No. _____

IN THE

Supreme Court of the United States

JEROME JONES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although the right to appeal a criminal sentence is a statutory entitlement under 18 U.S.C. § 3742, federal prosecutors in many jurisdictions—including the Eastern District of Louisiana—require standard plea agreements that must include a waiver of that statutory right. At the point a criminal defendant enters into such an agreement, however, he or she has no way of knowing what errors the district court may commit at a future sentencing hearing or the magnitude and impact of such errors. This Court has yet to rule on the validity of such waivers nor the limits on their enforcement. The result is a messy, multi-dimensional circuit split that injects confusion, unpredictability, and disparate treatment into one of the most common procedures in federal criminal law: the plea agreement.

Thus, the question presented is:

Can a criminal defendant knowingly and voluntarily forfeit his right to appeal the district court's yet-to-be-made errors as part of his plea agreement with the government, and, if so, what are the limits on the validity and enforceability of such appeal waivers?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Jones*, No. 22-cr-253-1, U.S. District Court for the Eastern District of Louisiana. Judgment entered April 11, 2024.
- *United States v. Jones*, No. 24-30259, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 7, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerome Jones respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On November 7, 2024, a panel of the Fifth Circuit Court of Appeals dismissed Mr. Jones's sentencing-related appeal based on an appeal waiver in his plea agreement. A copy of the order is attached to this petition as the Appendix (1a).

JURISDICTION

The Fifth Circuit entered its order of dismissal on November 7, 2024, and no petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is timely filed pursuant to Supreme Court Rule 13 because it is being filed within 90 days of the Fifth Circuit's final judgment.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3742(a) provides, in relevant part:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

STATEMENT OF THE CASE

On December 14, 2023, Petitioner Jerome Jones pleaded guilty to federal drug and firearm charges pursuant to a plea agreement with the government. Prior to sentencing, the U.S. Probation Office calculated Mr. Jones's advisory Sentencing Guidelines range as 84 to 105 months. One of his convictions was for a violation of 18 U.S.C. § 924(c)(1)(A)(i), which carries a statutory minimum penalty of 60 months—a sentence that must run consecutive to any other term of imprisonment. As a result, his aggregated Guidelines range was a substantial 144 to 165 months.

Mr. Jones requested a downward departure or variance from that high range to a total of 120 months based on several mitigating factors. The government opposed a downward variance, relying primarily on disputed and unsupported allegations of other criminal conduct—including a rape charge that had been refused. Defense counsel objected to the court considering dismissed charges and unadjudicated allegations in determining Mr. Jones's sentence, asking the court to instead consider only the reliable, mitigating information in the Presentence Investigation Report about Mr. Jones's difficult childhood and positive role in his daughter's life. A character witness also spoke on behalf of Mr. Jones and stated that she was aware of the rape allegation, which she knew to be false.

The district court ultimately denied Mr. Jones's request for a variance and imposed a sentence at the top of his advisory Guidelines range—*i.e.*, the sentence requested by the government and a sentence nearly four years higher than the one requested by the defense. In doing so, the court did not provide any specific reasons

for selecting that sentence, and it did not address any of the mitigating information that Mr. Jones had presented to the court regarding his history and characteristics. Importantly, after having directed questions and statements to Mr. Jones that alluded to the rape allegation, the court did not indicate to what extent it relied on that refused charge or the other disputed and unsupported allegations of criminal conduct that the government asserted in its sentencing arguments. Instead, the court's explanation consisted entirely of a boilerplate recitation of a few sentencing factors.

Mr. Jones vehemently objected to the court's pronouncement of sentencing, stating he felt that he "wasn't treated fairly" and that the court "went off of what [the prosecutor] said," and he asked whether the court believed "he really raped somebody." The court responded "no," that it was simply "asking [him] questions about . . . the allegations," but told him he could "feel that way." After a brief exchange, in which Mr. Jones expressed concern for his daughter in his absence and frustration with the court's sentencing, the court told him: "Well, you're entitled to your opinion, but I feel like your daughter will be much safer." Finally, Mr. Jones questioned whether the court felt that way simply because the prosecutor said that, to which the court responded: "No, because of what the evidence has shown." The court did not identify what "evidence" it was referring to, however, or provide clarity as to its reasoning.

