No. 25-79

In the Supreme Court of the United States

TON TON AQUINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

Michael Schwartz
Counsel of Record
Karin Kissiah
NEW SOUTH LAW, LLC
1305 Barnard Street #203
Savannah, GA 31401
(912) 581-1999
mas@newsouthlaw.net
karin@newsouthlaw.net

October 2, 2025 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

ARGUMENT

1. The Government's Assertion that an Appeal Waiver Requires Defendants to Accept Unlawful Sentences Highlights the Need for Review.

The government asserts that "Most fundamentally, petitioner's argument that waivers cannot bar appeals challenging 'unlawful' sentences . . . would negate one of the main reasons for having plea agreements in the first place. The defendant's belief that his sentence may be illegal is not a valid basis for disregarding an appeal waiver." Br. in Opp'n. at 11. That assertion does not just misstate the law. It inverts it.

This Court has explained that while "a valid and enforceable appeal waiver . . . precludes challenges that fall within its scope . . . an appeal waiver does not bar claims outside its scope" which include certain unwaivable claims including whether the waiver was involuntary or unknowing or results in an unlawful sentence. *Garza v. Idaho*, 586 U.S. 232, 238-39 (2019) (*citing United States v. Hardman*, 778 F.3d 896, 899 (11th Cir. 2014) ("[A]ll 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.")) And every court to consider the question has recognized that an appeal waiver cannot be enforced to uphold a sentence that is illegal, imposed without statutory authority, or in excess of the court's jurisdiction. *See* Pet. at 6-11.

The Petition itself presents the question of whether the Eleventh Circuit has distorted the "unlawful sentence" exception by narrowing it almost to the vanishing point. Its cases suggesting that the only sentences it will deem "unlawful" are for extreme hypotheticals, punishments like public flogging. *See, e.g.*, *United States v. Howle*, 166 F.3d 1166, 1169 n.5 (11th Cir. 1999) (explaining that "in extreme circumstances—for instance, if the district court had sentenced [the defendant] to a public flogging—due process may require that an appeal be heard despite a previous waiver"); *United States v. Johnson*, 541 F.3d 1064, 1068 (11th Cir. 2008) (reaffirming *Howle*'s recognition that some "fundamental and immutable legal landmarks" cannot be waived and citing the "public flogging" example); *United States v. Bascomb*, 451 F.3d 1292, 1294 (11th Cir. 2006) (noting that appeal waivers are subject to "narrow exceptions" such as sentences imposed in violation of constitutional guarantees); *United States v. Lawrence*, 758 F. App'x 808, 810 (11th Cir. 2018) (per curiam) (restating that "extreme circumstances—for instance, if the district court had sentenced the defendant to a public flogging—may warrant review despite a waiver"); *United States v. Piper*, 803 F. App'x 285, 287 (11th Cir. 2020) (unpublished) (same); *United States v. Jamison*, 850 F. App'x 696, 698 (11th Cir. 2021) (unpublished) (dismissing appeal because sentence did not rise to "extreme due process violation, such as public flogging"); *United States v. Mercado*, 844 F. App'x 271, 272 (11th Cir. 2021) (unpublished) (same); *United States v. Cancel-Velez*, 614 F. App'x 994, 995 (11th Cir. 2015) (unpublished) (same); *see* Pet. at 6-11 (explaining how the Eleventh Circuit's cramped approach makes it an outlier).

A guilty plea cannot waive review of an unlawful sentence, whether the sentence is the Eleventh Circuit's hypothetical "public flogging," or, as in this case, unlawful public shaming. "That an appeal waiver does not bar claims outside its scope follows from the fact that, '[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts.'" *Garza,* 586 U.S. at 238 (*quoting Puckett v. United States*, 556 U.S. 129, 137 (2009)). And "[a]s with any type of contract, the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived." *Id.* This contractual framework makes clear why a prospective waiver cannot extend to unanticipated errors that result in an unlawful sentence. By definition, a waiver is entered before sentencing, when neither the defendant nor the court can know whether the punishment ultimately imposed will include an unlawful act by the court itself—one that departs from statutory or constitutional limits. And no principle of contract law permits one party to bind itself to the other's future illegality.

