24-6630

ORIGINAL

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent – Appellee,

v.

AMADO DE LA MORA CARDENAS,

Petitioner – Appellant.

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

ERRATA REDACTED PETITION FOR WRIT OF CERTIORARI

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Andrew M. Wagley, WSBA #50007
Etter, McMahon, Lamberson,
Van Wert, & Oreskovich, P.C.
618 W Riverside Ave, Ste 210
Spokane, WA 99201
Telephone: (509) 747-9100
awagley@ettermcmahon.com
Attorney for Petitioner / Appellant

QUESTION PRESENTED FOR REVIEW

The question presented in this Petition for Writ of Certiorari is whether a criminal defendant may prospectively waive the right to appeal the District Court's legal errors in applying [redacted] the Use of a Minor Specific Offense Characteristic pursuant to USSG § 3B1, pursuant to the purported appellate waiver in the Plea Agreement at issue.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases **Page Number**

[redacted]

STATUTES AND COURT RULES

UNITED STATES SENTENCING GUIDELINES ("USSG")

I. PETITION FOR WRIT OF CERTIORARI

COMES NOW, Petitioner Amado De La Mora Cardenas, by and through his Criminal Justice Act ("CJA")[1] counsel of record, Andrew M. Wagley, and respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

II. OPINION BELOW

Petitioner respectfully seeks review of the Ninth Circuit's Order Granting the Government's Motion to Dismiss Appeal. The pertinent Order of the Ninth Circuit is included herein as pages 1-2 of the Appendix ("App.").

III. STATEMENT OF BASIS OF JURISDICTION

The Ninth Circuit entered the Order Granting Appellee's Motion to Dismiss on April 24, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, having timely filed this Petition for Writ of Certiorari within ninety days of the Ninth Circuit's judgment. In turn, the Ninth Circuit appropriately had jurisdiction pursuant to 28 U.S.C. § 1291.

IV. APPLICABLE LAW

This Petition involves the interpretation of a purported waiver of the right to appeal the District Court's legal error in the application [redacted]

[1] Counsel makes his appearance in this matter as having been appointed pursuant to the Criminal Justice Act of 1964. *See* Supreme Court Rule 9.1.

[redacted] the Use of a Minor Specific Offense Characteristic pursuant to USSG § 3B1.4.

V. SUMMARY OF THE ARGUMENT

The crux of this appeal is the District Court's interpretation of the legal requirements for [redacted] the Use of a Minor Specific Offense Characteristic pursuant to USSG § 3B1.4. [redacted] As indicated in the record, Mr. De La Mora Cardenas' Ninth Circuit Opening Brief brought multiple meritorious arguments along these lines. Instead of addressing the merits of this appeal, the Ninth Circuit dismissed it on procedural grounds.

As explained fully below, review by this Court is warranted for multiple reasons. First, no binding Supreme Court precedent exists regarding the scope,

interpretation, and legal ramifications of a purported appellate waiver contained in a plea agreement. Second, the Ninth Circuit's opinion was contrary to Supreme Court precedent requiring that contract principles govern the interpretation of a plea agreement, which in turn includes the tenet that a contract ambiguity should be construed against the drafter, particularly when dealing with a contract of adhesion. Third and finally, review is warranted to resolve Circuit Court uncertainty regarding the "miscarriage of justice" exception to a purported plea agreement waiver.

VI. STATEMENT OF THE CASE

On October 21, 2020, an Indictment was returned charging Mr. De La Mora Cardenas with: Count One—Conspiracy to Distribute 50 Grams or More of Actual (Pure) Methamphetamine (in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), 846), and Count Four—Possession with Intent to Distribute 50 Grams or More of Actual (Pure) Methamphetamine (in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii)). On March 15, 2023, Mr. De La Mora Cardenas pled guilty to Count Four, Possession with Intent to Distribute.

