No. _____

In the Supreme Court of the United States

MARSHALL RAY SCARBOROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Chelsea A. Pieroni
ELLIS & WINTERS LLP
4131 Parklake Ave
Ste 400
Raleigh, NC 27612
(919) 865-7000

Michelle A. Liguori
Counsel of Record
ELLIS & WINTERS LLP
4131 Parklake Ave
Ste 400
Raleigh, NC 27612
(919) 865-7000

Counsel for Marshall Ray Scarborough

QUESTION PRESENTED

Federal Rule of Criminal Procedure 11(b)(1)(N) requires that, before a district court accepts a plea of guilty, it must first "inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence."

Defendant Marshall Ray Scarborough pled guilty pursuant to a plea agreement drafted by the government that, by its written terms, waived "the right to appeal the conviction and whatever sentence is imposed on any ground" and "the right to contest the conviction or the sentence in any post-conviction proceeding." During the plea colloquy, however, the district court told Mr. Scarborough only that the plea agreement "waive[d] [his] right to appeal and waive[d] [his] right to contest the conviction at any post-conviction proceeding," without unambiguously informing Mr. Scarborough—or ensuring that he understood—that the appeal waiver applied to the sentence yet to be imposed.

Mr. Scarborough appealed his sentence. The government moved to dismiss based on the appeal waiver, and the Fourth Circuit granted the motion without discussing the flawed colloquy. The Fourth Circuit has similarly enforced appeal waivers based on nearly identical colloquies in several other cases. Other circuits have held appeal waivers unenforceable under the same or similar circumstances.

The question presented is:

Was it error for the Fourth Circuit to enforce Mr. Scarborough's appeal waiver to bar his sentencing appeal, and should this Court grant certiorari and reverse to correct an erroneous trend in the Fourth Circuit?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Marshall Ray Scarborough.

Respondent, appellee below, is the United States of America.

RELATED PROCEEDING

United States Court of Appeals (4th Cir.):

United States v. Scarborough, No. 23-4414 (Jan. 2, 2024).

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

OPINIONS AND RULINGS BELOW

The Fourth Circuit's order granting the government's motion to dismiss, 4th Cir. No. 24-4224, DE 29, was not reported, but is reprinted in the Petitioner's Appendix A ("App. A").

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on November 14, 2024. Mr. Scarborough invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Criminal Procedure 11(b)(1)(N) provides:

> CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.
>
> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> . . .
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence[.]

Fed. R. Crim. P. 11(b)(1)(N).

STATEMENT OF THE CASE[1]

Marshall Ray Scarborough is a 67-year-old man with a low IQ. JA67, JA83, JA85, JA87, JA101, JA103, JA106. He experienced hardship early on in his adult life, which rendered him unable to work. JA83–84. He became the community driver in his rural town. JA84–85, JA109–110. He got mixed up in using cocaine, and he obliged when others asked him to transport cocaine for sale. JA85.

A. Mr. Scarborough pleads guilty to drug charges.

Tragically, in April 2021, Mr. Scarborough was asked to transport cocaine, which, unbeknownst to him or to the purchasers, was laced with fentanyl. JA41, JA86. Four individuals who used their typical amount of cocaine died instantly because of the presence of fentanyl. JA116, JA122. The victims included Mr. Scarborough's friends and family. JA116.

Mr. Scarborough accepted responsibility for his conduct and pled guilty to a conspiracy count and a substantive count, and he stipulated to a death-results enhancement. JA69–70. The presentence report failed to apply a mitigating-role adjustment, JA59–74, even though the government acknowledged during the plea hearing and initial sentencing that Mr. Scarborough did not know that the cocaine at issue was laced with fentanyl. JA41, JA130. The government indicated that it would move for a downward departure based on Mr. Scarborough's conduct. JA112–114, JA122; see JA119, JA128–129, JA149, JA158.

[1] The JA references in this petition are to the Joint Appendix filed in the Fourth Circuit, No. 24-4224.

B. Mr. Scarborough appeals the district court's denial of a mitigating-role adjustment and the reasonableness of his sentence.