This same contractual lens also explains how courts can distinguish between claims that remain within the scope of a waiver and those that do not. Just as with any agreement, the parties' bargain can be reverse-engineered: if the sentence is unlawful in a way that no reasonable defendant could have contemplated when signing the waiver, then it falls outside the waiver's scope. Conversely, if the supposed error is one that was both foreseeable and within the range of outcomes the defendant knowingly and intelligently accepted, then the waiver bars review. In this way, the knowing-and-intelligent component of the waiver becomes dispositive—ensuring that waivers operate

as true agreements, not blank checks permitting unlawful sentences.

The government's suggestion that the "entire point" of an appeal waiver is to bar challenges to unlawful sentences defies both precedent and common sense. Br. in Opp'n. at 11. Appeal waivers are bargaining chips over *debatable* issues. They are not licenses for the government to impose punishment that Congress has not authorized or that the Constitution forbids. To accept the government's position would be to bless sentences untethered from law—allowing prosecutors to extract plea agreements that insulate unlawful punishment from review.

Far from undermining plea agreements, recognizing that unlawful sentences remain reviewable preserves their legitimacy. Such review ensures that bargains struck in the shadow of the law remain tethered to the law. An appeal waiver may limit a defendant's ability to challenge the discretionary or procedural aspects of his sentence, but it cannot empower the government to enforce an agreement for punishment the law does not permit.

2. The Miscarriage-of-Justice Argument Was Raised and Is Properly Before this Court.

The government's suggestion that this claim is waived because Petitioner did not earlier invoke the phrase "miscarriage of justice" is wrong. Br. in Opp'n. at 11. Petitioner raised the underlying claim from the outset: that the imposition of SORNA registration for misprision of a felony is unlawful. App.6a-8a; 72a-73a, 77a-83a. The miscarriage of justice occurred when the Eleventh Circuit enforced the waiver to uphold that unlawful condition. At that point—when the circuit

court's misapplication of the waiver created the injustice —Petitioner immediately invoked the miscarriage-of-justice framework in his petition for rehearing en banc, explaining that an unlawful sentence is by definition a miscarriage of justice. *See* Pet. Reh'g En Banc at 12, 15. Thus, the argument was not waived; it was pressed at the first moment it existed, and this case squarely presents why the exception applies.

The miscarriage-of-justice exception is not a free-standing claim that must be pled in advance; it is a safety valve that activates only when operation of a waiver would uphold an unlawful result. Until the Eleventh Circuit enforced the waiver to sustain the unlawful registration requirement, there was no miscarriage of justice to invoke. The exception comes into play only once a lawful bargain has been converted into an unlawful outcome. That is why this Court and the courts of appeals describe it as a "narrow" exception: it does not exist in the abstract but arises when the government seeks to apply a waiver to insulate an unlawful sentence. *See United States v. Olano*, 507 U.S. 725, 736 (1993) (plain-error review corrects errors that "seriously affect[] the fairness, integrity or public reputation of judicial proceedings"); *United States v. Khattak*, 273 F.3d 557, 562–63 (3d Cir. 2001) (enforcing waivers but recognizing exceptions where enforcement would result in a miscarriage of justice); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (waivers do not bar challenges to sentences exceeding statutory maximums imposed on impermissible factors or contrary to the plea agreement). In that posture, a defendant need not have incanted the words "miscarriage of justice" on the front end; raising the underlying unlawful-sentence issue suffices. The

exception is triggered when the unlawful sentence is upheld, and the party presses it at that moment—as happened here.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests this Court issue a writ of certiorari.

Respectfully submitted,

Michael Schwartz
Counsel of Record
Karin Kissiah
NEW SOUTH LAW, LLC
1305 Barnard Street #203
Savannah, GA 31401
(912) 581-1999
mas@newsouthlaw.net
karin@newsouthlaw.net

Counsel for Petitioner

October 2, 2025