No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JASON JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Sixth Circuit*

(CA6 No. 23-5854)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

While "jurisdictions appear to treat at least some claims as unwaivable" via an appeal waiver in a plea agreement, this Court has not yet had occasion to make a "statement…on what particular exceptions may be required." *Garza v. Idaho*, 586 U.S. 232, 238 & n.6 (2019). This Petition asks this Court to consider one such potential exception: an appeal alleging an illegal sentence. Several circuits permit such appeals notwithstanding an appeal waiver in a plea agreement. The Sixth Circuit below, however, refused to do so. This Court should resolve the conflict by answering the following question:

1. Did the appeal waiver in Petitioner's plea agreement foreclose an appeal claiming that his sentence was illegal on its face and could not lawfully be imposed on any defendant?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

PRIOR PROCEEDINGS

U.S. District Court for the Eastern District of Tennessee

United States v. Johnson, No. 1:19-cr-00129-TRM-SKL (E.D. Tenn.). Judgment was entered on September 19, 2023.

U.S. Court of Appeals for the Sixth Circuit:

United States v. Johnson, No. 23-5854 (6th Cir). Judgment was entered on December 18, 2024. It was not reported. No petition for rehearing was filed.

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Appendix Contents

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

Jason Johnson respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit Court of Appeals did not select its opinion for publication. A copy is included in Appendix A. It can also be electronically accessed at *United States v. Johnson*, 2024 U.S. App. LEXIS 32143 (6th Cir. Dec. 18, 2024).

The district court did not issue any relevant oral or written opinion, but a copy of the judgment of conviction is included in Appendix B.

JURISDICTION

The district court had jurisdiction over the underlying criminal action pursuant to 18 U.S.C. § 3231. It entered final judgment on September 19, 2023.

The U.S. Court of Appeals for the Sixth Circuit had jurisdiction to consider the district court's final judgment. 28 U.S.C. §§ 1291, 1294.

This Court has jurisdiction to review the Sixth Circuit's judgment. 28 U.S.C. § 1254(1). Judgment was entered on December 18, 2024. No petition for rehearing was filed.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Pursuant to a plea agreement, Mr. Johnson pleaded guilty to drug offenses. His plea agreement included the following provision:

> 10. The defendant acknowledges that the principal benefits to the United States of a plea agreement include the conservation of limited resources and bringing a certain end to the case. Accordingly….
>
> (a) The defendant will not file a direct appeal of the defendant's conviction(s) or sentence.
>
> (b) The defendant will not file any motions or pleads pursuant to 28 U.S.C. § 2255 or otherwise collaterally attack the defendant's conviction(s) or sentence, with two exceptions: The defendant retains the right to file a § 2255 motion as to (i) prosecutorial misconduct and (ii) ineffective assistance of counsel."

At sentencing, in addition to a term of imprisonment for 180 months and the required special assessment, the district court imposed a 10-year term of supervised release. Among the special provisions of supervised release were the following:

> 1) The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
>
> 2) The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

[Appendix B at PageID# 2423].

II. Proceedings in the Sixth Circuit

Mr. Johnson filed a notice of appeal. In his Opening Brief, he raised two anti-delegation challenges to the wording of his special conditions of supervised release, specifically:

> 1. Did the district court commit plain error when it delegated to the probation office the decision of whether Mr. Johnson would be required to submit to "a program of testing and/or treatment for drug and/or alcohol abuse…?" [RE 365 (9/19/23 Judgment), PageID# 2423].
>
> 2. Did the district court commit plain error when it required Mr. Johnson to submit to "mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer," [RE 365 (9/19/23 Judgment), PageID# 2423], without specifying whether the treatment would be inpatient or outpatient?

Upon motion of the Government, the Sixth Circuit dismissed the appeal pursuant to the plea agreement's appeal waiver. The opinion below noted that the Sixth Circuit does not accept the illegal-sentence exception to appeal waivers that the Ninth Circuit recognizes. *See* [Appendix A at 3 (noting that the Sixth Circuit does not follow the rule from *United States v. Wells*, 29 F.4th 580 (9th Cir. 2022)].

REASONS FOR GRANTING THE PETITION

Consistent with the contractual underpinnings of plea agreements, when an appeal waiver is asserted on appeal, the lower courts first ask whether the appeal falls within the plain text of the waiver's language. *E.g.*, *United States v. Toth*, 668 F.3d 374, 378 (6th Cir. 2012) ("First, we look to see if the claim raised on appeal falls within the scope of the appellate waiver…." (citation omitted)).