The instant appeal was before the Fourth Circuit after resentencing. At the first sentencing hearing, the district court did not apply a mitigating-role adjustment and imposed a 200-month sentence. JA132–133. The record contained inconsistent statements about the reason for the sentence. JA132–133. Mr. Scarborough appealed, challenging the district court's failure to apply a mitigating-role reduction and the procedural and substantive reasonableness of the sentence. 4th Cir. No. 23-4414, DE 28 at 28–32, 38–43. Mr. Scarborough also argued that the prosecutor committed misconduct by noticing its intent to move for a downward departure and then failing to do so, or, alternatively, that his trial counsel rendered ineffective assistance by withdrawing his objection to the failure to apply a mitigating-role adjustment based on the prosecutor's notice, and then not reviving the objection when the prosecutor failed to move for a downward departure. 4th Cir. No. 23-4414, DE 28 at 32–37.

After reviewing Mr. Scarborough's brief, the government moved to remand, pointing to Mr. Scarborough's argument that his 200-month sentence was procedurally and substantively unreasonable as the basis for the motion. 4th Cir. No. 23-4414, DE 42; see JA149. The Fourth Circuit granted the motion and remanded. 4th Cir. No. 23-4414, DE 44-1.

Notwithstanding asking the Fourth Circuit to remand based on Mr. Scarborough's argument that his 200-month sentence was unreasonable, at

resentencing, the government recommended just that sentence: 200 months. JA149. Defense counsel argued for application of the mitigating-role adjustment, which the district court denied, concluding that Mr. Scarborough was ineligible for the reduction because of his role in distributing cocaine. JA174–175. The district court did not discuss Mr. Scarborough's relative culpability regarding the distribution of fentanyl (such as his relative culpability related to the person who put the fentanyl in the cocaine), even though fentanyl caused death and was thus a driver of his high sentencing range. See JA174–175.

In imposing sentence, the district court made disparaging remarks about Mr. Scarborough's low IQ and parlance. JA167, JA171–172. The court imposed a 180-month sentence. JA177.

Application of a mitigating-role adjustment would have decreased Mr. Scarborough's offense level from 35 to either 31, 32, or 33. See JA70; USSG § 3B1.2. In turn, his guideline range (with his criminal history category of III) would have decreased significantly from 210 to 262 months to either 135 to 168 months, 151 to 188 months, or 168 to 210 months. See USSG Ch.5, Pt.A (sentencing table).

Mr. Scarborough again appealed, contending that it was error to conclude that he was not eligible for the mitigating-role adjustment and that his 180-month sentence was substantively unreasonable based on the facts of his case and his background, age, and health condition.[2] 4th Cir. No. 24-4224, DE 15 at 35–50. The Fourth Circuit has not addressed application of the mitigating-role adjustment where a defendant knowingly transported a controlled substance but lacked knowledge that the substance contained fentanyl. Few other courts have addressed this subject. Cf. United States v. Rivera, No. 15-CR-1020-MV, 2017 WL 3412101, at *9–11 (D. N.M. Mar. 17, 2017) (applying four-point minimal-role reduction, and noting that the defendant "did not know the type or quantity of drugs he was carrying").

[2] Section 3B1.2 of the Sentencing Guidelines instructs district courts to make the following adjustments:

> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

USSG § 3B1.2. The commentary to section 3B1.2 instructs that the determination whether to apply a two-, three-, or four-point adjustment is "based on the totality of the circumstances." Id., cmt. n.3(C). "[T]he defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant." Id., cmt. n.4 (emphasis added).

The government moved to dismiss the appeal based on an appeal waiver in Mr. Scarborough's plea agreement. 4th Cir. No. 24-4224, DE 22. The facts relevant to the appeal waiver are discussed below.

C. Mr. Scarborough enters a plea agreement prepared by the government that contains an appeal waiver.

Mr. Scarborough was charged on a five-count indictment with one count of conspiracy to distribute and possess with intent to distribute cocaine and fentanyl, three counts of distribution of cocaine and fentanyl where serious bodily injury and death resulted, and one count of distribution of cocaine and fentanyl. JA12–14. Mr. Scarborough entered a plea agreement with the government, in which he agreed to plead guilty to the conspiracy count and a lesser-included offense of one of the distribution counts, and the government agreed to dismiss the remaining counts. JA46, JA52.

