, 2023. It denied Petitioner's motion for en banc reconsideration and panel reconsideration on December 1, 2023.

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Petitioner Micheal Lee Villamonte respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on August 18, 2023.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished dispositive order and entered judgment on August 18, 2023, affirming Petitioner's conviction and sentence.[1] App. 1. The Ninth Circuit later denied Petitioner's

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[1] A copy of the dispositive order is included in the Appendix. See App. 1 (United States v. Villamonte, No. 23-50013 (9th Cir. Aug. 18, 2023) (unpublished)).

motion for reconsideration en banc and panel reconsideration on December 1, 2023. App. 53.

JURISDICTION

The Ninth Circuit entered judgment in this case on August 18, 2023, and denied reconsideration en banc on December 1, 2023. App. 1, 53. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3; S. Ct. Miscellaneous Order, July 19, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Second Amendment reads as follows: "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."

STATEMENT OF THE CASE

Petitioner draws the following factual rendition from the district court record, including the Modified Presentence Report that he concomitantly lodges under seal with the Court.

A. Petitioner Grows Up in a Single-Parent Household Under Trying Circumstances After His Father Dies, and He Later Drops Out of High School, But Through Experience Acquires Construction-Related Skills That Position Him to Someday Become a Licensed Contractor

Petitioner Micheal Lee Villamonte was born in Los Angeles in 1989. His

parents were noncitizens who had entered the United States without being authorized legally to do so. App. 38, 184.

When he was only three years old, Petitioner's father died, predicably but sadly causing chaos in the family's life. That included his mother's ultimately having eight children younger than Petitioner and becoming addicted to methamphetamine. App. 38-39.

Sadly, as the oldest child, Petitioner became responsible for quasi-parental duties. But those soon became overwhelming because his mother abandoned her family outright when Petitioner was fifteen years old, departing from Los Angeles to return to her native country of Mexico. App. 39.

Consequently, sometime shortly after completing the ninth grade in 2004, Petitioner dropped out of high school, and moved into his aunt's and uncle's home. He concomitantly began to work in a variety of construction-related jobs. App. 39, 154. Through that employment history, Petitioner developed valuable skills and started his own business, including his working as a subcontractor in the Los Angeles area with California-licensed contractors. App. 39, 154.

Currently, Petitioner – who is married and, along with his unfortunately estranged wife, has five children, for whom he is sole financial provider – aspires eventually to study for, apply, and receive his own such license. App. 153-54,

184.

B. The California Superior Court Convicts Petitioner of a Misdemeanor Domestic Violence Offense, Which It Dismisses Eleven Years Later

After Petitioner apparently pleaded guilty to violating Cal. Penal Code § 243(e)(1) by committing a battery against his wife, a Superior Court judge sentenced him on March 30, 2010, to 48 days in a county jail, to be followed by three years of probation. App. 186. Following that brief custodial period, Petitioner later pleaded guilty to violating probationary conditions, resulting in his being sentenced on July 31, 2013, to a new 90-day custodial term. Id.

More than eleven years after the original § 243(e)(1) conviction, a Superior Court judge on April 12, 2021, dismissed it under Cal. Penal Code § 1203.4, which permits a conviction's expungement once a defendant has completed his sentence and not served custodial time in state prison. App. 186.

C. Petitioner in 2018 Agrees to Possess a Friend's Firearm, Resulting in Law Enforcement Officers' Seizing It from Petitioner's Residence

Sometime before late-March 2018, law enforcement officials who were conducting an authorized wiretap of one of Petitioner's childhood friends (a purported narcotics distributor), intercepted a conversation between that person and Petitioner. During the call, Petitioner agreed to possess temporarily his

friend's firearm at Petitioner's home, notwithstanding Petitioner's earlier misdemeanor domestic violence conviction. App. 152.