The Plea Agreement provides that on or about September 24, 2020, "Defendant knowingly possessed methamphetamine" and "possessed it with the intent to deliver it to another person." (2-ER-55.)[2] The Plea Agreement provides:

> *Specific Offense Characteristics:*
> [Defendant is free to argue USSG 3B1.4 is not applicable to him.]
> [redacted]

(2-ER-74.) In relation to the "Length of Incarceration," the Plea Agreement provides: "The United States agrees to recommend a sentence no greater than 136 months. [redacted]

In regard to the "Waiver of Appeal," the Plea Agreement provides in pertinent part:

> Defendant understands that Defendant has a limited right to appeal or challenge Defendant's conviction and the sentence imposed by the Court. Defendant expressly waives his right to appeal his conviction and/or sentence so long as the Court sentences to no higher than 136 months. If the Court sentences him to higher than 136 months, Defendant can only appeal the reasonableness of the sentence.

(2-ER-77 (emphasis added).)

[2] This is a citation to the Ninth Circuit Record. Pursuant to Supreme Court Rule 12.7, "[i]n any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court."

During the March 15, 2023 Change of Plea Hearing, the following colloquy occurred between the Court and Mr. De La Mora Cardenas (through the use of a Court Interpreter):

> [The Court]: There's a waiver of appeal section in the written plea agreement. Did you discuss that waiver of appeal with your lawyer before you signed the agreement?
> [Mr. De La Mora Cardenas]: Yes, Your Honor.
> [The Court]: Do you believe you understand the waiver of appeal section?
> [Mr. De La Mora Cardenas]: Yes, Your Honor.
> [The Court]: Do you have any questions for me about the waiver of appeal?
> [Mr. De La Mora Cardenas]: No. That's fine, Your Honor.

(2-ER-40.) The Court did not further address the purported waiver at the Change of Plea Hearing. (*See id.*)

[redacted]

Prior to sentencing, the Draft Presentence Report ("PSR") did not apply the Use of a Minor upward adjustment pursuant to USSG § 3B1.4 [redacted] Counsel for Mr. De La Mora Cardenas

argued the case at sentencing. Nevertheless, the Court [redacted] applied the Use of a Minor upward adjustment. ([redacted] 3-ER-258—59.) [redacted]

At the Sentencing Hearing, the Court originally sentenced Mr. De La Mora Cardenas to 137 months based upon a mistaken belief that was the alleged waiver contained in the Plea Agreement. (3-ER-272.) Thereafter, the following exchange occurred:

> [The Court]: . . . I believe that based on the written plea agreement you have waived your appellate rights to that sentence. Are there any other issues that I've overlooked?
> [The Prosecution]: Your Honor, I apologize. I'm probably the one that misspoke. The plea agreement was 136 months and the waiver is at 136 months, I believe, so I wanted to make sure—I think the court said 137 months.
> [The Court]: I did. I thought that was your recommendation. And so if you want to correct that, I will follow your correction.
> [The Prosecution]: Yes, I would. I apologize if I misspoke. It's 136 months was our agreement, Your Honor, and I apologize.
> [The Court]: All right. All right. Then, then I will change that to 136 months.

(3-ER-273.)

Mr. De La Mora Cardenas timely filed a Notice of Appeal. On March 11, 2024, the Government filed a Motion to Dismiss Appeal. Mr. De La Mora timely filed a Response to the Government's Motion to Dismiss. On April 24, 2024, the

Ninth Circuit entered the Order Granting Appellee's Motion to Dismiss. (*See* App. at pp. 1-2.) This two-page Order indicates:

> Appellee's motion to dismiss this appeal in light of the valid appeal waiver is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable). Appellant's argument that he reasonably expected a lower sentence is not supported by the plea agreement, which unambiguously provided that appellant waived his right appeal as long as his sentence did not exceed 136 months. Contrary to appellant's claim, that waiver applies even if he did not foresee the issues he now wishes to raise on appeal. *See United States v. Medina-Carrasco*, 815 F.3d 457, 462-63 (9th Cir. 2016). Moreover, even if this court were to recognize a miscarriage of justice exception to enforcement of appeal waivers, it would not apply here.

(*See id.*) Mr. De La Mora Cardenas timely brings this Petition for Writ of Certiorari.

VII. POINTS & AUTHORITIES

In general, review on certiorari is governed by Supreme Court of the United States Rule 10:

> The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> **(a)** a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .
>
> . . .
>
> **(c)** . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10(a), (c).

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Rule 10. Review is granted "only for compelling reasons," which rarely includes "erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* The Supreme Court historically has granted review on unsettled criminal procedure issues that arise routinely, including those pertaining to plea agreements. *See, e.g., Puckett v. United States*, 556 U.S. 129, 133-34 (2009); *Garza v. Idaho*, 586 U.S. 232, 237 (2019).