The plea agreement set forth that:

> The Defendant agrees . . . [t]o waive knowingly and expressly the right to appeal the conviction and whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

JA46–47.

D. At his arraignment, the district court discusses the appeal waiver, unambiguously telling Mr. Scarborough only that it waived his right to appeal his conviction.

At Mr. Scarborough's arraignment, the district court ran through "the important parts of the [plea] agreement." See JA39. Specifically, the court stated:

> The plea agreement says you're going to plead guilty to those two charges and waive your right to appeal and waive your right to contest the conviction at any post-conviction proceeding and forfeit any contraband assets. The elements of Count 1 are set out in paragraph three on page four, specifically, and the elements of Count 2 are set out on page five of the plea agreement, and on page six. Any active sentence would be without parole. Pleading guilty has immigration consequences if you are subject to that.
>
> The US Attorney will dismiss Counts 3 through 5. The base Offense Level is a 38. There are crime victims under the Victims Rights Act. And a downward adjustment applies for acceptance of responsibility.

JA39.

The court ended this outline by asking, "Is that what you've agreed to?" JA39. Mr. Scarborough responded in the affirmative. JA39.

E. The record demonstrates Mr. Scarborough's intellectual and physical limitations.

Mr. Scarborough grew up in poverty in rural North Carolina and showed signs of "slowness" from an early age. JA82–83. As a child, he required extra help in school, and his siblings called him "old man" due to his limited abilities. JA83. He underwent a psychological evaluation for the purpose of this case, which revealed a Full Scale IQ in the range of 75–83, which puts Mr. Scarborough in the seventh percentile of intelligence. JA87.

Despite his intellectual limitations, Mr. Scarborough raised a loving and happy family. He was a doting stay-at-home parent to his four children. JA84, JA103, JA105. As his children grew older, however, Mr. Scarborough became increasingly unable to help them with their homework, which frustrated him. JA84. That is when his own children realized their father was "slow." JA84.

Mr. Scarborough's presentence report reflected additional challenges, including a history of substance abuse, low education level, and diagnosis with post-traumatic stress disorder. JA67–68.

F. The government moves to dismiss Mr. Scarborough's resentencing appeal; the Fourth Circuit summarily grants the motion.

The government moved to dismiss Mr. Scarborough's resentencing appeal. 4th Cir. No. 24-4224, DE 22. The government contended that Mr. Scarborough's plea agreement contained an appeal waiver and that Mr. Scarborough did not dispute entering the agreement knowingly and voluntarily. 4th Cir. No. 24-4224, DE 22 at 1–2. The government also contended that Mr. Scarborough's arguments on appeal—including that the district court erred in declining to apply a mitigating-role adjustment—fell within the scope of the appeal waiver. 4th Cir. No. 24-4224, DE 22 at 1.

Mr. Scarborough responded in opposition. 4th Cir. No. 24-4224, DE 25. He argued that the appeal waiver was not enforceable to bar his sentencing appeal because the district court did not unambiguously inform him during the plea colloquy that he was waiving his right to appeal his sentence, and instead, only

explicitly informed him that he was waiving his right to appeal his conviction. 4th Cir. No. 24-4224, DE 25 at 7–14, 17. Moreover, nothing else in the record demonstrated a knowing waiver of the right to appeal his sentence. 4th Cir. No. 24-4224, DE 25 at 12–13, 17. Rather, Mr. Scarborough's limited mental faculties undermined any finding of a knowing waiver, where the district court did not unambiguously state the waiver's terms. 4th Cir. No. 24-4224, DE 25 at 12–14. Accordingly, Mr. Scarborough did not knowingly and intelligently waive the right to appeal his sentence. 4th Cir. No. 24-4224, DE 25 at 7.

On November 14, 2024, the Fourth Circuit entered an order summarily dismissing Mr. Scarborough's appeal. 4th Cir. No. 24-4224, DE 29. According to the Fourth Circuit, Mr. Scarborough "knowingly and voluntarily waived his right to appeal," and "the issues [he sought] to raise on appeal [fell] squarely within the scope of his waiver of appellate rights." 4th Cir. No. 24-4224, DE 29 at 1–2. The Fourth Circuit did not discuss the plea colloquy. See id.