If an appeal does contravene the waiver's text, courts next ask whether the waiver was knowingly and voluntarily made at the change of plea. *See generally United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is voluntary and that the defendant must make related waivers knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences." (quotation omitted)). In federal court, the Federal Rules of Criminal Procedure specifically require the judge to review any appellate waivers during the plea colloquy. Fed. R. Crim. Pro. 11(b)(1)(N).

In contrast to the widespread agreement in the lower courts with respect to the preceding analysis, the federal circuits are divided as which exceptions, if any, exist to an otherwise valid appeal waiver. This Petition presents an important question and is a good vehicle for the issue presented.

I. The Circuits Are Divided About Which Exceptions, if any, Exist to an Otherwise Valid Appeal Waiver.

A. Many Circuits Impose Some Exceptions on Appeal Waivers.

While plea agreements may sound in contract law, they are not only subject to contractual principles of interpretation. Constitutional concerns may sometimes require relaxation of otherwise applicable contract principles:

> This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that 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. *E.g., Blackledge* v. *Allison*, 431 U.S. 63, 75, n. 6

> (1977). It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.

Ricketts v. Adamson, 483 U.S. 1, 16 (1987).

Given those considerations, many circuits recognize at least some extra-textual exceptions to appeal waivers:

> [A] sentence based on constitutionally impermissible criteria, such as race, *United States v. Hicks*, 129 F.3d 376, 377 (7th Cir. 1997); *United States v. Johnson*, 347 F.3d 412, 414-15 (2d Cir. 2003); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992), or a sentence in excess of the statutory maximum sentence for the defendant's crime, *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997); *United States v. Black*, 201 F.3d 1296, 1301 (10th Cir. 2000), can be challenged on appeal even if the defendant executed a blanket waiver of his appeal rights. *See also United States v. Sines*, 303 F.3d 793, 798 (7th Cir. 2002); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (*en banc*) (*per curiam*).

United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005).

Some, but not all, circuits also recognize an exception for a manifest injustice in the sentence that was imposed. *Compare, e.g.*, *United States v. Corso*, 549 F.3d 921, 927 (3rd Cir. 2008) (explaining that the Circuit will decline to "enforce[e] the waiver [when it] would work a miscarriage of justice" (citations omitted)) *and United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003) (*en banc*) ("Even when [a waiver was knowingly made and the appeal falls within it] …, we will not enforce a waiver where to do so would result in a miscarriage of justice."), *with United States v. Chaney*, 120

F.4th 1300, 1303 (5th Cir. 2024) ("We have not adopted a miscarriage-of-justice exception for appeal waivers…." (citation omitted)), *and King v. United States*, 41 F.4th 1363, 1368 n.2 (11th Cir. 2022) ("[O]ur Circuit has never adopted a general 'miscarriage of justice' exception to the rule that valid appeal waivers must be enforced according to their terms." (citations omitted)).[1] Before invoking this exception to excuse an appeal waiver, courts will consider "a litany of factors, such as the clarity of the error, its gravity and character, its impact on the defendant, the government's interest in enforcing the waiver, and the extent to which the defendant acquiesced in the result below." *United States v. Andruchuk*, 122 F.4th 17, 24 (1st Cir. 2024) (citation omitted). At least some circuits deem "[a] proper showing of 'actual innocence' [as] sufficient to satisfy the 'miscarriage of justice'" exception to appeal waivers. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (quotation omitted).

The Seventh Circuit has recognized an exception that permits an appeal over "obviously vague special conditions" of supervised release. *United States v. Adkins*, 743 F.3d 176, 193 (7th Cir. 2014) (declining to enforce appeal waiver and vacating special condition of supervised release on plain-error review).

