No. 21-5201

IN THE

United States Court of Appeals for the Sixth Circuit

ELIEZER ALBERTO JIMENEZ,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT JIMENEZ

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CORPORATE DISCLOSURE STATEMENT

As required by Sixth Circuit Rule 26.1 and Fed. R. App. P. 26(a)(4)(A), undersigned counsel certifies that the National Association of Criminal Defense Lawyers ("NACDL") is neither a subsidiary nor affiliate of a publicly owned corporation and that no publicly owned corporation has a financial interest in the outcome of this appeal.

NACDL represents no parties in this matter. It has no pecuniary interest in its outcome. No party's counsel authored this brief in whole or in part. NACDL is being represented in this matter pro bono. No one contributed money to fund the preparation or submission of this brief.

/s/ Stephanie Franxman Kessler
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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF IDENTITY, INTEREST, AND CONSENT vii

ISSUES PRESENTED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. The central role of plea bargains and expansion of collateral attack waivers. 3

B. Petitioner Jimenez's plea agreement allows him to be sentenced based on an unconstitutional state-court conviction. 6

ARGUMENT..9

A. A criminal defendant cannot waive the right to collaterally attack a term of imprisonment based on a vacated and unconstitutional state-court conviction. 10

B. This Court should join the majority of its sister Circuits in refusing to enforce collateral attack waivers that work a miscarriage of justice...14

C. Enforcing Petitioner Jimenez's sentence would lead to a miscarriage of justice by enforcing an unconstitutional conviction and sanctioning poor representation. 16

CONCLUSION... 19

CERTIFICATE OF COMPLIANCE.. 21

CERTIFICATE OF SERVICE..22

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS 23

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 18

Berger v. United States, 295 U.S. 78 (1935) 18

Engle v. Isaac, 456 U.S. 107 (1982) 9

Gentry v. Deuth, 456 F.3d 687 (6th Cir. 2006) 13

Haring v. Prosise, 462 U.S. 306 (1983) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 2

Menna v. New York, 423 U.S. 61 (1975) 11

Missouri v. Frye, 566 U.S. 134 (2012) 4

Shelley v. Kraemer, 334 U.S. 1 (1948) 11

State v. Castillo-Alvarez, 836 N.W.2d 527 (Minn. 2013) 13

United States v. Adams, 814 F.3d 178 (4th Cir. 2016) 14

United States v. Allen, 635 F. App'x 311 (6th Cir. 2016) 15

United States v. Andis, 333 F.3d 886 (8th Cir. 2003) 15

United States v. Chua, 349 F. Supp. 3d 214 (E.D.N.Y. 2018) 5, 9, 12

United States v. Guillen, 561 F.3d 527 (D.C. Cir. 2009) 14

United States v. Gwinnett, 483 F.3d 200 (3d Cir. 2007) 14

United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) 14

United States v. Harris, 628 F.3d 1203 (9th Cir. 2011) 14

United States v. Jacobsen, 15 F.3d 19 (2d Cir. 1994) 12

United States v. Johnson, 347 F.3d 412 (2d Cir. 2003) 14

United States v. Josefik, 753 F.2d 585 (7th Cir. 1985) 2

United States v. Khattak, 273 F.3d 557 (3d Cir. 2001) 16

United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) 15, 16

Watson v. United States, 165 F.3d 486 (6th Cir. 1999) 10

Wheat v. United States, 486 U.S. 153 (1988) 11

Statutes

18 U.S.C. § 2255 2

Other Authorities

1 William Blackstone, Commentaries on the Laws of England 135 .... 2, 13

Cameron Casey, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea Bargaining*, 61 B.C.L. Rev. E. Supp. II 73 (2020) 12

Carissa Byrne Hessick, *Punishment Without Trial: Why Plea Bargaining is a Bad Deal* (2021) 4, 5

Dylan Walsh, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, the Atlantic (May 2, 2017), https://tinyurl.com/yhbpshfn 4

Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 1 (Eng.) 2

Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73 (2015) 4, 5

U.S. SENT'G GUIDELINES MANUAL ch.5, pt. A 8

STATEMENT OF IDENTITY, INTEREST, AND CONSENT

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in the subject matter of this appeal. The appeal involves a consideration of the scope and validity of collateral attack waivers in plea agreements in federal criminal matters, which is directly relevant to the everyday work of NACDL and its members. NACDL members consider and advise criminal defendants about thousands of collateral attack waivers every year, and federal prisoners also routinely seek NACDL members' advice about collateral attack waivers they may have entered into in

their matters. The appeal thus presents issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Providing amicus assistance on these issues is squarely within NACDL's mission.

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting this brief.

ISSUES PRESENTED

Petitioner Jimenez's criminal history category was higher and his federal prison sentence longer because the district court considered a state-court conviction that was later vacated as unconstitutional. At sentencing, his counsel incorrectly advised both him and the district court that the validity of the earlier State conviction would have no impact on Mr. Jimenez's guidelines range in this case.

