No. _____

In the Supreme Court of the United States

_____

TOVIS ATION RICHARDSON,
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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Fourth Circuit and several other circuits apply the U.S.S.G. § 2D1.1(b)(1) enhancement if a firearm is found in any place where a defendant's conspiracy was carried out. Other circuits apply a multi-factor test that requires a stronger connection between the firearm and the defendant's offense conduct. Did the Fourth Circuit err in holding that a section 2D1.1(b)(1) enhancement was properly applied to Mr. Richardson because a shotgun was found in the trunk of a car he had previously driven to carry out drug transactions?

II. The federal courts of appeals are split on whether and when a knowing and otherwise valid appeal waiver will be enforced because enforcement would result in a miscarriage of justice, with some circuits not recognizing such an exception at all, others applying a recognizable standard, and some recognizing a miscarriage of justice only on a case-by-case basis. Did the Fourth Circuit, which applies more of a case-by-case approach, err in declining to apply a miscarriage-of-justice exception where failing to correct a guideline error in Mr. Richardson's sentence rendered him ineligible for a sentencing reduction under Amendment 821, which was not a bargained-for benefit of his appeal waiver?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Tovis Ation Richardson.

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

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INTRODUCTION

Section 2D1.1(b)(1) of the U.S. Sentencing Guidelines applies a two-level enhancement to a defendant's offense level "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1). While a two-level enhancement may sound small, for some defendants, a two-level enhancement may raise the guideline range by a matter of years. Currently, the federal courts of appeals use different standards for applying the section 2D1.1(b)(1) enhancement, leading to a situation where defendants with similar offense conduct may face significantly different sentences, depending on the circuits in which their prosecutions arise.

Tovis Ation Richardson pled guilty to one count of conspiracy to distribute and possess with intent to distribute methamphetamine, and one count of possession with intent to distribute methamphetamine. At his sentencing, the district court imposed a section 2D1.1(b)(1) enhancement based on evidence that, at a time when he was not engaged in drug transactions, a shotgun was found in a vehicle that he previously used to carry out drug transactions. The record did not show, and the government did not claim to have, evidence that the firearm was in Mr. Richardson's car at the time he carried out any drug transactions or any other relevant conduct. Under such circumstances, a different circuit applying a different section 2D1.1(b)(1) standard likely would have come to a different conclusion. Moreover, the Fourth Circuit's lenient approach to section 2D1.1(b)(1) implicates Second Amendment considerations for defendants like Mr. Richardson, who had no

scorable criminal history, and no felony convictions, and thus was constitutionally free to possess a firearm.

Below, Mr. Richardson raised an ineffective assistance of counsel claim, based on his counsel's failure to object to the section 2D1.1(b)(1) enhancement. The Fourth Circuit decided the ineffective assistance of counsel claim on the merits, holding that Mr. Richardson could not show ineffective assistance because the section 2D1.1(b)(1) enhancement was supported by the record. For the reasons discussed herein, that determination was erroneous.

Mr. Richardson suffers double the effect from the Fourth Circuit's failure to correct the section 2D1.1(b)(1) error. In the months between his plea hearing and sentencing, Amendment 821 to the Sentencing Guidelines enacted section 4C1.1. Section 4C1.1 provides a two-point offense-level reduction for offenders who do not receive any criminal history points and whose offenses did not involve specified aggravating factors, such as possession of a firearm in connection with the offense. Section 4C1.1 may be applied retroactively, allowing defendants to seek a reduction in sentence if they were sentenced before section 4C1.1 went into effect.

In the alternative to his ineffective assistance claim, Mr. Richardson also argued to the Fourth Circuit that the district court plainly erred by applying the section 2D1.1(b)(1) enhancement, where the record lacked support for it. The Fourth Circuit declined to review that argument based on an appeal waiver in Mr. Richardson's plea agreement.

The advent of Amendment 821 asks an important question: Can an appeal waiver be enforced to bar correction of a guideline error when the plea agreement in which it is contained does not waive the defendant's right to seek a reduction of sentence under a retroactive guideline amendment, but enforcing the appeal waiver to bar correction of a guideline error has the effect of denying him an opportunity to seek a reduction of sentence under that guideline amendment?