Mr. Jones filed a timely appeal, arguing that the district court committed prototypical sentencing error—abusing its discretion by failing to adequately explain

its sentencing decision, including by failing to make central, contested factual findings and not making clear its reasoning for imposing a sentence nearly four years higher than the one requested by the defense. Rather than defend the district court's sentencing procedures, the government simply moved to dismiss Mr. Jones's appeal based on the broad appeal waiver provision contained in his plea agreement. The government argued that Mr. Jones "knowingly and voluntarily waived his right to appeal his sentence" and that "the waiver covers his challenge to the district court's explanation of his within guidelines sentence."

Mr. Jones opposed dismissal, arguing that sentencing appeal waivers like the one in his case are bad policy, harmful to the integrity of the criminal process, and inherently unknowing and involuntary. He acknowledged, however, that his challenges to the waiver's validity were foreclosed under Fifth Circuit precedent, which long had held that appeal waivers like his are presumptively valid.

Based on that appeal waiver clause, a Fifth Circuit panel dismissed Mr. Jones's claims without reaching the merits of the issues raised in his brief.

REASONS FOR GRANTING THE PETITION

Approximately ninety-seven percent of federal criminal defendants plead guilty pursuant to plea agreements—agreements that often mandate broad waivers of not just trial rights, but all appellate rights as well.[1] As commentators and judges

[1] *See Missouri v. Frye*, 566 U.S. 134, 144 (2012); Honorable Robert J. Conrad & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 Geo. Wash. L. Rev. 99, 153 (2018); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87, 122-26 (2015); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (observing that "criminal justice today is for the most part a system of pleas, not a system of trials.").

alike have observed, this widespread and compulsory forfeiture of appellate rights—especially those regarding yet-to-be-made sentencing errors—raises serious policy and fairness concerns, implicating not only the fundamental rights of huge swaths of criminal defendants, but also the health of the criminal process as a whole. Moreover, broad waivers like the one in Mr. Jones's case are inherently unknowing and involuntary and therefore are legally dubious.

This Court has yet to weigh on the issue of appeal waivers—thus far declining to address the broader question of their permissibility and, more specifically, the limits, if any, on their enforcement. Thus, unsurprisingly, the circuits are split over the limits on and exceptions to the enforcement of appeal waivers. That split has led to confusion, unpredictability, and disparate treatment of similarly situated individuals. Absent intervention by this Court, important legal issues regarding the proper application of the Sentencing Guidelines will continue to be insulated from appellate scrutiny in criminal cases, and fundamental sentencing errors by district courts will continue to go unchecked. Clarification from this Court is urgently needed.

I. This Court should finally weigh in on the constitutionality of ubiquitous appeal waivers like the one in this case—which are inherently unknowing and involuntary.

Despite their widespread use—and associated widespread criticism—this Court "has not yet ruled on the constitutionality of plea agreement waivers of the statutory right to . . . direct appeal of sentence after conviction by plea." Klein, *supra* note 1, at 81. Circuit courts, for the most part, have allowed these waivers to proliferate relatively unabated, with few defined limits on their enforcement. "The established law" of the Fifth Circuit "provides that a defendant may, by knowingly

and voluntarily entering into a valid plea agreement, waive the statutory right to appeal his sentence," including the right to appeal errors in the district court's calculation of his Sentencing Guidelines range. *United States v. Somner*, 127 F.3d 405, 408-09 (5th Cir. 1997) (Jolly, J., concurring); *see also, e.g.*, *United States v. Williams*, 949 F.3d 237, 239 (5th Cir. 2020). Other Circuits agree. *See, e.g.*, *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992), *overruled in part by United States v. Andis*, 333 F.3d 886, 892 n.6 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52–54 (4th Cir. 1990).

