No. _____

In the

Supreme Court of the United States

_____

Joel Miles,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether appellate waivers in federal criminal cases contain an implied exception for judgments that represent a miscarriage of justice?

PARTIES TO THE PROCEEDING

Petitioner is Joel Miles, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joel Miles seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment and sentence is attached as Appendix B. The unpublished order of the Court of Appeals dismissing the appeal is reprinted in Appendix A to this Petition.

JURISDICTION

The order dismissing the appeal was entered on April 26, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

26 U.S.C. §5861(d) reads:

> It shall be unlawful for any person—
>
> ***
>
> (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record…

26 U.S.C. §5845(a)(3) reads:

> The term "firearm" means … (3) a rifle having a barrel or barrels of less than 16 inches in length…

The Second Amendment to the United States Constitution 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.

Section 2106 of Title 28 reads:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

After receiving a report of a domestic altercation, police officers stopped Petitioner Joel Miles in the parking lot of a gas station and searched his person and car. They found a short-barreled shotgun and small quantities of drugs. He and the federal government entered a plea agreement, the government dismissing a charge under 18 U.S.C. §922(g)(1) in exchange for his plea of guilty to a violation of 26 U.S.C. §5861(d), possession of an unregistered short-barreled rifle. The agreement also waived the defendant's right of appeal, save certain express exceptions not relevant here. The district court imposed sentence of 115 months imprisonment, five months below the statutory maximum.

B. Appellate Proceedings

On appeal, Petitioner maintained that the Second Amendment protected his right to possess a short-barreled shotgun as it was, for good or ill, one in common use in America today. Half a million such weapons have been officially registered with the ATF; of course, many more are not so registered. *See* Bureau of Alcohol, Tobacco, and Firearms, Firearms Commerce in the United States, 2020 Annual Statistical Update, p. 17 (2020)(reflecting 460,544 registered short-barreled shotguns throughout the United States), *available at https://www.atf.gov/firearms/docs/report/2021-firearms-commerce-report/download, last visited July 24, 2024*. He conceded that the argument

appeared to be foreclosed by *United States v. Miller*, 307 U.S. 174 (1939), and sought only to preserve review to this Court.

As respects the appeal waiver, Petitioner noted that under Fifth Circuit law that a defendant cannot waive the right not to be convicted or imprisoned for conduct that does not constitute the charged offense, and that such a challenge is impliedly reserved by an appeal waiver. *See United States v. Trejo*, 610 F.3d 308, 312-313 (5th Cir. 2010); *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008); *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002); *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002); *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001). Because, he contended, possession of a short-barreled shotgun does not constitute an offense that may be constitutionally prosecuted, he argued that the court should reach the merits.

The court of appeals, however, declined to reach the merits, and held that substantive challenges to a statute's constitutionality may be waived by a general waiver of appeal. It said:

> Miles … alleges his appeal waiver was ineffective as to that claim because in his view, a defendant cannot waive the right to assert that his statute of conviction is unconstitutional.
>
> Miles' argument is foreclosed. *See United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (enforcing an appeal waiver against a constitutional challenge to a statute of conviction); *see also United States v. Ford*, 688 F. App'x 309, 310–11 (5th Cir. 2017) (per curiam) (citing *Portillo-Munoz* for the proposition that constitutional claims "may be waived by a valid appeal waiver"); *United States v. Caldwell*, 38 F.4th 1161 (5th Cir. 2022) (per curiam) (holding defendants can waive the right to collaterally attack a conviction on constitutional grounds). Miles therefore waived the right to press his Second Amendment claim on appeal.

[Appx. A]; *United States v. Miles*, No. 22-10932, 2024 WL 1827825, at *1 (5th Cir. Apr. 26, 2024)(unpublished).

REASONS FOR GRANTING THE PETITION

The courts of appeals have divided as to whether a defendant may avoid a waiver of appeal on the grounds that its enforcement would work a miscarriage of justice.

Federal courts of appeals will enforce a knowing and intelligent waiver of appeal to the extent of its scope. *See United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994); *United States v. Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Rutan*, 956 F.2d 827, 829-830 (8th Cir. 1992); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir. 1992), *amended*, 38 F.3d 394 (1994); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). But this Court has recognized that "no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019).

Thus, many federal courts of appeals have recognized an exception to appellate waivers for cases involving a miscarriage of justice. *See United States v. Teeter,* 257 F.3d 14, 21–27 (1st Cir.2001); *United States v. Khattak*, 273 F.3d 557, 559–63 (3d Cir.2001); *United States v. Adkins*, 743 F.3d 176, 192–93 (7th Cir. 2014); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). These courts have reasoned that "[b]y waiving the right to appeal his sentence, the defendant does not agree to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant

sentencing court." *Guillen*, 561 F.3d at 530. And they have reasoned that because courts "construe the agreement against a general background understanding of legality … [it] presume(s) that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement," *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).