Mr. Scarborough now asks this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision was clearly erroneous and should be reversed to protect the rights of Mr. Scarborough and other criminal defendants in the Fourth Circuit. Its decision is in conflict with this Court's case law and Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure. The Fourth Circuit's decision in Mr. Scarborough's case is also directly at odds with a decision of the Tenth Circuit, and substantially in conflict with decisions of six other circuits. Moreover, the Fourth Circuit's decision in Mr. Scarborough's case is in conflict with the Fourth Circuit's own precedent, and is part of an erroneous trend in analogous cases. Under these circumstances, this Court should grant certiorari and reverse.

A. The Fourth Circuit's ruling is in conflict with this Court's caselaw and Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure.

This Court has recognized that, to be valid, appeal waivers must be "knowing, intelligent, and voluntary." Garza v. Idaho, 586 U.S. 232, 239 & n.6 (2019) (quoting United States v. Brown, 892 F.3d 385, 394 (D.C. Cir. 2018)). This Court also has recognized that "[a] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope." Garza, 586 U.S. at 238.

Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure requires that, during a plea hearing, before a district court accepts a plea of guilty, it must first "inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." As this Court explained in McCarthy v. United States, the

purpose of Rule 11 is to "expose[] the defendant's state of mind on the record through personal interrogation," to facilitate the court's "own determination of . . . voluntariness," and to "facilitate[] that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary." 394 U.S. 459, 467 (1969).

The Fourth Circuit's decision dismissing Mr. Scarborough's sentencing appeal based on the appeal waiver in his plea agreement violates the above principles. The district court violated Rule 11(b)(1)(N) and McCarthy by telling Mr. Scarborough only that the appeal waiver applied to his conviction, and not telling him that it applied to the sentence yet to be imposed. JA39. Thus, while the record may demonstrate a valid waiver of Mr. Scarborough's right to appeal his conviction, it does not demonstrate that Mr. Scarborough made a knowing, intelligent, and voluntary waiver of his right to appeal the sentence that was yet to be imposed—especially where Mr. Scarborough's intelligence level is in the seventh percentile. See JA87. The Fourth Circuit's decision to nonetheless enforce the appeal waiver to bar Mr. Scarborough's appeal of his sentence is contrary to the principles discussed in Garza, and to McCarthy and Rule 11(b)(1)(N).

B. The Fourth Circuit's ruling is in conflict with the decisions of several other circuits.

Several other circuits have correctly recognized that appeal waivers are not enforceable when the district court's explanation of the waiver during the plea colloquy is inaccurate or incomplete.

United States v. Benitez-Diaz, 320 F. App'x 868 (10th Cir. 2009) (unpublished), involved the same situation presented in Mr. Scarborough's case. There, the defendant's plea agreement contained an appeal waiver that stated: "Defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, conviction and sentence." Id. at 870. At the plea colloquy, the district court discussed only part of the waiver in the following exchange with the defendant:

District court: "Do you understand by entering a free and voluntary plea of guilty you may be giving up any right to challenge your conviction upon appeal?"

Defendant: "Yes."

Id. at 869. Neither defense counsel nor the government corrected the district court's misstatement. Id. at 869–70. The Tenth Circuit held that the district court narrowed the scope of the appeal waiver, rendering it valid only to waive challenges to the defendant's conviction. Id. at 871. The appellate court reviewed the defendant's challenge to his sentence, which was based on denial of the right to allocution, found error, and remanded for resentencing. Id. at 874–75.

In similar situations, other circuits have likewise held that portions of appeals waivers that the district court failed to discuss or incorrectly discussed at the plea hearing were unenforceable.

In United States v. Godoy, the defendant's plea agreement provided that he waived "the right to appeal his sentence or the manner in which it was determined

pursuant to 18 U.S.C. § 3742, except to the extent that the Court sentences [him] to a period of imprisonment longer than the statutory maximum." 706 F.3d 493, 495 (D.C. Cir. 2013). However, during the plea colloquy, "the district court mischaracterized the meaning of the waiver in a fundamental way," telling the defendant: "[Y]ou have given up your right to appeal except should you come to believe after consulting with counsel that the Court has done something illegal, such as imposing a period of imprisonment longer than the statutory maximum." Id. (emphasis in original). The D.C. Circuit reasoned that, "[t]aken for its plain meaning—which is how criminal defendants should be entitled to take the statements of district court judges—the court's explanation allows Godoy to appeal any illegal sentence." Id. The appellate court held that the waiver did not bar the defendant's appeal of his sentence, which was below the statutory maximum. Id. at 495–96.