Enforcing Mr. Richardson's appeal waiver in this context resulted in a miscarriage of justice, and this Court should recognize it as such. Importantly, there is no nationwide guidance on how an appellate court should review this question. Of the circuits that recognize a "miscarriage of justice" exception, there is disparity about the meaning of miscarriage of justice. And there are other circuits that do not recognize a miscarriage-of-justice exception at all. This Court should step in to provide guidance on this issue and the standard for applying a section 2D1.1(b)(1) enhancement.

OPINIONS AND RULINGS BELOW

The Fourth Circuit's opinion affirming the judgment of the district court, 4th Cir. No. 23-4471, DE 61, is reprinted in the Petitioner's Appendix A ("App. A").

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on July 28, 2025. Mr. Richardson invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2D1.1(b)(1) of the U.S. Sentencing Guidelines provides:

> If a dangerous weapon (including a firearm) was possessed, increase [the offense level] by 2 levels.

U.S.S.G. § 2D1.1(b)(1).

Section 4C1.1 of the U.S. Sentencing Guidelines provides that if

> (1) the defendant did not receive any criminal history points from Chapter Four, Part A; [and]
>
> . . .
>
> (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense . . .
>
> decrease the offense level determined under Chapters Two and Three by 2 levels.

U.S.S.G. § 4C1.1(a).

Section 3582(c)(2) of Title 18 of the U.S. Code provides that:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

Section 1B1.10(a)(3) of the Sentencing Guidelines provides that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3).

Finally, 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]

A. Following a traffic stop, Mr. Richardson accompanies officers to his home, where drugs are seized.

In August 2021, the Johnston County Sherriff's Office and Smithfield Police Department received information that Mr. Richardson and two other individuals were distributing narcotics in Johnston County, North Carolina. JA74. From August 26, 2021, to October 1, 2021, a confidential informant, either by himself or while accompanied by one of Mr. Richardson's coconspirators, purchased methamphetamine from Mr. Richardson on multiple occasions. JA74–75.

Investigators stopped Mr. Richardson pursuant to a "traffic stop" on October 8, 2021.[2] JA75. There is no indication that Mr. Richardson was involved in drug sales on the day of the traffic stop. See JA75. Following the traffic stop, Mr. Richardson agreed to lead the investigators to his home, where law enforcement executed a search warrant. JA75. Mr. Richardson was detained and released that same day. JA71.

B. Mr. Richardson pleads guilty to drug charges, and his plea is accepted during his arraignment.

On November 21, 2022, Mr. Richardson entered a plea agreement by which he pled guilty to one count of conspiracy to distribute and possess with intent to distribute methamphetamine, "[b]eginning or about October 2020" through "about

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[1] The JA references in this petition are to the Joint Appendix filed in the Fourth Circuit, No. 23-4471.

[2] There is no additional information in the record about the basis for this "traffic stop." See JA75.

October 14, 2021," and one count of possession with intent to distribute methamphetamine, "[o]n or about October 8, 2021." JA62–63. Mr. Richardson stipulated that a base offense level of 36 applied, pursuant to U.S.S.G. § 2D1.1(c)(2), because the readily provable drug quantity was between 1.5 and 4.5 kilograms. JA65. He also stipulated to a two-point upward adjustment for maintaining a dwelling pursuant to section 2D1.1(b)(12), and the government stipulated to a two or three-point downward adjustment for acceptance of responsibility pursuant to section 3E1.1. JA65–66. Mr. Richardson's plea agreement also included an appeal waiver. JA59. In December 2022, Mr. Richardson was formally charged by information. JA7–9. Later that same month, he provided a written acceptance of responsibility. JA76.

Mr. Richardson's arraignment was held on January 26, 2023. JA28. During the hearing, the district court confirmed that Mr. Richardson waived indictment and consented to prosecution by information. JA44–45. The district court also confirmed that Mr. Richardson agreed to forfeit "one Winchester 1400 MKII 12-gauge shotgun . . . seized on October 8, 2021." JA48. While providing its factual basis for the pleas, the government stated that law enforcement found drugs in Mr. Richardson's home and "the 12-gauge shotgun" in his vehicle on October 8, 2021. See JA51–52. The district court approved the plea agreement and accepted Mr. Richardson's pleas. JA53, 66.

