

In the Supreme Court of the United States

ANGEL ALEJANDRO PENA, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether enforcing the appeal waiver in the plea agreement—
despite the district court’s repeated assurances that Pena could
appeal whether the statute of conviction is constitutional—
resulted in a manifest miscarriage of justice.

PARTIES TO THE PROCEEDING

Petitioner Angel Alejandro Pena was the appellant below and the defendant in the district court.

Respondent United States of America was the appellee below and the plaintiff in the district court.

RELATED PROCEEDINGS

United States District Court for the Western District of Texas:

United States v. Angel Alejandro Pena,
No. 5:22-cr-249 (Oct. 5, 2023)

United States Court of Appeals for the Fifth Circuit:

United States v. Angel Alejandro Pena,
No. 23-50717 (Mar. 26, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angel Alejandro Pena respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Fifth Circuit's opinion is not reported but is available at 2026 WL 839111 and is reproduced at App. 1a–8a.

JURISDICTION

The Fifth Circuit entered its judgment on March 26, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. When officers executed a search warrant at Pena's residence in April 2021, they found a single round of .45 caliber ammunition in a shoebox in Pena's bedroom. C.A. ROA 280, 293. About a month before the search, officers had responded to a bar fight at which Pena apparently had a gun. *Id.* at 293. At the time of the search and the bar fight, Pena had a pending charge in Texas state court for evading arrest in a vehicle, a third-degree felony. *Id.* at 280. The evading arrest charge was later dismissed. *See State v. Pena*, No. 2020CR326D4 (406th Dist. Ct., Webb County, Tex. Feb. 7, 2022). But three months after that charge was dismissed, the government charged Pena with receiving a firearm (count one) and ammunition (count two) while under felony indictment, both in violation of 18 U.S.C. § 922(n). C.A. ROA 10–11.

2. Pena moved to dismiss the indictment, arguing that § 922(n) violates the Second Amendment under the two-step framework set out by this Court in *NYSRPA v. Bruen*, 597 U.S. 1 (2022). C.A. ROA 63–75. The district court denied the motion, relying on its earlier decision addressing whether § 922(n) violated the Second Amendment in another case. *Id.* at 127–28 (citing *United States v. Simien*, 655 F. Supp. 3d 540 (W.D. Tex. 2023)). In *Simien*, the same district court held that receipt of a firearm by someone under indictment was covered by the text of the Second Amendment. 655

F. Supp. 3d at 550–51. But the court held that early American surety statutes presented a “sufficient, though imperfect, historical analogue to § 922(n).” *Id.* at 551–52.

3. After the district court denied his motion to dismiss, Pena and the government entered into a plea agreement. C.A. ROA 278–87. Pena agreed to plead guilty to count two (receiving ammunition), and the government agreed to dismiss count one (receiving a firearm). *Id.* at 278. Pena also waived his “right to appeal the conviction or sentence on any ground, including any challenge to the constitutionality of the statute of conviction.” *Id.* at 282.

4. At sentencing, Pena’s counsel confirmed his understanding that, under this Court’s decision in *Class v. United States*, 583 U.S. 174 (2018), the plea agreement did not bar Pena’s right to appeal his Second Amendment challenge: “And the plea agreement that we reached in this case ... does not encumber Mr. Pena from pursuing his Second Amendment claim, wherein he challenges the constitutionality of Title 18, Section 922(n).” C.A. ROA 232–33. The district court agreed that Pena had preserved his “ability to challenge the underlying constitutionality of the statute ... should [he] decide to pursue an appeal” and that his appeal was “not foreclosed.” *Id.* at 233–34. The government never disputed this understanding of the plea agreement. *See id.* at 232–34.

The district court sentenced Pena to 37 months’ imprisonment and 3 years’ supervised release. ROA.198–99, 251. After imposing the sentence, the court again confirmed that although Pena gave up some appellate rights in the plea agreement, he was “not foreclosed from challenging the constitutionality of the 922(n) charge.” *Id.* at 265–66.

5. Pena appealed, and the Fifth Circuit dismissed his appeal, holding that the appeal waiver was enforceable. App. 1a–8a. Although it acknowledged that the district court “wrongly advised Pena of his right to appeal,” the court held that Pena’s waiver was still knowing. *Id.* at 6a. The court also held that the record was not sufficiently developed to determine whether counsel was ineffective at sentencing. *Id.* at 7a. Finally, the court held that the government had not obviously breached the plea agreement. *Id.* at 8a.

REASONS FOR GRANTING THE PETITION

In *Hunter v. United States*, No. 24-1063 (June 18, 2026), this Court recently clarified the limits for enforcing an appeal waiver. Although the Fifth Circuit had recognized two—and “only two”—exceptions to the general rule that appeal waivers are enforceable, *United States v. Barnes*, 953 F.3d 383, 388 (5th Cir. 2020), this Court recognized a third in *Hunter*: when enforcing the appeal waiver would “result in a miscarriage of justice,” slip op. 1.

This Court should grant, vacate, and remand (GVR) so that the Fifth Circuit can apply *Hunter* to determine whether enforcing the appeal waiver here would result in a miscarriage of justice. *See Lawrence v. Chater*, 516 U.S. 163, 168–69 (1996) (explaining that intervening decisions from this Court that the lower court had no opportunity to apply generally warrant a GVR). And enforcing the appeal waiver here may well constitute a miscarriage of justice. The error was “obvious.” *See Hunter*, slip op. 11. The district court incorrectly interpreted this Court’s opinion in *Class v. United States*, 583 U.S. 174 (2018), to permit the appeal of a constitutional issue, C.A. ROA 232–34, 265–66, despite the appeal waiving barring “any challenge to the constitutionality of the statute of conviction,” *id.* at 272.¹ And based on the district court’s repeated but incorrect assurances, Pena lost the opportunity to withdraw his plea before sentencing. *See Fed. R. Crim. P. 11(d)(2)*. That is a serious mistake that is likely to “undermine[s] public confidence in the judiciary.” *Hunter*, slip op. 11.

¹ To be clear, Pena is not arguing that a district court’s mere statement at sentencing that a defendant could appeal—standing alone—makes an appeal waiver unenforceable. *See Hunter*, slip op. 5–7. But unlike the district court’s “momentary mistake” in *Hunter*, *id.* at 6, the district court and Pena’s counsel here engaged in an extended colloquy about whether this Court’s precedent allowed Pena to appeal the denial of his motion to dismiss despite the appeal waiver, *see* C.A. ROA 232–34, 265–66.

Of course, this Court need not decide now whether enforcing the appeal waiver here would result in a miscarriage of justice. This Court is “a court of review, not of first view.” *Hunter*, slip op. 14 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Rather, this Court should follow its usual course and GVR this case for the Fifth Circuit to apply *Hunter* and to decide in the first instance whether enforcing Pena’s appeal waiver would result in a miscarriage of justice.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted.

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