The D.C. Circuit emphasized that "[c]riminal defendants . . . 'need to be able to trust the oral pronouncements of district court judges.'" Id. at 495 (quoting United States v. Wood, 378 F.3d 342, 349 (4th Cir. 2004), in turn quoting United States v. Buchanan, 59 F.3d 914, 918 (9th Cir. 1995)). "That trust is maintained by enforcing their pronouncements in situations like this." Godoy, 706 F.3d at 495. "[W]hen a court mischaracterizes a waiver provision . . . a defendant can hardly be taken to comprehend, let alone accept . . . [and the defendant has] no chance to demonstrate that he understood and accepted what it meant." Id. Moreover, in Godoy—as in Mr. Scarborough's case—because the government "could have objected

at the hearing to the district court's mischaracterization, but . . . did not," this result was not unfair to the government. Id.

As noted above, other circuit courts have reached similar conclusions on similar facts. See, e.g., United States v. Valencia, 829 F.3d 1007, 1009, 1012 (8th Cir. 2016) (reviewing merits of one defendant's appeal where magistrate judge misstated the scope of appeal waiver during his plea colloquy); United States v. Saferstein, 673 F.3d 237, 243 (3d Cir. 2012) ("[W]e must find that a statement made by the sentencing court during the colloquy can create ambiguity where none exists in the plain text of the plea agreement."); United States v. Padilla-Colon, 578 F.3d 23, 28–29 (1st Cir. 2009) ("[T]aken in context, the court's statement at the change-of-plea hearing [that the defendant could appeal 'depending on the facts the court finds and the sentence it eventually imposes'] was so misleading that it nullified Padilla's waiver of appeal."); United States v. Partin, 565 F. App'x 626, 626 (9th Cir. 2014) (unpublished) (declining to enforce appeal waiver where "the applicable waiver provision was never mentioned during the plea colloquy, and the district court misstated the scope of the provision it did mention"); United States v. Melvin, 557 F. App'x 390, 396 (6th Cir. 2013) (unpublished) ("The weight of the authority in this circuit and others leads inexorably to the conclusion that the district court's inadvertent expansion of the exceptions to an appeal-waiver provision in a plea agreement controls the actual scope of the defendant's waiver, provided that the district court misstates the scope of that waiver before accepting the defendant's guilty plea.").

The Fourth Circuit's decision conflicts with these well-reasoned decisions of its sister circuits.

C. The Fourth Circuit's ruling is also in conflict with its own precedent.

What is more, the Fourth Circuit's decision to enforce Mr. Scarborough's appeal waiver to bar his sentencing appeal is also contrary to its own precedent. The Fourth Circuit, too, has declined to enforce appeal waivers where the district court failed to accurately advise the defendant of the terms of the appeal waiver. See, e.g., United States v. Manigan, 592 F.3d 621, 627–28 (4th Cir. 2010); United States v. Wood, 378 F.3d 342, 347–48 (4th Cir. 2004); United States v. Lundy, 601 F. App'x 219, 220–22 (4th Cir. 2015) (unpublished); United States v. Villegas-Martinez, 487 F. App'x 827, 828 (4th Cir. 2012) (unpublished).

In Manigan, even though the defendant had signed a plea agreement containing an appeal waiver, the district court advised the defendant that he could appeal his sentence at the colloquy. 592 F.3d at 628. At sentencing, the court later advised him again that he could appeal. Id. The Fourth Circuit declined to enforce the appeal waiver, explaining: "When a district court has advised a defendant that, contrary to the plea agreement, he is entitled to appeal his sentence, the defendant can hardly be said to have knowingly waived his right of appeal." Id.