Based on what law enforcement officials learned while listening to that telephone call, they later obtained a search warrant for Petitioner's home in Pico Rivera, California, which they executed on March 30, 2018. There, they discovered and seized a "5.56 mm caliber semiautomatic pistol" that had been manufactured in Tacoma, Washington. App. 152, 185. Petitioner, who did not otherwise have any connection to his friend's narcotics-distribution-related conduct, cooperated with the officers throughout the search – including going so far as to admit having received the firearm when the officers asked him about it, and then directing them to its precise location. App. 152.

D. Following Negotiations That Resulted in a Plea Agreement with an Appellate Waiver, the Government Files an Information in the District Court, Charging Petitioner with Violating § 922(g)(9), While Petitioner Enters a Lengthy Diversionary Program Under the District Court's Auspices

In early January 2021, Petitioner received a target letter from the United States Attorney's Office for the Central District of California, notifying him that it was considering charges against Petitioner flowing from his having possessed his friend's firearm. After receiving counsel's advice, Petitioner applied for and was accepted into a diversionary program in September 2021 that the United States

District Court for the Central District of California administers: the Conviction and Sentences Alternatives program ("CASA"). App. 152.

Ultimately, although Petitioner sought to be admitted into what the district court terms a Track 1 arrangement, though which the government would agree to dismiss all charges if Petitioner were complete his CASA obligations successfully, the government held firm. Instead, it offered Villamonte only a Track 2 option, through which Petitioner would receive a probationary-term sentence from the district court under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, but would still be convicted under 18 U.S.C. § 922(g)(9) and have to suffer collateral consequences resulting from it. App. 33-35, 153.

Consequently, Petitioner and the government executed a plea agreement, which they filed in the district court on October 25, 2021. Among other things, Petitioner agreed to plead guilty to one count of violating § 922(g)(9). App. 54-55, 59-60. In exchange, the parties agreed that if Petitioner were to complete the CASA Track 2 program successfully, the district court under Rule 11(c)(1)(C) would then sentence Petitioner to a three-year term of probation. App. 56-57, 61.

Significantly for this appeal's purposes, the plea agreement contained a provision under which Petitioner agreed to waive his right to appeal directly to this Court from his conviction, including "arguments that the statute to which

[Petitioner] is pleading guilty is unconstitutional . . . ." App. 62. Petitioner also agreed that he would waive any appellate claims regarding his sentence if the district court were to sentence him to a probationary term. App. 61, 63.

Also on October 25, 2021, the government filed an information in the district court, charging Petitioner with violating § 922(g)(9) by possessing the firearm while knowing that he been convicted of a misdemeanor domestic violence offense. App. 50-51. At a later hearing, a magistrate judge permitted Petitioner to remain at liberty, provided that he post a $10,000 unsecured appearance bond, which he did. App. 89-91, 100-09.

E. Petitioner Pleads Guilty to the § 922(g)(9) Count and Enters the CASA Program

Following his waiving indictment, Petitioner appeared before a district judge (The Hon. Dolly M. Gee), who was overseeing CASA-accepted defendants, on November 8, 2021, for a change-of-plea hearing. App. 2, 4, 110-11. After the district judge conducted a thorough colloquy, during which she assiduously applied Rule 11(b)(1), (b)(2), and (b)(3) of the Federal Rules of Criminal Procedure, she accepted Petitioner's guilty plea for the § 922(g)(9) count and deferred his sentencing, pending Petitioner's completing the CASA program's exacting requirements – which included mandated attendance at counseling

sessions and regular assessments by the same district judge. See App. 5-29, 70-74.

F. While Petitioner is Performing Well in the CASA Program, the Court Issues Its Opinion in *Bruen*

As Petitioner was steadily satisfying his CASA programmatic requirements (see App. 113-36, 141, 145-46), the Court issued its opinion in New York Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), on June 23, 2022. Therein, Bruen held that any attempt by a state actor to regulate a person's right to possess firearms must satisfy a "historical tradition" test, under which a court must examine whether the pertinent regulation had some analogue to practices that existed contemporaneously to when – for federal purposes – the Second Amendment was enacted as part of the Bill of Rights in 1791. See generally Bruen, 142 S. Ct. at 2125-34.