In enforcing appeal waivers, courts have reasoned that, because defendants may waive *constitutional* rights, they also may waive the statutory right to appeal a sentence.[2] But the analogy courts have drawn between sentencing-related appeal waivers and the waiving of constitutional rights by pleading guilty is fundamentally flawed and has been rightly criticized because the constitutional rights waived by a guilty plea are known at the time they are waived:

> [O]ne waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases, the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty.

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[2] *See, e.g.*, *Andis*, 333 F.3d at 889 ("[T]he right to appeal is not a constitutional right but rather purely a creature of statute. . . . Given that the Supreme Court has allowed a defendant to waive constitutional rights, we would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." (internal quotation marks omitted)); *Khattak*, 273 F.3d at 561 ("The ability to waive statutory rights, like those provided in 18 U.S.C. § 3742, logically flows from the ability to waive constitutional rights."); *United States v. Teeter*, 257 F.3d 14, 21-22 (1st Cir. 2001) ("[T]he idea of permitting presentence waivers of appellate rights seems relatively tame because the right to appeal in a criminal case is not of constitutional magnitude.").

United States v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring). In that context, due process is satisfied because the waiver is an intentional, knowing "relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also United States v. Olano*, 507 U.S. 725, 732–33 (1993); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

By contrast, sentencing-related appeal waivers are made at the time of the plea and therefore lack the essential prerequisite for waiver: contemporaneous knowledge of the rights being relinquished. Defendants enter into appeal waiver agreements long before sentencing occurs, and those waivers often are made, as here, with no agreement between the parties regarding the sentence the defendant might receive or even the Sentencing Guidelines range that will apply. At that moment, the right to appeal has not yet accrued, and the sentencing errors have not yet occurred. There can be no waiver without knowledge of the right waived. *Cf. Newton v. Rumery*, 480 U.S. 386, 390–403 (1987) (approving waiver of right to bring civil suit for false arrest and imprisonment, when right to sue had already accrued).

A defendant cannot preserve sentencing errors for review by making a blanket objection at rearraignment to any prospective error in the court's application of the Sentencing Guidelines or balancing of the applicable sentencing factors. *See* Fed. R. App. P. 51(b) (requiring an objection "when the court ruling or order is made or sought"); *Puckett v. United States*, 556 U.S. 129, 135 (2009) (describing Rule 51(b) as a "contemporaneous-objection rule"). Conversely, a defendant cannot waive—*i.e.*, knowingly and intentionally relinquish—the right to have such an error corrected

without first knowing what the error is. *See Olano*, 507 U.S. at 733. Moreover, it is unreasonable to expect a defendant to anticipate—and thus "know"—whether errors will be made in calculating a sentence, much less the severity of those errors' impact. A defendant cannot have concrete knowledge of what is ceded when supposedly waiving the right to appeal the sentence. Thus, sentencing-related appeal waivers are inherently unknowing.

Sentencing-related appeal waivers are also involuntary in federal jurisdictions like the Eastern District of Louisiana, where prosecutors regularly insist that plea agreements include broad, boilerplate waivers of this important statutory right. As has become standard practice in criminal cases in the Eastern District of Louisiana, Mr. Jones's plea agreement required him to waive all appellate and collateral relief rights except an attack on a sentence imposed in excess of the statutory maximum or a claim of ineffective assistance of counsel. This is the broadest and most restrictive appeal waiver permitted by law and U.S. Department of Justice Policy.[3] By incorporating these waivers into every plea agreement and requiring defendants to assent to the agreement's terms to accept any plea deal—even when those waivers were not part of the bargained-for exchange—the government is compelling defendants to waive their appeal rights for no benefit.