C. The presentence report shows nothing more than that a shotgun was seized from Mr. Richardson's vehicle.

Mr. Richardson's presentence report was filed on April 24, 2023. JA70. The presentence report provided that "[a] shotgun was retrieved from the trunk of [Mr.] Richardson's vehicle" during the October 8, 2021 search. JA75. Mr. Richardson stated that the "shotgun" had been given to him by his late father. JA75–76. The presentence report referenced no other information about this shotgun, such as whether it was loaded or even operational.[3] See JA70–87. Beside the shotgun, nothing else—including drugs or paraphernalia—was found in Mr. Richardson's vehicle. JA75. Nonetheless, the presentence report concluded that Mr. Richardson was "responsible for possession of a firearm during his drug trafficking activities." JA76 (emphasis added).

The presentence report, pursuant to the plea agreement, applied a base offense level of 36 and a two-point enhancement under U.S.S.G. § 2D1.1(b)(12) for maintenance of a dwelling for drug trafficking. JA83. It also applied a two-point enhancement pursuant to section 2D1.1(b)(1). JA83. Pursuant to section 3E1.1(a), the presentence report applied a two-point reduction for acceptance of responsibility

[3] The presentence report stated that a box of ammunition, "of various calibers and gauges," was found in Mr. Richardson's home (i.e., in a different place from the shotgun found in Mr. Richardson's vehicle). JA75. Mr. Richardson informed law enforcement that, in addition to the "shotgun," his father had given him the ammunition found in the home and a separate "rifle," which Mr. Richardson had given to his brother. JA75–76. The presentence report did not state that the ammunition matched the shotgun found in the vehicle, nor that it matched the rifle now owned by Mr. Richardson's brother. See JA75–76.

and an additional one-point reduction, pursuant to section 3E1.1(b), for "timely notifying authorities of the intention to enter a plea of guilty." JA84. The resulting total offense level was 37. JA84.

The presentence report calculated a criminal history score of zero, which resulted in a criminal history category of I. JA77. The resulting guideline range was 210 to 262 months. JA84. Neither the government nor Mr. Richardson's trial counsel objected to the presentence report. JA87.

D. Mr. Richardson is sentenced to twenty years.

Mr. Richardson's sentencing hearing was held on June 26, 2023. JA88. After stating that Mr. Richardson "possessed a firearm during drug trafficking," JA100; see also JA100 ("[T]here was a search, October 8th, 2021, where these -- the cash and the gun and the drugs are recovered . . . ."), the district court imposed a 20-year sentence, followed by five years' supervised release. JA101. The court again noted that the sentence imposed was based, in part, on Mr. Richardson's "possession of a firearm." JA102.

E. Between Mr. Richardson's two hearings, the U.S. Sentencing Guidelines are amended.

Amendment 821 to the U.S. Sentencing Guidelines was submitted to Congress on April 27, 2023—three months after Mr. Richardson's January 26, 2023 plea hearing and two months before his June 26, 2023 sentencing hearing. See "Amendments to the Sentencing Guidelines," United States Sentencing Commission

(April 27, 2023).[4] This amendment enacted U.S.S.G. § 4C1.1, which provides a two-point offense-level decrease for offenders who did not receive any criminal history points and whose offenses did not involve specified aggravating factors. Id. at 79. One of the aggravating factors that would make an otherwise qualifying defendant ineligible for the two-point decrease is if the defendant "possess[ed] . . . a firearm . . . in connection with the offense." Id. at 87.

A proceeding for a reduction of sentence under a guideline amendment is not a full resentencing, which means the district court cannot revisit findings that supported guideline enhancements that applied during the original sentencing. U.S.S.G. § 1B1.10(a)(3).

Section 4C1.1 was made retroactive in August 2023. "Amendment to the Sentencing Guidelines," United States Sentencing Commission (August 31, 2023).[5] It went into effect on November 1, 2023. See U.S.S.G. § 4C1.1(a).