Yet a plea agreement Mr. Jimenez signed before sentencing purports to bar him from using a habeas petition to purge the taint of his unconstitutional state-court conviction from his federal sentence. The questions presented on appeal, as articulated by Mr. Jimenez in his brief, are:

One

Whether a collateral attack waiver in a plea agreement is unenforceable when its enforcement would result in a miscarriage of justice.

Two

Whether Mr. Jimenez's habeas petition raised an ineffective assistance of counsel claim.

* * *

Amicus NACDL addresses only the first question in this brief.

INTRODUCTION

"[I]f the parties [to a criminal case] stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept." *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (per Posner, J.). Moreover, courts must "indulge every reasonable presumption *against* waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (emphasis added) (cleaned up). There is, in other words, an outer limit to the rights that parties to a criminal case may bargain away in plea negotiations.

The opportunity to collaterally attack an unlawful conviction—generally through a petition for a writ of habeas corpus under 18 U.S.C. § 2255—is a fundamental right. Indeed, the right to the Great Writ is not only enshrined in the Constitution; it predates the 1787 Philadelphia Convention by more than a century. *See* Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 1 (Eng.), reprinted in 3 The Founders' Constitution 310, 311 (Philip B. Kurland & Ralph Lerner eds., 1987). Writing on the eve of the Revolution, William Blackstone declared the Writ a "second *magna carta*, and stable bulwark of our liberties," declaring that—without it—"there would soon be an end of all other rights and immunities." 1 William Blackstone, Commentaries on the Laws of England 135, 137 (Thomas M. Cooley ed., Callaghan & Co. 1884)

(1765). It follows that purported waivers of this right, protective as it is of all other criminal procedure rights, must be closely scrutinized and strictly limited.

While the collateral attack waiver in Petitioner Jimenez's plea agreement may not rise to the level of trial by orangutan, enforcing it nonetheless violates fundamental principles of due process—depriving Mr. Jimenez of his liberty based on an unconstitutional state-court conviction. Moreover, adhering to its terms would work a fundamental miscarriage of justice. For either or both reasons, Amicus NACDL joins Petitioner Jimenez in arguing that his collateral attack waiver may not be enforced and the district court's judgment rejecting his Section 2255 petition should be reversed.

STATEMENT OF THE CASE

As Petitioner Jimenez ably describes the underlying facts and procedural history of this case in his brief, Amicus NACDL highlights here only those facts most relevant to its position.

A. The central role of plea bargains and expansion of collateral attack waivers.

"To a large extent," in the modern criminal justice system, "horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566

U.S. 134, 144 (2012). Indeed, more than 97 percent of federal criminal cases result from guilty pleas, not jury verdicts or bench trials. *See* Dylan Walsh, *Why U.S. Criminal Courts are so Dependent on Plea Bargaining*, the Atlantic (May 2, 2017), https://tinyurl.com/yhbpshfn; *see also* Carissa Byrne Hessick, *Punishment Without Trial: Why Plea Bargaining is a Bad Deal* 19, 24 (2021) (ebook) (describing the increase in federal cases resolved by plea bargaining from around 65 percent in 1910 to 97 percent today.

The parties do not come to the plea-bargaining process on equal footing. Under current law, prosecutors are free to threaten to add enhancements, bring additional charges, invoke "three-strikes" or career-offender statutes, and more if defendants refuse to plead guilty. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 74–75 (2015). More than that, they can also offer steep sentencing discounts, dropped charges, and other benefits to defendants who cooperate. *Id.* Defendants also know that prosecutors will seek and judges are likely to impose a so-called "trial penalty" in the form of a tougher sentence if they refuse to plead guilty and are convicted by a jury. Hessick, *supra* at 45.

On the other side of the ledger, defendants rarely have much to offer the government beyond the administrative convenience of avoiding trial. If they are lucky, they may also be able to offer interesting information on other suspects in exchange for "cooperation" credit.

But even those limited bargaining chips are weakened by the nature of the system. "Overworked and underpaid defense lawyers frequently do not have the information or the resources to assess the government's case and accurately predict trial outcomes." Klein et al., *supra*, at 75–76. Thus, "[o]nly a very small percentage of defendants are situated so that they have a realistic chance of success at trial and can therefore sensibly take the risk of rejecting the steeply discounted sentence available only by plea . . . ." *Id.* at 75 n.12.

And that addresses only the legal barriers to betting on trial. "For those living in poverty, a plea agreement may be the only way … to ensure social and economic stability following indictment." *United States v. Chua*, 349 F. Supp. 3d 214, 217 (E.D.N.Y 2018). Even if a defendant prevails at trial, he will likely have spent months in jail waiting for his day in court—at the cost of his job, missed rent or mortgage payments, and other dire economic consequences. *See* Walsh, *supra* (describing the experience of a defendant who, as the father of four and family breadwinner, was forced to plead guilty rather than give his attorney time to prepare for trial); *accord.* Hessick, *supra* at 73 ("The desire to be free—to go home to their families and their jobs—overwhelmed any desire to invoke their right to trial."). To say nothing of the social stigma resulting from having been arrested and the psychological strain of living with the risk of prison time and personal disaster hovering overhead.