[3] *See* U.S. Dep't of Justice, "Department Policy on Waivers of Claims of Ineffective Assistance of Counsel," Oct. 14, 2014, https://www.justice.gov/file/70111/download (prohibiting federal prosecutors from seeking in plea agreements to have a defendant waive any claims of ineffective assistance of counsel); U.S. Dep't of Justice, U.S. Attorney's Manual, CRM § 626, "Plea Agreements and Sentencing Appeal Waivers—Discussion of the Law" (detailing various arguments on appeal that cannot legally be waived, including challenges to sentences exceeding the statutory maximum).

Many judges and commentators have expressed dismay over this trend, noting the serious legal and policy concerns raised by the widespread, compelled forfeiture of appellate rights. For example, these broad appeal waivers require defendants to forfeit serious errors that they could not have anticipated at the time of relinquishment, arise from inherently inequitable bargaining positions, reduce incentives for careful sentencing and strict compliance with the Sentence Guidelines, insulate serious errors from review and correction, leave difficult legal questions unanswered, and otherwise inhibit development of the law. *See, e.g.*, *Melancon*, 972 F.2d at 573 (Parker, J., concurring) ("[E]ven if I were convinced that the sort of futuristic waiver at issue in this case could be knowing and intelligent, I could not support it. Any systemic benefits that might inhere in this type [of] waiver cannot overcome its extremely deleterious effects upon judicial and congressional integrity, and individual constitutional rights."); *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1339 (W.D. Wash. 2016) ("Although the Court would not intentionally impose an improper sentence, the Court is not infallible and, in the course of formulating a sentence, the Court is often faced with issues on which reasonable minds can differ. The criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law."); *United States v. Vanderwerff*, No. 12-cr-69, 2012 WL 2514933, at *5 (D. Colo. June 28, 2012) ("Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions."); Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y.

Times, July 17, 2012, at A24 ("Congress gave appeals courts the power to review federal sentences to ensure the government applies the law reasonably and consistently. Without an appeals court's policing, the odds go up that prosecutors will do neither. Our system of pleas then looks more like a system of railroading."); Andrew Dean, *Challenging Appeal Waivers*, 61 Buff. L. Rev. 1191, 1211 (2013) ("The lack of bargaining equality between the defense and prosecution has led some judges to reject appeal waivers as contracts by adhesion. Because conditioning the plea agreement on acceptance of an appeal waiver skews the balance so far in the prosecution's favor, the defendant has no hope at achieving equal bargaining power. This renders the contract unconscionable."); John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 Fed. Sent. R. 209, 210 (Jan./Feb. 1998) ("The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the sentencing guidelines.").

Of course, courts long have pointed to the institutional benefits of appeal waivers—most commonly, conservation of resources and finality. However, as one district court observed, these benefits may be overblown:

> Any suggestion that unilateral waivers of the right to appeal promote finality is disingenuous. Finality is not secured simply because only the Government, and not the defendant, is entitled to appeal. Moreover, to the extent the Government's motive is merely to reduce the burden of appellate and collateral litigation on sentencing issues, the avenue for achieving such finality is explicitly contemplated in Rule 11(c)(1)(C),

> pursuant to which the Government may agree to a specific [Sentencing Guidelines] range and bind both the defendant and the Court.

Mutschler, 152 F. Supp. 3d at 1340 (internal citations omitted).

Moreover, use of appeal waivers in *every* plea agreement—or, at least, virtually all of them, as occurs in the Eastern District of Louisiana—does not merely reduce direct criminal appeals—it threatens to eliminate them. No doubt, some balance must be struck between the interests of resource management and finality on the one hand, and, on the other, the statutory right to appeal with all of its benefits, such as error correction, guidance for lower courts, and just results. The former cannot be allowed to consume the latter. *Vanderwerff*, 2012 WL 2514933, at *4 ("Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.").

This Court must finally acknowledge and address the widespread practice of blanket appellate waivers.

II. This Court should resolve the circuit split appeal waiver enforcement, which long has resulted in inconsistent treatment of criminal appellants.