F. Mr. Richardson appeals his sentence.

Mr. Richardson appealed to the Fourth Circuit. JA23–24. Undersigned counsel was appointed for the appeal. See 4th Cir. No. 23-4471, DE 18; see also 4th Cir. No. 23-4471, DE 26.

Mr. Richardson argued to the Fourth Circuit that the district court plainly erred in applying a section 2D1.1(b)(1) sentencing enhancement on the sole basis of

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[4] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf.

[5] Available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202308_RF-retro.pdf.

the presence of a shotgun, where there was no established connection between said shotgun and the drug offenses. 4th Cir. No. 23-4471, DE 21 at 17–23. Mr. Richardson argued, alternatively, that his trial counsel rendered ineffective assistance by not objecting to the enhancement. 4th Cir. No. 23-4471, DE 21 at 23–26.

After oral argument, the Fourth Circuit issued a published opinion affirming Mr. Richardson's sentence. App. A. As to section 2D1.1(b)(1), the Fourth Circuit concluded that, because "[t]he shotgun was . . . discovered in a place where [his] conspiracy was carried out," the district court did not err in applying the sentence enhancement. App. A at 11. Thus, the Fourth Circuit held that Mr. Richardson could not show ineffective assistance of counsel. App. A at 16. The Fourth Circuit did not reach Mr. Richardson's plain error argument, concluding that his appeal waiver precluded his appeal of that issue. App. A at 4–7. The Fourth Circuit acknowledged that it had the authority to "refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice," but only for a "narrow class of claims." App. A at 6 (quotations omitted). As examples of such claims, the Fourth Circuit cited to United States v. Smith, 134 F.4th 248, 261 (4th Cir. 2025), in which the district court "had a regular practice of 'omitting necessary information in both plea and sentencing hearings,'" and United States v. Adams, 814 F.3d 178, 183 (4th Cir. 2016), in which the defendant had made a "valid claim of actual innocence." App. A at 6.

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Richardson's petition for a writ of certiorari to the Fourth Circuit on the two bases below.

First, this Court should grant certiorari to establish uniformity in application of the section 2D1.1(b)(1) firearms enhancement, vacate the decision of the Fourth Circuit on Mr. Richardson's ineffective assistance claim, and remand. Whereas, below, the Fourth Circuit held that the sentence enhancement was warranted based solely on the presence of a shotgun in the trunk of a car that had, on discrete earlier occasions, been used for drug trafficking, use of a multi-factor inquiry applied by other circuits would likely have resulted in no section 2D1.1(b)(1) enhancement and a different guideline range for Mr. Richardson.

Second, this Court should grant certiorari to establish a nation-wide standard for determining when enforcement of an otherwise valid appeal waiver would enact a miscarriage of justice. The Court should recognize that a miscarriage of justice occurs when the failure to correct a guideline error would render a defendant ineligible to obtain relief under retroactive Amendment 821, where the defendant did not knowingly waive the right to such relief. Accordingly, the Court should vacate the Fourth Circuit's decision on Mr. Richardson's appeal waiver and remand for the Fourth Circuit's consideration of his plain error claim.

A. This Court should clarify that the section 2D1.1(b)(1) enhancement requires more than finding a firearm near where the defendant's conspiracy occurred.

According to section 2D1.1(b)(1) of the U.S. Sentencing Guidelines, a weapons-based enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." U.S.S.G. § 2D1.1, cmt. n.11(A). The federal courts of appeals, however, have diverged on their understanding of when a weapon is "present."

1. There is a disparity among the circuits in applying section 2D1.1(b)(1).

Some circuits apply a multi-factor test. See, e.g., United States v. Perez, 5 F.4th 390, 400–401 (3d Cir. 2021) ("[F]actors that will ordinarily matter [are]: (1) the type of gun involved, with handguns more likely to be connected with drug trafficking than hunting rifles; (2) whether the gun was loaded; (3) whether the gun was stored (or, we add, possessed) near the drugs or drug-related items; and (4) whether the gun was accessible."); United States v. Mosley, 53 F.4th 947, 966 (6th Cir. 2022) ("Six factors bear on [a section 2D1.1(b)(1)] determination: (1) the type of gun [the defendant] possessed, (2) its accessibility, (3) the presence of ammunition, (4) the gun's proximity to illegal drugs, cash, or drug paraphernalia, (5) evidence that [the defendant] used the weapon, and (6) whether [the defendant] was engaged in drug trafficking, rather than manufacturing or possession.").