A. The Supreme Court Has Not Clearly Addressed the Scope of Purported Appellate Waivers Contained Within Plea Agreements.

Certiorari is warranted if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). Based upon Defense Counsel's review, the Supreme Court has not directly addressed the scope of an appellate waiver contained within a plea agreement.

In *Garza v. Idaho*, 586 U.S. 232, 247 (2019), the Supreme Court held that prejudice is presumed for an ineffective assistance of counsel claim when "an attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions." In coming to this conclusion, the *Garza* Court noted that "even the broadest appeal waiver does not deprive a defendant of all

appellate claims." *Garza*, 586 U.S. at 247. In a dicta statement, the *Garza* Court cited to Circuit Courts and State Courts for the following rules of law:

> As courts widely agree, "[a] valid and enforceable appeal waiver ... only precludes challenges that fall within its scope." . . . As with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived. . . . Separately, all jurisdictions appear to treat at least some claims as unwaivable. Most fundamentally, courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary. Consequently, while signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain.

Garza, 586 U.S. at 238-39 (internal citations omitted). However, the *Garza* Court assumed without deciding that this was the appropriate standard. *See id.*

In *Class v. United States*, 583 U.S. 174, 176 (2018), the Supreme Court answered in the negative when presented with the issue of whether a guilty plea "bar[s] a criminal defendant from later appealing his conviction on the ground that the statute of conviction violates the Constitution." In coming to this conclusion, the Court noted that the defendant "did not relinquish his right to appeal the District Court's constitutional determinations simply by pleading guilty," despite the expressly waiver in the plea agreement of "the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range" and "most collateral attacks on the conviction and sentence." *Class*, 583 U.S. at 177-78. In coming to this conclusion, the *Class* Court noted that the

constitutional challenge did not fit within the waiver as it challenged "the Government's power to 'constitutionally prosecute' him." *Id.* at 181-82 (internal citations omitted). As such, the Court noted that plea agreement "does not expressly refer to a waiver of the appeal right here at issue." *Id.* at 185.

In *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." As a preliminary issue, the *Ruiz* Court noted that the plea bargain "asks a defendant to waive indictment, trial, and an appeal." *Ruiz*, 536 U.S. at 625. In analyzing the appellate waiver, the *Ruiz* Court noted that the provision of 18 U.S.C. § 3742(a)(1) regarding whether a sentence was "imposed in violation of law" could be applicable if appellant's constitutional claim prevailed, but nonetheless ultimately concluded "a federal court always has jurisdiction to determine its own jurisdiction." *Id.* at 628.

As indicated above, the Supreme Court has not definitely addressed nor ruled upon the standard applicable to the waiver of the right to appeal in a plea agreement. This Court has long indicated that plea bargaining "is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971); *accord Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978) ("[W]hatever might be the situation in an ideal world, the fact is that the guilty

plea and the often-concomitant plea bargain are important components of this country's criminal justice system."). In this vein, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Santebello*, 404 U.S. at 260. Similarly, the right to appeal is available to indigent criminal defendants in nearly every State and the federal system. *See Garza*, 586 U.S. at 238 n. 4.

As indicated above, this Court has deemed it necessary to address ineffective assistance of counsel predicated upon the failure to file a notice of appeal based upon an appellate waiver in a plea agreement (*Garza*), as well as the application of a purported appellate waiver in a plea agreement pertaining to an unconstitutional statute of conviction (*Class*) and a plea agreement that waives the right to exculpatory evidence (*Ruiz*). As such, the legal standard pertaining to an appellate waiver in a plea agreement is one of vast magnitude, perhaps more important than what has already been addressed by this Court.

The legal effect, interpretation, and scope of a purported waiver of the right to appeal in a plea agreement is an issue of substantial importance in the criminal justice system. As indicated fully below, this issue often involves a fact specific scenario and can have a substantial impact on a criminal defendant's sentence and rights. As such, this issue should be definitively addressed by the Supreme Court

of the United States to provide guidance and uniformity. Instead, the law regarding the waiver of appellate rights in a plea agreement is generally developed by the United States Circuit Courts. Review is warranted so this important question of federal law can be "settled by this Court." Rule 10(c).