Appeal waivers like the one in this case are ubiquitous across the country, and, although appellate courts recognize their validity as a general matter, the limits courts have set on such waivers and the situations in which courts refuse to enforce them varies wildly by circuit. As one commentator observed, "[i]n the absence of Supreme Court precedent guiding the enforcement of appeal waivers, . . . various courts of appeal have created their own limits and exceptions to their enforcement."

Aliza Hochman Bloom, *Sentence Appeal Waivers Should Not Be Enforced in the Event of Superseding Supreme Court Law: The Durham Rule As Applied to Appeal Waivers*, 18 Fla. Coastal L. Rev. 113 (2016). That means a defendant in one circuit may be permitted to proceed with an appeal—and potentially have a sentencing error remedied—while an identically situated defendant in another circuit will be deprived of that right entirely.

This inconsistency and uncertainty is evident in the various, diverse frameworks courts have developed to examine the validity of appeal waivers. *See generally*, *id*. at 116–22 (outlining the split). The Fifth Circuit, for example, has adopted a two-step inquiry. The court first asks "(1) whether the waiver was knowing and voluntary," and then determines "(2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *Bond*, 414 F.3d at 544. The inquiry ends there.

By contrast, some courts conduct a *third* step, inquiring whether the court's failure to consider the defendant's claim will result in a "miscarriage of justice." *See, e.g.*, *United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *Khattak*, 273 F.3d at 562–63; *Teeter*, 257 F.3d at 25. At least the Third, Eighth, and Tenth Circuits have recognized some version of this "miscarriage of justice" exception to the enforcement of appeal waivers. *See, e.g.*, *United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *Khattak*, 273 F.3d at 562-63; *Teeter*, 257 F.3d at 25. How these courts define that term, however, varies tremendously from circuit to circuit.

For example, the First Circuit holds broadly that even knowing and voluntary appeal waivers should not be enforced in "egregious cases" and "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." *Teeter*, 257 F.3d at 25–26. The Tenth Circuit has limited the "miscarriage of justice" exception to four discrete circumstances:

> (1) reliance by the court upon an impermissible factor such as race in imposition of the sentence; (2) ineffective assistance of counsel in connection with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful and seriously affects the fairness, integrity, or public reputation of judicial proceedings.

United States v. Porter, 405 F.3d 1136, 1143 (10th Cir. 2005). The Third Circuit, while declining to adopt a bright-line rule, considers certain factors (first articulated by the First Circuit), such as:

> 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.

Khattak, 273 F.3d at 562.

Of particular concern, appellate courts do not even agree about whether an appeal waiver properly can be applied to exclude direct or collateral claims of ineffective assistance of counsel. *Compare, e.g.*, *Hurlow v. United States*, 726 F.3d 958, 964, 966 (7th Cir. 2013) ("[A] direct or collateral review waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel."), *and United States v. Attar*,

38 F.3d 727, 729 (4th Cir. 1994) (holding that a general waiver of appellate rights cannot be construed as waiving claims of ineffective assistance of counsel), *with Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (holding that an appeal waiver precluded a collateral claim of ineffective assistance of counsel and urging that "a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless").

The broad appeal waiver in Mr. Jones's plea agreement encompassing all challenges to the Guidelines and manner in which his sentence was determined is unjust, unknowing, and involuntary. But even if this Court ultimately determines that sentencing-related appeal waivers like Mr. Jones's generally are lawful, there should at least be uniform rules governing their enforcement and interpretation, including whether and when appellate courts should review a challenged sentencing error notwithstanding the existence of an applicable appeal waiver. The Court's guidance is urgently needed to clarify those rules, which impact scores of criminal defendants.

III. This case is a good vehicle for this Court to address appeal waivers.

This Court should also grant certiorari in this case because Mr. Jones's circumstances present a good vehicle for this Court to address the validity and enforceability of sentencing-related appeal waivers. Mr. Jones fully preserved these arguments in opposition to enforcement of his appeal waiver below, and, thus, these issues are cleanly presented for this Court's consideration.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Jones's petition for writ of certiorari.

Respectfully submitted,

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