G. Petitioner Successfully Completes the CASA Program, and the District Court Sentences Him to a Year of Probation After Declining to Address Whether *Bruen* Invalidated Petitioner's § 922(g)(9) Conviction

Once it became clear in October 2022 that Petitioner would soon be completing the CASA program successfully, the district court endeavored to schedule a sentencing hearing. Twice, however, Petitioner sought and obtained continuances so that his counsel could examine Bruen's implications. App. 142, 147-49, 152.

Ultimately, Petitioner's pre-sentencing memorandum argued that rather than merely sentencing Petitioner to a three-year term of probation, the district court should instead apply Bruen, invalidate § 922(g)(9) under the Second Amendment, and dismiss the information that the government had filed against Petitioner. App. 153-60.

Generally speaking, during the sentencing hearing on January 9, 2023, the district court was sympathetic to Petitioner's not wanting to have a federal felony conviction in his record, particularly considering that it had personally witnessed Petitioner's participating successfully in the CASA Track 2 program. Nevertheless, the district court stressed that it was ultimately solely within the government's discretion – which the government declined to exercise here – whether to switch Petitioner to the program's Track 1. App. 33-35, 39.

And regarding the Second Amendment claim that Petitioner asserted, the district court deemed itself bound by his binding plea agreement that it had already accepted under Rule 11(c)(1)(C), in which he had – at least for appellate purposes – waived his right to assert constitutional challenges on direct appeal. App. 34-35. But it did secure the government's agreement to alter Petitioner's sentence so that

he would have to serve only one year of probation instead of three.[2] App. 36.

After hearing a short heartfelt allocution from Petitioner, during which he thanked the district court and others for permitting him to participate in the CASA program (App. 37), the district court praised Petitioner:

> Throughout his participation in CASA, he has maintained his sobriety and taken seriously his commitment to mental health treatment and changing to a healthier lifestyle. He has reconciled with his mother, set healthy boundaries, and has kept away from negative influences. He has been helpful to his fellow CASA participants, including offering them employment when his construction business allowed him to do so.

App. 39. The district court once again lamented that it had to "saddle" Petitioner "with a felony conviction," but the district court observed that "it is not within [its] authority to change that sentence that you agreed to in your binding plea agreement." App. 39-40.

Finally, the district court informed Petitioner that he had generally waived his right to appeal his conviction and sentence, but he was nevertheless entitled to file a notice of appeal "if you have some theory that you wish to raise with the [Ninth Circuit] . . . ." App. 43.

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[2] As required, the district court calculated Petitioner's Guidelines range, determining that he had an adjusted base offense level of 17 and fell within Criminal History Category III. That yielded an advisory range of 30-37 months. App. 37-38.

H. The Court of Appeals' Disposition

After Petitioner filed a timely notice of appeal in the district court and an opening brief in the United States Court of Appeals for the Ninth Circuit, the government moved to dismiss. App. 1. It reasoned that Petitioner's appellate waiver provision in his plea agreement barred the Ninth Circuit from exercising jurisdiction. Id. In response, Petitioner contended that the Ninth Circuit's case law and traditional equitable principles counseled in favor of recognizing a miscarriage of justice exception to the appellate waiver doctrine. Id.

Without hearing oral argument, a three-judge motions panel of the Ninth Circuit issued a dispositive order on August 18, 2023, that granted the government's motion to dismiss. The Ninth Circuit panel reasoned that the appellate waiver provision in Petitioner's plea agreement was sufficiently expansive to include even constitutional claims, such as the one that Petitioner wished to assert under the Second Amendment to challenge his conviction under § 922(g)(9). App. 1. Moreover, the Ninth Circuit panel specified that it had "not previously applied a 'miscarriage of justice' exception to the enforcement of an appellate waiver, and [it] decline[d] to do so here." Id.