Other circuits, including the Fourth, apply the enhancement if the firearm is found in a place where the defendant's offense, conspiracy, or relevant conduct took place. See, e.g., United States v. Cantero, 995 F.2d 1407, 1411–12 (7th Cir. 1993) ("[O]ur review is not limited to the evidence dealing with the proximity of the gun and the drugs at the specific time of the arrest, rather, we must determine whether the gun was possessed during the offense, i.e., during the course of the conspiracy."); United States v. Sanchez-Cruz, No. 23-1528, 2024 WL 4457233, at *2 (9th Cir. Oct. 10, 2024) ("We apply U.S.S.G. § 2D1.1(b)(1) broadly, and have concluded that the offense in this context refers to the entire course of criminal conduct, not just the crime of conviction. [T]he government simply bears the burden of proving that the weapon was possessed at the time of the offense." (brackets in original) (quotations omitted)); United States v. Flores, 149 F.3d 1272, 1280 (10th Cir. 1998) ("This nexus may be established by showing that the weapon was located nearby the general location where drugs or drug paraphernalia are stored or where part of the transaction occurred." (quotation omitted)); United States v. Moore, No. 23-50892, 2025 WL 561419, at *4 (5th Cir. Feb. 20, 2025) ("[T]he Government must show that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred." (quotations omitted)); see also Perez, 5 F.4th at 401 (in which the Third Circuit expressly distinguished its approach from that of the First, Fourth, Fifth, Eighth, and Eleventh Circuits).

In its decision below, the Fourth Circuit said that, "[i]f 'the underlying offense is conspiracy to distribute drugs, . . . discovery of a weapon "in a place where the

conspiracy was carried out or furthered" is sufficient to link the weapon to the conspiracy.'" App. A at 10 (quoting United States v. Bolton, 858 F.3d 905, 912 (4th Cir. 2017)). With that reasoning, the Fourth Circuit held that a shotgun found in Mr. Richardson's vehicle during a traffic stop, on a day when he was not engaged in drug trafficking, and the fact that he was later charged with conspiracy to distribute were sufficient to warrant application of a section 2D1.1(b)(1) enhancement. See App. A at 11–12.

2. Using a different approach would likely result in a different outcome.

If Mr. Richardson's case had come before a circuit applying a multi-factor analysis, such as those employed by the Third and Sixth Circuits, the outcome likely would have been different. These methods would focus on factors such as the following:

- The type of gun at issue, see Perez, 5 F.4th at 401, Mosley, 53 F.4th at 966—in this case, a shotgun, JA75–76; see also Perez 5 F.4th at 401 (noting that handguns are "more likely to be connected with drug trafficking than hunting rifles");
- Whether the gun was loaded, see Perez, 5 F.4th at 401—which, in this case, is not addressed by the record, JA75–76;
- Whether the gun was accessible, see Perez, 5 F.4th at 401; Mosley, 53 F.4th at 966—in this case, arguably not, as it was found in the trunk of a vehicle, JA75–76;

- Whether the gun was stored or possessed near the drugs or drug-related items at issue, see Perez, 5 F.4th at 401; Mosley, 53 F.4th at 966—here, no, JA75–76;
- Whether there was evidence that Mr. Richardson used the weapon, Mosley, 53 F.4th at 966—here, no, JA75–76.

A court applying this analysis could certainly conclude that these factors weighed against imposing the firearm enhancement in Mr. Richardson's case. See Perez, 5 F.4th at 402 ("Our holding here avoids the problem of a drug trafficker who coincidentally has a hunting rifle buried in his closet." (quotation omitted)); cf. Mosley, 53 F.4th at 966–67 (concluding district court did not err in applying enhancement where weapon in question was "a small pistol that was not difficult to conceal," the pistol was accessible to the defendant, and the pistol was found "inches away from [the defendants]'s fentanyl stash" and "only a foot and a half away from" other drug "residue").