B. The Ninth Circuit's Order Conflicts With Supreme Court Precedent Applying Contract Law Principles to Plea Agreements.

Certiorari is also warranted if "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). [redacted]

This argument was consistent with general principles of contract law, as the Supreme Court has indicated are applicable to plea agreements. However, the Ninth Circuit did not consider the ambiguity of the Plea Agreement when read as a whole, nor whether a criminal defense can prospectively waive an error of law.

The Supreme Court has expressly indicated "'[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts.'" *Garza*, 586 U.S. at 238 (quoting *Puckett*, 556 U.S. at 137). In this vein, "the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987); *accord Kernan v. Cuero*, 583 U.S. 1, 6 (2017)

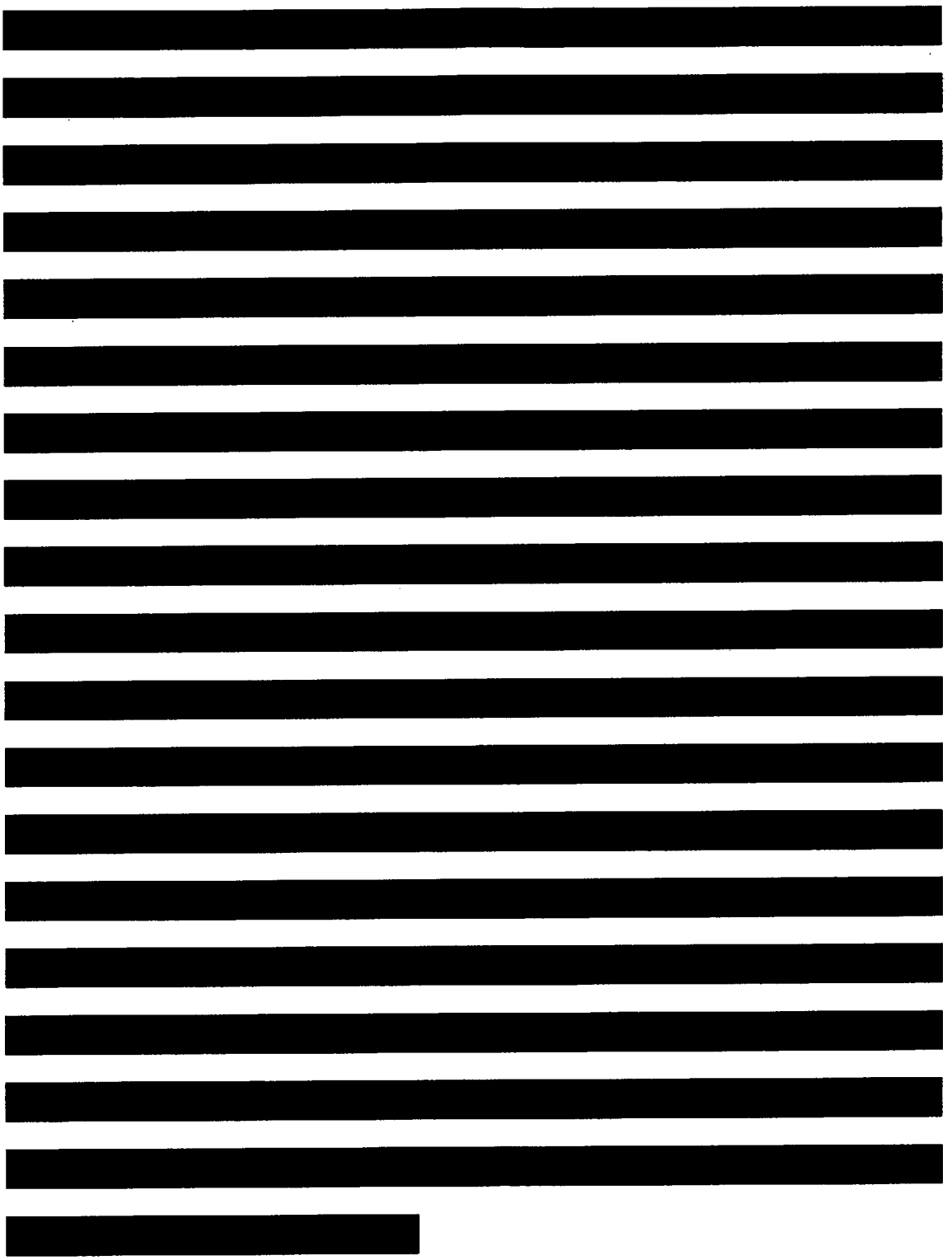
(noting the "plea agreement amounts to, and should be interpreted as, a contract under state contract law"). Furthermore, "plea agreements must be construed in light of the rights and obligations created by the Constitution." *Ricketts*, 483 U.S. at 16. As such, "no appeal waiver serves as an absolute bar to all appellate claims." *Garza*, 586 U.S. at 238.