Per Ninth Circuit procedures regarding a dispositive order, Petitioner then filed a timely motion for reconsideration en banc and for panel reconsideration.

See Ninth Cir. R. 27-10. Without reasoning, the Ninth Circuit panel denied the motion on December 1, 2023. App. 53.

REASONS FOR GRANTING THE WRIT

1. Although the Court has not yet addressed definitively whether a federal criminal defendant can knowingly and validly waive the right to appeal core constitutional claims attendant to his or conviction – including whether the statutory offense that Congress promulgated is unconstitutional – at least six federal courts of appeals have definitively recognized what they denominate as a miscarriage of justice exception to the appellate waiver doctrine. That is, whereas only the Ninth Circuit and at least one of its sister circuits (namely, the Fifth Circuit) deem such waivers to be valid categorically regardless of the consequences, at least two of them – the First and Third Circuits – appear to have done so sufficiently expansively such that their recognized exceptions likely would apply to the facts of petitioner's case and therefore vitiate his appellate waiver.

2. Consequently, a circuit conflict exists regarding whether the appellate waiver doctrine – essentially, one that has principles arising from federal common law, the Fifth Amendment's Due Process Clause, and contract law – requires a miscarriage of justice exception, particularly when the defendant wishes

to challenge his or her conviction based on the underlying congressional statutory provision's unconstitutionality. See infra at 15-20.

3. Consequently, because the Ninth Circuit's disposition and the governing rule that at least three other federal courts of appeals have promulgated squarely conflict, the Court should grant certiorari to resolve that discrepancy. See S. Ct. R. 10(a). And the underlying facts of Petitioner's case illustrate that it would present a suitable vehicle for the Court to do so – particularly because a California court has already vacated the underlying predicate state misdemeanor offense that resulted in his becoming federally liable under § 922(g)(9), and powerful equities regarding his personal rehabilitation since he possessed a firearm counsel in favor of the Ninth Circuit's having jurisdiction to adjudicate Petitioner's Second Amendment claim on the merits. See infra at 20-23.

The Court should therefore grant Petitioner's petition for a writ of certiorari.

I. ALONE AMONG THE REGIONAL FEDERAL COURTS OF APPEALS, ONLY THE FIFTH CIRCUIT AND THE NINTH CIRCUIT HAVE EXPLICITLY DECLINED TO RECOGNIZE A MISCARRIAGE OF JUSTICE EXCEPTION TO THE APPELLATE WAIVER DOCTRINE, AND A DEEP CIRCUIT SPLIT THEREFORE EXISTS REGARDING THIS QUESTION.

A. Although this Court apparently has not yet addressed the appellate waiver doctrine specifically, its core components are uncontroversial and apparently universal within all of the federal courts of appeals. That is, as a component of a plea agreement, a federal criminal defendant can knowingly or voluntarily waive his or her right to appeal a conviction and/or sentence. And by so doing, that divests a court of appeals from having jurisdiction to entertain any of the claims a defendant who files a timely notice of appeal might ultimately raise, including constitutional ones regarding the statutory provision governing the conduct to which the defendant pleaded guilty in the district court. See, e.g., United States v. Bibler, 495 F.3d 621, 623-24 (9th Cir. 2007).

B. But as is true for most doctrines, all of the federal courts of appeals have recognized various exceptions under which the defendant's appeal can proceed notwithstanding the knowing-and-voluntary waiver provision.[3] One

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[3] Some of the exceptions that are not directly pertinent to the present petition include (a) an illegal sentence (usually defined as one whose custodial term exceeds the statutory maximum); (b) the district court's vitiating the waiver by incorrectly specifying during the sentencing hearing that the defendant retains his

of them is what all of the circuits refer to in at least some limited contexts as a "miscarriage of justice." Regarding this exception, the circuits currently fall into four different categories.