Finally, the Ninth Circuit has a rule—specifically rejected by the Sixth Circuit opinion below—that an appeal waiver "does not bar a defendant from challenging an *illegal* sentence. In this context, an 'illegal sentence' has a very limited and precise

[1] The Fifth Circuit does permit appeals for sentences that exceed the statutory maximum. *United States v. Barnes*, 953 F.3d 383, 389 (5th Cir. 2020) (citation omitted). So does the 11th Circuit. *See United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008) (citation omitted).

meaning…. [A]n appeal waiver does not apply to a sentence if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *United States v. Wells*, 29 F.4th 580, 584 (9th Cir. 2022) (quotation and citations omitted). Thus, in addition to vagueness and First Amendment challenges to provisions of supervised release, a claim that a provision of supervised release amounts to an "unconstitutional delegation of authority" to the probation officer will survive an appeal waiver in the Ninth Circuit. *Id.* at 588. The Fourth Circuit, Seventh Circuits, and Eighth Circuits agree with the Ninth Circuit that facially illegal sentences survive an appeal waiver. *See United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012) (explaining that the Fourth Circuit will not enforce an appeal waiver when "the sentence is alleged to have been beyond the authority of the district court to impose" pursuant to statutory or constitutional provisions (collecting cases)); *United States v. Litos*, 847 F.3d 906, 911 (7th Cir. 2017) (holding that an appeal waiver did not bar an appeal over a restitution order because the order was "contrary to the applicable statute and therefore illegal—just as a prison term that exceeded a statutory maximum would be illegal"); *Andis*, 333 F.3d at 891-92 ("[A] defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver…. [A] sentence is illegal when it is not authorized by law; for example, when the sentence is in excess of a statutory provision or otherwise contrary to the applicable statute.").

B. The Sixth Circuit Does Not Recognize Extra-Textual Exceptions.

In contrast to the clear weight of authority from other circuits, the Sixth Circuit below applied its rule that no extratextual exceptions exist to an appeal waiver.

United States v. Milliron, 984 F.3d 1188, 1193 (6th Cir. 2021) ("Because Milliron's plea withdrawal claim falls within the scope of the appeal waiver provision, only challenges to the validity of the plea agreement and the appeal waiver therein will be entertained." (footnote and citation omitted)). The rule appears iron clad. The Sixth Circuit does not even view challenges to the district court's jurisdiction as excusing an appeal waiver. *See United States v. Gibney*, 519 F.3d 301, 305 (6th Cir. 2008) (enforcing an appeal waiver even though the defendant sought to argue that the district court "lacked jurisdiction" to impose the sentence).

II. This Petition Presents an Important Question.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). In the federal system, appeal waivers are a frequent component of plea agreements. One study, for example, found that 90% of plea agreements in the Ninth Circuit contained appeal waivers. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 232 (2005).

While enforcement of promises in a plea agreement is generally important, or else the parties will not bargain at all, a rule that provides the parties with no recourse if the sentencing court violates the law is inconsistent with their reasonable expectations at the time of contracting. *See, e.g.*, *United States v. Ready*, 82 F.3d 551, 559 (2nd Cir. 1996) ("[W]e presume 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."

(citation omitted)). Requiring defendants to assume the risk that the district court will impose an illegal sentence reduces the incentive for defendants to enter into plea bargains at all.

Allowing the Government to enforce an appeal waiver in the face of a claim of illegality also undermines public confidence in the judiciary. *See generally United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) ("[W]ith respect to federal prosecutions, the courts' concerns [with implementing plea bargains] run even wider than protection of the defendant's individual constitutional rights—to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." (citation omitted)).

Whether an appeal waiver will be enforced in the face of the claim of an illegal sentence is thus an important question that would merit the Court's review, even if the Circuits had not already been divided.

III. This Petition Is a Good Vehicle.

The Sixth Circuit below acknowledged that its rule conflicted with that of the Ninth Circuit. Accordingly, a split among the circuits is squarely presented here.

The merits challenges to the delegation at issue in the terms of supervised release are also colorable. *See, e.g.*, *United States v. Stephens*, 424 F.3d 876, 879 (9th Cir. 2005) (holding illegal a special condition of supervised release that delegated to the probation office the ability to determine the frequency of drug testing); *United States v. Matta*, 777 F.3d 116, 23 (2d Cir. 2015) ("The Ninth and Tenth Circuits, the only other

circuits to have considered the issue in precedential opinions, have held that district courts may not delegate to the Probation Department the decision to require inpatient or outpatient treatment…. We agree with both of our sister circuits….” (footnote and citations omitted)).[2]

CONCLUSION

For the forgoing reasons, Mr. Johnson requests that the Court grant the Petition and reverse the judgment below.

Dated: March 17, 2025

Respectfully submitted,

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[2] The drug-testing condition that Mr. Johnson sought to raise below is the subject of the petition for *certiorari* to this Court in *Vaughn v. United States*, 24-6761 (U.S.).