Conversely, the method employed by the Fourth Circuit relies on speculation, allowing for much more attenuated circumstances to warrant a section 2D1.1(b)(1) enhancement. If it is conceivable that the weapon in question was possessed or used during the course of the conduct in question, that is sufficient to trigger the sentence enhancement. See App. A at 11.

The more lenient approach applied by the Fourth Circuit and others also raises Second Amendment concerns. Mr. Richardson, as an American citizen, had a constitutional right to possess a firearm. U.S. Const. amend. II; see also D.C. v.

Heller, 554 U.S. 570, 619 (2008) ("The right to bear arms has always been the distinctive privilege of freemen." (quotation omitted)). Mr. Richardson had no scorable criminal history, and, before he pled guilty to the instant offenses, was not a felon, which would have barred him from owning a firearm. Allowing this more lenient approach to the section 2D1.1(b)(1) enhancement to stand risks infringing the Second Amendment rights of Americans in a significant portion of the United States.

B. This Court should recognize a miscarriage-of-justice exception to appeal waivers and apply it here.

1. No national standard exists for declining to enforce appeal waivers based on a miscarriage of justice.

This Court has not taken a position on the standard that should be applied to determine when an appeal waiver should not be enforced because enforcement would effect a miscarriage of justice. See Garza v. Idaho, 586 U.S. 232, 239 & 239 n.6 (2019) ("mak[ing] no statement . . . on what particular exceptions may be required" for determining when an appeal waiver is unenforceable). In the absence of guidance from this Court, there is disparity among the federal courts of appeals as to when, if ever, a miscarriage-of-justice exception to enforcement of an appeal waiver is appropriate, and what analysis that exception entails.

As noted in the opinion below, App. A at 6, the Fourth Circuit applies a "miscarriage of justice" inquiry when determining whether a court should reject an otherwise enforceable appeal waiver. Adams, 814 F.3d at 182; United States v. Mikalajunas, 186 F.3d 490, 493–96 (4th Cir. 1999); see also United States v. Blick,

408 F.3d 162, 171 n.10 (4th Cir. 2005). Other circuits recognize a miscarriage-of-justice exception as well. See, e.g., United States v. Guillen, 561 F.3d 527, 531 (D.C. Cir. 2009); United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001); United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001); United States v. Williams, 81 F.4th 835, 840 (8th Cir. 2023); United States v. White, 584 F.3d 935, 948 (10th Cir. 2009). However, these circuits' interpretation of "miscarriage of justice" varies.

The Fourth and D.C. Circuits employ an understanding of the exception that appears limited to a "narrow class of claims." Blick, 408 F.3d at 171; see, e.g., Smith, 134 F.4th at 261 (stating that the Fourth Circuit's "narrow class of claims" has included "sentences imposed in excess of the maximum penalty provided by statute," "based on a constitutionally impermissible factor such as race," "imposed while a defendant was deprived of counsel during his sentencing proceedings," "imposed beyond the authority of the district court," and where "an appellant makes a "proper showing of actual innocence" (quotations omitted)); Guillen, 561 F.3d at 531 (stating that the D.C. Circuit's class of claims has included those where a district court "fails to advert to factors in 18 U.S.C. § 3553(a)," where the sentence imposed "exceed[ed] the statutory maximum," and where the sentence rested upon "constitutionally impermissible factor[s]"). Because these circumstances are not beholden to specific criteria, the "narrow class of claims" is unpredictable. See Smith, 134 F.4th at 261–62 (expanding the Fourth Circuit's class of claims to include the scenario before it, where the district court had exhibited "[t]he regular

practice" of "omit[ting] necessary information and disregard[ing] required procedure in both plea and sentencing hearings").