1. In the first category, the First, Third, and D.C. Circuits have either explicitly or impliedly adopted a broad, quasi-common-law exception to encompass situations where defendants would suffer severe prejudice by not being able to appeal directly from their federal conviction and/or sentence. As the First Circuit defined "miscarriage of justice" for this purpose in United States v. Teeter, 257 F.3d 14 (1st Cir. 2001), that court of appeals retains considerable discretion to recognize it when it deems the equities in their totality to be favorable:

> In sum, we conclude that plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs. In charting this course, we recognize that the term 'miscarriage of justice' is more a concept than a constant. Nevertheless, some of the considerations come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a

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or her appellate rights; (c) unconstitutional elements of the sentence's custodial term and/or supervised release conditions; and (d) violations of Rule 11 of the Federal Rules of Criminal Procedure during the defendant's change-of-plea hearing. See, e.g., Bibler, 495 F.3d at 624.

> sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. Other considerations doubtless will suggest themselves in specific cases.

Id. at 25-26 (emphasis added).

Later that year in United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001), the Third Circuit explicitly adopted the First Circuit's rule in Teeter, adding that the "factors" Teeter enumerated "provide some guidelines for determining when a particular sentencing error may warrant vacating an otherwise valid waiver of appeal. But the governing standard to apply in these circumstances is whether the error would work a miscarriage of justice." Id. (emphasis added).

And albeit not explicitly adopting the full breadth of Teeter's miscarriage of justice framework, the D.C. Circuit in United States v. Guillen, 561 F.3d 527 (D.C. Cir. 2009), cited favorably to a footnote in Teeter in which the First Circuit had, by way of illustrative examples, discussed "a constitutionally impermissible factor, such as the defendant's race or religion" that would fall within the exception's ambit if they motivated the sentence that the district court had imposed. Guillen, 561 F.3d at 531 (citing, among other cases, Teeter, 257 F.3d at 25 n.9).

2. Within the second category, there are two federal courts of appeals that enumerate several categories of exceptions to the appellate waiver doctrine that they refer to overall as being a "miscarriage of justice," but do not take the same broad, fact-based, and case-specific approach that Teeter and Khattak do. In United States v. Andis, 333 F.3d 886 (8th Cir. 2003) (en banc), a en banc Eighth Circuit noted that in recognizing a miscarriage of justice exception it was not "providing an exhaustive list of the circumstances" in which it would apply. Id. at 891. But it did enumerate three specific examples: ". . . an illegal sentence or a sentence in violation of the terms of [a plea] agreement, or a claim asserting ineffective assistance of counsel." Id. at 891 (discussing United States v. Deroo, 223 F.3d 919, 923-24 (8th Cir. 2000)).

The following year, the en banc Tenth Circuit in United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam), essentially adopted a modified version of Andis' rule regarding a miscarriage of justice exception to the appellate waiver doctrine. Id. at 1325, 1327. More specifically, the Tenth Circuit held that it would limit the exception to the following four scenarios: "'[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum,

or [4] where the waiver is otherwise unlawful.'" Id. at 1327 (quoting United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001)).

Further, although the Fourth Circuit in United States v. Johnson, 410 F.3d 137 (4th Cir. 2005), did not explicitly adopt Andis' approach toward the miscarriage of justice exception, it did simultaneously enumerate several specific situations in which a waiver would not be applicable: an unlawful sentence, one "based on a constitutionally impermissible factor such as race," a sentence imposed "in violation of [the defendant's] Sixth Amendment right to counsel, and an ineffective assistance of counsel claim. Id. at 151 (internal quotation marks omitted). And quoting favorably from Andis, the Fourth Circuit observed that "appellate courts 'refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice.'" Id. (quoting Andis, 333 F.3d at 891).