Similar to the law of contracts, a defendant's waiver of his appellate rights is enforceable: (1) "if the language of the waiver encompasses his right to appeal on the grounds raised," and (2) "if the waiver was knowingly and voluntarily made." *United States v. Watson*, 582 F.3d 974, 986 (9th Cir. 2009). In conducting such an analysis, the Ninth Circuit "looks to the circumstances surrounding the signing and entry of the plea agreement." *Watson*, 582 F.3d at 986. The terms of a plea agreement are interpreted according to "objective standards" and, in the event of a dispute, the "dispositive question" is what the parties "reasonably understood." *United States v. Arnett,* 628 F.2d 1162, 1164 (9th Cir. 1979). The Court also "looks to the circumstances surrounding the signing and entry of the plea agreement." *Watson*, 582 F.3d at 986.

Pursuant to fundamental tenets of contract law, a contract is ambiguous when, read as a whole, reasonable minds could reach different conclusions. *See United States v. Seckinger*, 397 U.S. 203, 216 (1970) ("between two reasonable and practical constructions of an ambiguous contractual provision . . . the

provision should be construed less favorably to that party which selected the contractual language"). As plea agreements are contracts of adhesion, they should be interpreted against the drafter (*i.e.*, the Government). *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (noting that "the use of waiver provisions [in a plea agreement] as contracts of adhesion has become accepted practice"); *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) ("In context of plea agreements, the government is usually the drafter and must ordinarily bear the responsibility for any lack of clarity"); *United States v. De la Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993). Furthermore, a distinction should be drawn between the waiver of antecedent legal errors (prior to entry of the plea agreement), and legal errors that occur after entry of the plea agreement and at the time of sentencing. *See Class*, 583 U.S. at 179 ("The Court noted that a guilty plea bars appeal of many claims, including some 'antecedent constitutional violations' related to events (say, grand jury proceedings) that had 'occurred prior to the entry of the guilty plea.' (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). In this vein, a criminal defendant cannot knowingly, intelligently, and voluntarily waive an error in the application of the law that has not yet occurred. *See id.*

[redacted]



In the situation at hand, the Plea Agreement is ambiguous [redacted] As a contract of adhesion, the Plea Agreement must be strictly construed against the Government.

[redacted]

Pursuant to fundamental tenets of contract law, the Ninth Circuit was required to consider the context and circumstances surrounding the entry of the

Plea Agreement to determine Mr. De La Mora Cardenas' reasonable expectation of the benefit of his bargain. This certainly does not include a waiver of the right to appeal the Court's legal errors in determining his [redacted]. The Ninth Circuit was required to construe any ambiguities in the Plea Agreement against the Government, as the draft of a contract of adhesion. Although public policy favors the finality of litigation, the same does not apply when a criminal defendant enters into a plea agreement [redacted], fulfills his end of the bargain, and is unable to reap the benefit of his negotiated deal.

The Ninth Circuit erred in ignoring fundamental tenets of contract law—as required by the Supreme Court—in interpreting the scope of the purported waiver in the Plea Agreement. *See* Rule 10(c).

C. The Circuit Courts Are in Conflict Regarding the "Manifest Injustice" Exception to a Plea Agreement Appellate Waiver.

Finally, certiorari is warranted if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). In the Ninth Circuit's Order, it indicated "even if this court were to recognize a miscarriage of justice exception to enforcement of appeal waivers, it would not apply here." (App. at 2.)