Similarly, the Eighth and Tenth Circuits have held that a miscarriage of justice only occurs under specific circumstances. See, e.g., Williams, 81 F.4th at 840; United States v. Mason, No. 25-5100, 2025 WL 2701944, at *3 (10th Cir. Sept. 23, 2025). Unlike the Fourth and D.C. Circuits, however, these circumstances also include ineffective assistance of counsel. See, e.g., Williams, 81 F.4th at 840 ("The miscarriage-of-justice exception is a narrow one that arise[s] in only limited contexts. We have recognized it for challenges to an illegal sentence, to a sentence that violates the terms of an agreement, and where ineffective assistance of counsel rendered the appeal waiver itself unknowing and involuntary." (brackets in original) (quotations omitted)); see also Mason, 2025 WL 2701944, at *3 (employing an even narrower set of circumstances that is limited to "four enumerated situations": "'[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful'" (brackets in original) (quoting United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004))); cf. United States v. Vigil-Benitez, No. 22-3031, 2023 WL 6939238, at *1 (D.C. Cir. Oct. 20, 2023) (treating ineffective assistance of trial counsel as an exception to enforcement of an appeal waiver that is independent of the miscarriage of justice exception); see Sharpe v. Bell, No. 06-6825, 2007 WL 1180306, at *1 (4th Cir. Apr. 20, 2007) (same);

but see United States v. Jordan, 438 F. App'x 180, 181 (4th Cir. 2011) (citing Tenth Circuit's decision in Hahn to include ineffective assistance of counsel as an example of a miscarriage of justice).

Other circuits employ a multi-factor analysis to determine whether the miscarriage of justice exception applies. The First Circuit, specifically, "consider[s] a litany of factors" in determining whether the "enforcement of an appeal waiver would work a miscarriage of justice," namely, "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) (citing Teeter, 257 F.3d at 26). The Third Circuit has expressly adopted the First Circuit's approach. Khattak, 273 F.3d at 563.

Among the circuits that recognize a miscarriage-of-justice exception, there is disparity as to which party bears the burden of proof when an appeal waiver is challenged. While there appears to be no Fourth Circuit case on point, in the Eighth Circuit it is the government that bears the burden of showing: "(1) that the appeal is [clearly and unambiguously] within the scope of the waiver, (2) that the defendant entered into the waiver knowingly and voluntarily, and (3) that dismissing the appeal based on the defendant's waiver would not result in a miscarriage of justice." United States v. McIntosh, 492 F.3d 956, 959 (8th Cir. 2007) (brackets in original) (quotation omitted). Conversely, in the Tenth Circuit,

"[t]he burden rests with the defendant to demonstrate that the appeal waiver results in a miscarriage of justice." White, 584 F.3d at 948 (quotation omitted).

Other circuits have expressly rejected recognizing any "miscarriage of justice" exception altogether. See, e.g., United States v. Johnson, No. 24-30442, 2025 WL 2375233, at *1 (5th Cir. Aug. 15, 2025) ("[T]his court does not recognize a miscarriage-of-justice exception to an appeal waiver."); United States v. Ayala, 316 F. App'x 636, 637 (9th Cir. 2009) (same); United States v. Chavez-Borja, No. 22-13975, 2024 WL 1253804, at *1 (11th Cir. Mar. 25, 2024) (same); see United States v. Nulf, 978 F.3d 504, 505 (7th Cir. 2020) (without officially denying recognition of "miscarriage of justice" exception, the court expressly employs a "normal rule," i.e., that "the appeal waiver is enforceable unless the underlying guilty plea was invalid").

A few other courts, still, have yet to adopt a position. See, e.g., United States v. Mathews, 534 F. App'x 418, 425 (6th Cir. 2013) ("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." (collecting cases)); United States v. Thompson, 143 F.4th 169, 183 (2d Cir. 2025) ("[W]e have left open the question of whether a defendant can challenge the constitutionality of his conviction on appeal notwithstanding a waiver in the rare circumstance when there has been a complete miscarriage of justice." (quotation omitted)).

This disparity among the circuits results in uneven application of the law throughout the United States. Where, in one jurisdiction, a defendant may show that the circumstances of his case render his appeal waiver unenforceable, a defendant in another jurisdiction could have his appeal waiver enforced despite the same circumstances. This Court has the power to resolve that disparity by granting certiorari and harmonizing the standard applied across the circuits. See, e.g., Heckler v. Turner, 468 U.S. 1305, 1306 (1984) (explaining that certiorari had been granted to resolve a conflict between the circuit courts with respect to the treatment of beneficiaries under the Aid to Families with Dependent Children statute).