3. Additionally, in the third category, there are four federal courts of appeals – the Second, Sixth, Seventh, and Eleventh Circuits – that discuss principles distilled from their sister circuits that have recognized a formal miscarriage of justice exception, without adopting a rule explicitly that recognizes it.

Proceeding chronologically within this category, in United States v. Johnson, 347 F.3d 412, 415 (2d Cir. 2003) (R. Katzmann, J.), the Second Circuit

seemed to cite Andis and Khattak favorably, but did not use language suggesting that it was adopting those cases' rules to create a formal miscarriage of justice exception to the appellate waiver doctrine. Next, in United States v. Caruthers, 458 F.3d 459, 472 (6th Cir. 2006), overruled on other grounds by Cradler v. United States, 891 F.3d 695 (6th Cir. 2018), the Sixth Circuit noted Hahn, Khattak, and Teeter, but did not then pivot toward explicitly adopting the exception. Two years later in United States v. Johnson, 541 F.3d 1064, 1067 (11th Cir. 2008), the Eleventh Circuit discussed the Eighth Circuit's Andis rule, but did not adopt it. And finally, most recently in United States v. Litos, 847 F.3d 906, 910 (7th Cir. 2017) (Posner, J.), the Seventh Circuit noted at least a theoretical possibility of a miscarriage of justice exception, but did not promulgate one.

4. The final category – involving only the Fifth and Ninth Circuits – is the one that most directly impacts the present petition. In United States v. Barnes, 953 F.3d 383, 389 (5th Cir. 2020), the Fifth Circuit – discussing one of that court's unpublished dispositions – stated that it had declined "explicitly either to adopt or to reject" a miscarriage of justice exception. And the Ninth Circuit has addressed this issue confusingly in its published opinions, observing in a footnote in United States v. Goodall, 21 F.4th 555, 565 n.6 (9th Cir. 2021), that ". . . [W]e do not consider [] the applicability, if any, of an exception for a miscarriage of

justice. We express no view on the viability of that exception in other circumstances." But a mere ten years earlier, the Ninth Circuit in United States v. Harris, 628 F.3d 1203, 1205 (9th Cir. 2011), had suggested that there is indeed such an exception within the appellate waiver doctrine's contours. Unfortunately here, the three-judge motions panel sidestepped that intra-circuit conflict, noting without any analysis that it "ha[d] not previously applied a 'miscarriage of justice' exception to the enforcement of an appeal waiver, and we decline to do so here." App. 1.

* * *

In sum, this survey of pertinent case law in this area demonstrates that there is a deep four-way split among the federal courts of appeals regarding not only whether a miscarriage of justice exception to the appellate waiver doctrine exists, but also if so, how broadly it sweeps. The Court should therefore grant certiorari to resolve this question definitively and therefore ensure national uniformity in direct federal criminal appeals. See S. Ct. R. 10(a).

II. THIS CASE IS A STRONG VEHICLE FOR RESOLVING THE DEEP CIRCUIT SPLIT REGARDING THE MISCARRIAGE OF JUSTICE EXCEPTION TO THE APPELLATE WAIVER DOCTRINE.

A. Petitioner notes that because the Second Amendment claim is the only one that he wishes to assert if he were able to appeal his conviction directly,

this case presents a clean vehicle for the Court to resolve the vexing and deep circuit conflict that exists regarding whether there is a miscarriage of justice exception to the appellate waiver doctrine. If the Court were to grant certiorari and adopt a broad rule such as what the First Circuit did in Teeter and the Third Circuit did in Khattak, the Ninth Circuit would then determine on remand whether Petitioner qualifies for the exception. But if the Court were to instead promulgate a rule more tantamount to the limited approach the Eighth Circuit took in Andis – or were to decline altogether to recognize a miscarriage of justice exception – then he likely would not fall within any of the currently enumerated categories that the Ninth Circuit recognizes, and his direct appeal would become final.