In what would most likely constitute dicta, the Ninth Circuit has indicated that a Court should refuse to dismiss an appeal if "'the result would work a

miscarriage of justice.'" *United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (quoting *United States v. Gwinnett*, 483 4 F.3d 200, 203 (3d Cir. 2007)); *accord United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) ("Absent some miscarriage of justice, . . . we will not exercise that jurisdiction to review the merits of [an] appeal if we conclude that [the defendant] knowingly and voluntarily waived the right to bring the appeal." (quotations omitted).)

As argued to the Ninth Circuit, the dismissal of Mr. De La Mora Cardenas' appeal would result in a miscarriage of justice. [redacted] Instead, the Ninth Circuit deprived Mr. De La Mora Cardenas of the benefit of his bargain by dismissal of his appeal on a procedural ground. Furthermore, the Court [redacted] purposely sentenced Mr. De La Mora Cardenas to 136 months to ensure the purported waiver was effective. (*See* 3-ER-273.)

In the situation at hand, there is no consistency whatsoever amongst the Circuit Courts regarding the recognition, application, and scope of a "miscarriage of justice" exception to a purported appellate waiver contained in a plea agreement. In this vein, the Third, Fourth, and Tenth Circuits have expressly adopted the miscarriage of justice exception. *See, e.g., United States v. Khattak*,

273 F.3d 557, 558 (3d Cir. 2001) ("We hold that waivers of appeals are generally permissible if entered into knowingly and voluntarily, unless they work a miscarriage of justice."); *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005) ("appellate courts refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice"); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (Circuit will determine "whether enforcing the waiver would result in a miscarriage of justice").

The Sixth Circuit has "implicitly recognized" the miscarriage of justice exception. *See, e.g., United States v. Mathews*, 534 F. App'x 418, 425 (6th Cir. 2013) (unpublished) ("Although we have never expressly recognized the miscarriage-of-justice exception to the enforcement of appellate waivers in a published decision, we have implicitly recognized it in several unpublished decisions."). On the other hand, the Seventh Circuit has "declined to adopt a general miscarriage-of-justice exception." *Cochrell v. Sproul*, 2021 WL 9507636, at *1 (7th Cir. 2021) (unpublished).

Additionally, the First, Second, Eighth, and D.C. Circuit appear to have adopted the "miscarriage of justice" exception in limited circumstances. *See, e.g., Sotirion v. United States*, 617 F.3d 27, 36 (1st Cir. 2010) (miscarriage of justice exception is meant for only "egregious cases" and should be applied "sparingly and without undue generosity"); *United States v. Johnson*, 347 F.3d 412, 415 (2d

Cir. 2003) (noting that a plea agreement cannot waive an appeal premised on a sentence that is "constitutionally deficient because it rests improperly upon [defendant's] status"). *United States v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (miscarriage of justice exception is "extremely narrow"); *United States v. Adams*, 780 F.3d 1182, 1184 (D.C. Cir. 2015) (noting miscarriage of justice exception "is a very narrow exception").

Finally, the Fifth, Ninth (despite the above quoted language), and Eleventh Circuit have refused to expressly either adopt or reject the miscarriage of justice exception. *See, e.g., United States v. Goodwin*, 2024 WL 3082337, at *1 (5th Cir. June 21, 2024) (unpublished) ("Although some other circuit courts have recognized the possibility of a miscarriage-of-justice exception to appeal waivers, this court has 'declined to explicitly either adopt or reject' it."); *United States v. Bernal-Arias*, 702 F. App'x 636 (9th Cir. 2017) (unpublished) ("Even assuming this court recognized such an exception [for miscarriage of justice] to the enforceability of an appeal waiver, it does not apply here."). *United States v. Bijou*, 2023 WL 1991784, at *2 (11th Cir. 2023) (unpublished) ("we've never recognized a 'miscarriage of justice' exception").

As such, this Court should grant Certiorari to clarify the conflicting Circuit Court opinions pertaining to the miscarriage of justice exception. Rule 10(a).

This includes, but is not limited to, not only the existence doctrine, but its scope and application in specific circumstances. *See id.*

VIII. CONCLUSION

Based upon the foregoing, Mr. De La Mora Cardenas respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 18th day of December, 2024.

ETTER, McMAHON, LAMBERSON,
VAN WERT & ORESKOVICH, P.C.

By: _____
Andrew M. Wagley, WSBA #50007
CJA Counsel for Petitioner / Appellant