The Ninth Circuit, however, has declined to adopt this exception, criticizing it as "nebulous." *United States v. Ligon*, 461 F. App'x 582, 583 (9th Cir. 2011)(unpublished)("Ligon asks the court to recognize a 'miscarriage of justice' exception to otherwise valid waivers of appellate rights. The court declines the invitation. This court does recognize certain exceptions to valid appellate waivers, but a nebulous 'miscarriage of justice' exception is not among them.")(internal citation omitted)(citing *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir.1996)). The court below has likewise "decline(d) to adopt the miscarriage of justice exception to appellate waivers." *United States v. Fairley*, 735 F. App'x 153, 154 (5th Cir. 2018)(unpublished); *see also United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020)("Finally, Barnes spends two paragraphs suggesting that we can refuse to enforce his waiver by applying a 'miscarriage of justice' exception. Though some other circuits recognize such an exception, we have declined explicitly either to adopt or to reject it.")(citing *United States v. Ford*, 688 F. App'x 309, 309 (5th Cir. 2017) (unpublished)).

This conflict between the courts of appeals pertains to an issue of great significance, meriting this Court intervention. The miscarriage of justice exception to appeal waivers is trained precisely on those cases that carry the greatest potential for grave injustice, such as:

> (1) a sentence based on "constitutionally impermissible criteria, such as race"; (2) a sentence that exceeds the statutory maximum for the defendant's particular crime; (3) deprivation of "some minimum of civilized procedure" (such as if the parties stipulated to trial by twelve orangutans); and (4) ineffective assistance of counsel in negotiating the plea agreement.

Adkins, 743 F.3d at 192–93. These issues lie at the core of due process in the criminal realm. The absence of a failsafe protection against errors of this consequence is no small matter.

Uncertainty in this area, moreover, has tangible impact on the administration of justice. Defendants who forego the right of appellate review should enjoy certainty about the scope of that waiver. And as appellate waivers are frequently appended to plea agreements, such uncertainty may result in the surrender of the precious right to trial by jury based on a misconception as to the real terms of the agreement.

Finally, the uncertainty surrounding the scope of appellate waivers has caused the Department of Justice to advise its lawyers to avoid relying on them. It said that because a "reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice … in a case involving an egregiously incorrect sentence, the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid

confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might result in a miscarriage of justice." DOJ Criminal Resource Manual, *Plea Agreements and Sentencing Appeal Waivers -- Discussion of the Law*, §626(2) (Updated January 22, 2020), *available at https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law, last visited July 24, 2024*. Certainty would benefit all parties; recognition of an exception for miscarriages of justice would protect against the most serious errors in the criminal process.

The present case well presents the issue that has divided the court of appeals. The decision below rests entirely on the appeal waiver, so the applicability of appeal waivers to facial constitutional challenges to a criminal statute was passed upon below. Indeed, it was the only issue addressed in the opinion below.

Further, there is good reason to think that Petitioner's substantive constitutional challenge would assert a miscarriage of justice, were such an exception recognized. In the widely cited *United States v. Teeter,* 257 F.3d 14 (1st Cir.2001), the First Circuit provided the following standards for identifying a miscarriage of justice in the context of an appeal waiver:

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

Teeter, 257 F.3d at 26. Although the clarity of the error and the defendant's degree of acquiescence do not support a finding of miscarriage, the remaining factors clearly do.

The character of the error certainly supports an exception: the issue pertains not merely to an advisory Guideline, nor even just to the severity of the sentence, but to the government's very power to criminalize the defendant's conduct. Indeed, to the extent that the Second Amendment serves as a structural restraint on the power of government, its importance surpasses even the narrow consideration of fairness to the parties themselves. *See United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024)("As a leading and early proponent of emancipation observed, 'Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.'")(quoting Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens)).

Likewise, the impact of the error on the defendant strongly supports recognizing an exception to the waiver. The claim of error, if successful, would prevent the defendant's conviction for the charged offense entirely, and take it off the table in future proceedings.

Finally, while the claim of error would certainly have some impact on the government, it would not trench on any legitimate prosecutorial interest. The government has a legitimate interest in prosecuting and punishing law-breaking,

but no legitimate interest in seeking punishment for constitutionally protected conduct. *See Berger v. United States*, 295 U.S. 78 (1938).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 25th day of July, 2024.

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