Similarly, in Wood, the Fourth Circuit held that "the terms of the plea agreement were modified by the district court's assurances regarding Wood's opportunity to challenge drug weight, without limitation, and the Government's failure to clarify, object or respond." 378 F.3d at 347–48. The court reasoned that,

even though the appeal waiver in his plea agreement would have waived his appeal, "Wood reasonably relied on the terms of the plea agreement as explained to him during the plea colloquy and as repeated and later acquiesced in by the Government[.]" Id. at 348.

In Lundy and Villegas-Martinez, the Fourth Circuit held that appeal waivers did not bar the defendants' appeals of their convictions, where the district court only informed the defendants during the plea colloquy that the appeal waivers applied to their sentences. Lundy, 601 F. App'x at 220–22 ("Because the judge did not question Lundy about the full scope of the waiver provision and the record does not otherwise indicate that Lundy understood its full significance, we decline to enforce the waiver provision."); Villegas-Martinez, 487 F. App'x at 828 ("The record reveals . . . that the court did not ensure Appellants understood the terms of their appeal waivers regarding their convictions. Thus, we deny in part the Government's motion to dismiss the appeal of Appellants' convictions.").

The Fourth Circuit broke with its own precedent—which the appellate court easily and correctly applied to analogous situations in Lundy and Villegas-Martinez—when it enforced Mr. Scarborough's appeal waiver to bar his sentencing appeal, where the district court only unambiguously informed him during the plea colloquy that his waiver applied to his conviction. As is discussed below, the error in Mr. Scarborough's case is part of an erroneous trend in the Fourth Circuit and calls for this Court's reversal.

D. Reversal is warranted to protect the rights of Mr. Scarborough and other criminal defendants in the Fourth Circuit.

In several cases, the Fourth Circuit has enforced appeal waivers to bar sentencing appeals based on plea colloquies that were nearly identical to the one here. In each case—all from the Eastern District of North Carolina—the defendant entered a standard appeal waiver that, by its written terms, applied to both the conviction and sentence.

In United States v. Page, the district court advised the defendant during the plea colloquy: "The plea agreement says you're going to plead guilty to the charge of the superseding criminal information; waive your right to appeal; waive your right to contest the conviction; waive your right to have a jury decide the elements." No. 7:21-cr-00087, DE 78 at 5 (E.D.N.C. Jan. 3, 2023). Without even discussing the plea colloquy, the Fourth Circuit summarily concluded that "the record reveals that the appellate waiver contained in Page's plea agreement is valid and enforceable, as Page entered it knowingly and voluntarily." United States v. Page, No. 23-4293, 2024 WL 2355395, at *2 (4th Cir. May 23, 2024) (unpublished). The Fourth Circuit granted the government's motion to dismiss the defendant's appeal of his sentence. Id.

Similarly, in United States v. Collins, the district court advised the defendant during the plea colloquy: "The plea agreement says that you waive your right to appeal, and waive your right to contest the conviction at any post-conviction proceeding, and forfeit to the Government any contraband property." No. 5:22-cr-00242, DE 41 at 5 (E.D.N.C. Feb. 7, 2023). In an order noting that Mr. Collins

sought to appeal his sentence, the Fourth Circuit granted the government's motion to dismiss the appeal, stating summarily: "Upon review of the record, we conclude that Collins knowingly and voluntarily waived his right to appeal and that the issue Collins seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights." United States v. Collins, No. 23-4395, DE 26 at 1–2 (4th Cir. May 30, 2024).

And yet again, in United States v. Henry, the district court advised the defendant during the plea colloquy: "The plea agreement says you're going to plead guilty to the superseding indictment, waive your right to appeal, waive your right to contest the conviction in any post conviction proceeding." No. 5:21-cr-00388, DE 238 at 5 (E.D.N.C. Sept. 6, 2022). Again noting that the defendant sought to appeal his sentence (and term of supervised release), the Fourth Circuit summarily granted the government's motion to dismiss in an order, stating: "Upon review of the record, we conclude that Henry knowingly and voluntarily waived his right to appeal and that the issue Henry seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights." United States v. Henry, No. 23-4417, DE 29 at 1–2 (4th Cir. March 5, 2024).