B. Further, because of the strong equities favoring Petitioner's being able to appeal his conviction directly – and therefore challenge § 922(g)(9) either facially or as-applied under the Second Amendment – this case is a compelling vehicle to allow the Court to craft a national rule regarding the miscarriage of justice exception to the appellate waiver doctrine, particularly because Petitioner would have strong arguments under Teeter's and Khattak's approaches.

For instance, the district court agreed with Petitioner during his sentencing hearing that the government should have shifted him to the CASA's program's Track 1, which would have resulted in his § 922(g)(9)'s dismissal and his

therefore having a close-to-clean criminal record. App. 33-35, 39-40. Thus, although the government has discretion under standard separation of powers principles in deciding eligibility for particular diversionary programs, failing to do so here creates a harsh result – a felony conviction for an offense under a statutory provision similar to the one (§ 922(g)(8)) that the Fifth Circuit has already facially invalidated in United States v. Rahimi, 61 F.4th 443 (5th Cir.), cert. granted, 143 S. Ct. 2688 (2023), which the Court is currently reviewing following oral argument earlier this term. United States v. Rahimi, No. 22-915 (oral argument heard on Nov. 7, 2023).

Additionally, as Petitioner has already alluded to (see supra at 4), the government could not have prosecuted Petitioner under § 922(g)(9) if he had possessed the firearm at issue after April 11, 2021. This is because the California Superior Court dismissed his predicate misdemeanor domestic violence conviction the following day. Thus, although Petitioner acknowledges that he accrued federal criminal liability when he did so in 2018, his conviction's dismissal more than two years later further weighs in favor of deeming his situation to be a miscarriage of justice. Quite simply, the government's interest in maintaining Petitioner's's felony status into perpetuity becomes less viable when considering his misdemeanor domestic violence conviction no longer exists and he does not have

any felony convictions other than the present one.

Moreover, rather than giving mere lip service to being rehabilitated, Petitioner's record indicates that he tangibly achieved that result. To do so, he had to participate successfully in the CASA program for close to a year, which – as the district court itself attested from its hands-on work in that process – Petitioner did indeed accomplish, including helping his fellow participants by offering to employ them through his construction company if they needed work. App. 39. Thus, it would be a particularly harsh and unjust outcome for Petitioner under these circumstances to retain a permanent stigma from a federal felony conviction, particularly if the underlying statute ultimately were invalidated under the Second Amendment.

Finally, in addition to the multitudes of collateral consequences that result from a person's being a convicted federal felon (see App. 58), Petitioner's particular circumstances present one that stands out: his wishing to study for and obtain a contractor's license in California that a felony conviction almost certainly would preclude him from doing so. See App. 154. And that result would persist if he were unable to appeal directly from a conviction that – but for his waiving a Second Amendment claim that was not cognizable when he and the government were negotiating his plea agreement – this Court might later otherwise recognize

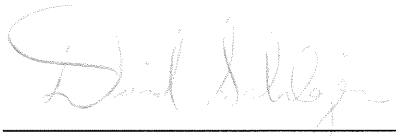
as being unconstitutional.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated: February 29, 2024

Respectfully submitted,



DAVID A. SCHLESINGER
JACOBS & SCHLESINGER LLP
The Douglas Wilson Companies Building
1620 Fifth Avenue, Suite 750
San Diego, CA 92101
Telephone: (619) 230-0012
david@jsslegal.com

Counsel for Petitioner

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PROOF OF SERVICE

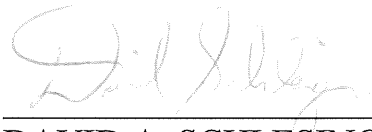
I, David A. Schlesinger, declare that on February 29, 2024, as required by Supreme Court Rule 29, I served Petitioner Micheal Lee Villamonte's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Elizabeth B. Prelogar, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 2024



DAVID A. SCHLESINGER
Declarant