2. The Fourth Circuit's enforcement of Mr. Richardson's appeal waiver on the facts here was fundamentally unfair.

Here, enforcing Mr. Richardson's appeal waiver to bar correction of the guideline error prevented him from obtaining relief under Amendment 821, because it allowed an erroneous finding that he possessed a firearm in connection with his offenses to stand and to bar his eligibility for a sentencing reduction for which he would otherwise be eligible.

Rule 11 of the Federal Rules of Criminal Procedure provides that, "[b]efore the court accepts a plea of guilty or nolo contendere, . . . the court must inform the defendant of, and determine that the defendant understands," among other things, "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). But Mr. Richardson was not informed of the full extent his appeal waiver, as it was ultimately applied by the Fourth Circuit.

The appeal waiver in Mr. Richardson's plea agreement did not waive his right to relief under Amendment 821, because the government did not bargain for that as part of the plea agreement. See JA59–66; see also supra pp. 9–10 (discussion of Amendment 821). Further, the plea hearing transcript is silent as to Amendment 821, even though trial counsel for Mr. Richardson or the government could have sought, or inquired as to, section 4C1.1 relief while the amendment was pending. See United States v. Harris, No. 23-6811, 2025 WL 18131, at *1 n.1 (2d Cir. Jan. 2, 2025) ("While the advisory Guidelines range at the time of [the defendant]'s sentencing was 121 to 151 months, the parties agreed that a range of 97 to 121 months' imprisonment appropriately accounted for the then-anticipated amendment to U.S.S.G. § 4C1.1, which would have retroactively applied to [the defendant]'s sentence.").

Mr. Richardson did not receive any criminal history points, JA77, and none of the other aggravating factors in section 4C1.1 appears to apply. See U.S.S.G. § 4C1.1(a). The record does not show that Mr. Richardson knew that, by agreeing to an appeal waiver, he was waiving the ability to seek retroactive relief pursuant to section 4C1.1. Nor does the record show that the government bargained for waiver of section 4C1.1 relief as part of the appeal waiver—if it had, that should have been brought to Mr. Richardson's attention. See Fed. R. Crim. P. 11(b)(1)(N).

Where the record shows that there was no evidence that Mr. Richardson's shotgun was present during any of his offense conduct, it is unfair to allow the firearm enhancement to stand and to require Mr. Richardson to serve a sentence

that was not only erroneously enhanced but may be passed over for a sentencing reduction for which he otherwise would be eligible.

3. Employing other circuits' approaches likely would have given Mr. Richardson a different outcome.

What the Fourth Circuit did below was construe Mr. Richarson's appeal as an attempt to "re-bargain the waiver of his right to appeal because of changes in the law," and so it summarily ruled that no miscarriage of justice would result from enforcing his waiver. App. A at 7 (quotations omitted). Had the Fourth Circuit applied a different existing approach—e.g., the multi-factor analysis favored by the First and Third Circuits—it may have recognized that an "unusual circumstance" was afoot and come to a different conclusion. See Khattak, 273 F.3d at 562.

The Third and First Circuits analyze the following before determining whether an appeal waiver should be enforced:

> [t]he 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.

Id. at 563 (quoting Teeter, 257 F.3d at 25–26). Under this lens, a reviewing court may have noted that, because Mr. Richardson's plea agreement never mentioned the then-pending sentencing amendment, he had no reason to know that, by agreeing to his plea agreement and the appellate waiver within it, he was agreeing to waive a chance at a reduced sentence subject to Amendment 821. See, e.g., United States v. Icker, 13 F.4th 321, 326 & 326 n.3 (3d Cir. 2021) (declining to enforce appeal waiver where "the Plea Agreement never mentioned any SORNA

requirements, and because [the defendant] did not plead guilty . . . under SORNA as part of that agreement, he had no reason to know that he would be subject to SORNA," and, "enforcing this waiver would be a miscarriage of justice" as "(1) the error was clear, . . . (2) the error is grave, (3) the error presents a legal question, not a fact question, (4) the error creates a burdensome obligation for [the defendant], and (5) the impact to the Government in correcting this error would be minimal.").

In other words, if Mr. Richardson's case had appeared before the First or Third Circuits, it appears likely that his appeal waiver would not have been enforced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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