In each case, neither defense counsel nor the government stepped in to correct the district court's misstatement of the appeal waiver's terms. Each case involved a clear violation of Rule 11(b)(1)(N) that the Fourth Circuit failed to address in any way in dismissing the appeals. If this Court does not step in, district

courts in the Fourth Circuit[3] will continue to misstate the terms of defendants' plea agreements, and the Fourth Circuit will continue to dismiss defendants' appeals of their sentences where the record is insufficient to demonstrate that the defendants knowingly and voluntarily waived their right to appeal the sentences yet to be imposed.

This erroneous trend matters, given the great frequency with which criminal charges are resolved by guilty pleas in the United States[4]—including in district courts within the Fourth Circuit—and where the government routinely requires an appeal waiver as a condition of entering plea agreements. Indeed, each year, thousands of criminal defendants stand before judges seeking to resolve criminal charges by entering plea agreements with appeal waivers. For many, this is the most consequential decision in their lives. While the exchange between the judge and defendant may not last long, its "importance" is evident. See McCarthy, 394 U.S. at 463. A thorough plea colloquy that satisfies Rule 11 and McCarthy—including an accurate discussion of the terms of the appeal wavier in a defendant's plea agreement—involves only a tiny fraction of a district court's time—especially

---

[3] All of the colloquies referenced in the above paragraphs involved the same district court judge.

[4] See Lindsey Devers, Bureau of Justice Assistance, Dep't of Justice, Plea and Charge Bargaining, Research Summary 1 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf ("[S]cholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through [plea bargaining.]"); McCarthy, 394 U.S. at 463 n.7 (noting statistics from the Director of the Administrative Office of the Courts showing that, "[d]uring 1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in the United States district courts were pursuant to a plea of guilty or its substantial equivalent, a plea of nolo contendere").

compared to the amount of time required for a trial or resolution of the merits of an appeal.

The Fourth Circuit's trend away from enforcing Rule 11(b)(1)(N), which is contrary to the trend in other circuits, raises questions of basic fairness. If Mr. Scarborough—and Mr. Page, Mr. Collins, and Mr. Henry—had been in the First, Third, Sixth, Eighth, Ninth, Tenth, or D.C. Circuits, their appeal waivers would not have been enforced to bar their sentencing appeals because the district court did not ensure that these defendants understood that they were waiving their right to appeal their sentences.

This Court has recognized the significance of ensuring equal application of Rule 11 to the fair administration of the criminal justice system. See, e.g., McCarthy, 394 U.S. at 463 ("Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal court, and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule, we granted certiorari."). The Court should do so again here, by granting certiorari and reversing the Fourth Circuit's

decision. Doing so would not only correct the clear error in Mr. Scarborough's case, but would halt the erroneous trend that has been developing in the Fourth Circuit.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the Fourth Circuit's decision should be reversed.

Respectfully submitted,

/s/ Michelle A. Liguori
Michelle A. Liguori
Counsel of Record
ELLIS & WINTERS LLP
4131 Parklake Ave, Ste 400
Raleigh, NC 27612
(919) 865-7000
michelle.liguori@elliswinters.com

Chelsea A. Pieroni
ELLIS & WINTERS LLP
4131 Parklake Ave, Ste 400
Raleigh, NC 27612
(919) 865-7000
chelsea.pieroni@elliswinters.com

FEBRUARY 12, 2025

[5] Granting certiorari would also permit the Court to resolve a split on the standard of review for the enforceability of appeal waivers. Most circuits apply a de novo standard of review. See, e.g., United States v. Manigan, 592 F.3d 621, 626 (4th Cir. 2010) ("The issue of whether a defendant has waived his right of appeal in connection with a plea proceeding is a matter of law that we review de novo." (quotation omitted)); United States v. Valencia, 829 F.3d 1007, 1010 (8th Cir. 2016) ("We review de novo the issue of whether a defendant has knowingly and voluntarily waived rights in a plea agreement." (quotations omitted)); see also United States v. Saferstein, 673 F.3d 237, 241 (3d Cir. 2012) ("[O]ur review of the validity and scope of appellate waivers is plenary."). However, some circuits, at least some of the time, have reviewed for plain error. See, e.g., United States v. Arellano-Gallegos, 387 F.3d 794, 796–97 (9th Cir. 2004); United States v. Melvin, 557 F. App'x 390, 393 (6th Cir. 2013) (unpublished).