"Plea bargains have become the offer a defendant cannot refuse." Klein et al., *supra* at 75. So it is unsurprising that plea agreements have become boiler

plate rather than being tailored to each individual case; "for the most part, defendants cannot negotiate individual terms, or else they run the risk of rejecting the deal and going to trial." *Id.*

The boilerplate agreements prosecutors offer increasingly require the waiver of appellate and collateral-attack rights. Indeed, in 2015, one study suggested that more than two-thirds of plea agreements included language waiving a defendant's right to file a petition for habeas corpus or other collateral attack challenging his conviction or sentence. *See id.* at 87. These provisions are designed to insulate sentencing and other errors from review—saving on litigation expenses at the cost of accurate criminal judgments.

B. Petitioner Jimenez's plea agreement allows him to be sentenced based on an unconstitutional state-court conviction.

Petitioner Jimenez signed one of these boilerplate plea agreements in July 2019. Plea Agreement, R. 114, Page ID #328–34. But before the district court even accepted that plea, Mr. Jimenez and his counsel were at loggerheads.

From jail and just days before his change of plea hearing, Mr. Jimenez filed a letter with the court complaining that he had "requested [his] attorney to provide [him] with all evidence pertaining to this criminal case in order for [him] to understand and make knowingly and Intelligent decisions in respect to [his] pleadings." Jimenez Letter, R. 112, Page ID #324. But, he wrote, his trial counsel "circumvented [his] very specific request insisting that there is

sufficient evidence … including phone calls incriminating" him. *Id.* The district court was sufficiently concerned about these allegations that it converted a change of plea hearing into a hearing on Petitioner Jimenez's letter. Benitez July 12, 2019 Rearraignment Hr'g Tr., R. 230, Page ID #3–4.

Petitioner Jimenez, his counsel, and the Court were able to hash out this particular disagreement between client and counsel. And the Court proceeded to accept Jimenez's guilty plea on the same day. The plea agreement the parties signed included a term stating: "Except for claims of ineffective assistance of counsel, the Defendant also waives the right to attack collaterally the guilty plea, conviction, and sentence." Plea Agreement, R. 114, Page ID #332, ¶ 8. The district court ordered the probation department to compile a pre-sentence report ("PSR") for Petitioner Jimenez and scheduled the case for sentencing.

In the meantime, Petitioner Jimenez had filed a post-conviction motion in Minnesota state court challenging the constitutionality of a 2015 conviction for cocaine possession. Because that motion was still pending by the time sentencing rolled around in this federal case, the probation department's PSR recommended assessing Mr. Jimenez a total of three criminal history points based on the earlier Minnesota cocaine conviction. Appellant's Br. at 17.

As the magistrate judge acknowledged in his opinion recommending a denial of Petitioner Jimenez's Section 2255 motion, without the 2015 cocaine conviction, Mr. Jimenez would have had a criminal history category of I rather

than III. *See* Recommended Disposition & Order, R. 212, Page ID #845. Including the conviction thus increased his guidelines range from 57–71 months to 70–87 months. *See* U.S. SENT'G GUIDELINES MANUAL ch.5, pt. A.

Before the sentencing hearing, Mr. Jimenez—again without assistance from trial counsel—filed his own objections to the PSR. One of those objections included a challenge to his criminal history score. Petitioner Jimenez believed the 2015 Minnesota cocaine conviction should not count against him in light of his pending collateral attack. Pro Se Objections, R. 140, Page ID #410–11.

Bafflingly, trial counsel filed a motion to withdraw those objections two weeks later, claiming that his Minnesota collateral attack could not and would not have any impact on Mr. Jimenez's criminal history score. Objection Withdraw, R. 141, Page ID #417–18. Counsel then repeated this "advice" on the record at sentencing, telling Mr. Jimenez: "I'm suggesting to you that [the objection to the criminal history score] be withdrawn. Because as I stated right now, it has no legal significance." Mem. Opinion & Order, R. 221, Page ID #972–73. Through all of this, the government—notwithstanding its vast experience with criminal history scores, appeals, and collateral attacks—said nothing.

Trusting his trial counsel and the acquiesce of the district court and government counsel, Mr. Jimenez dropped his objection and was sentenced to 87 months in prison.

Nine months later, the State of Minnesota joined with Mr. Jimenez in moving to vacate his 2015 cocaine conviction as having been "obtained in violation of [Mr. Jimenez's] rights under the laws and constitution of the United States and the State of Minnesota." Minn. Order Vacating Conviction, R. 210-1, Page ID #834–36. And Mr. Jimenez promptly filed a motion under Section 2255 seeking to vacate his federal sentence in this case based on the change to his criminal history.

Even though no party disputes that, if Mr. Jimenez were sentenced today, his 2015 conviction could not be considered in calculating his guidelines range, the government opposed Mr. Jimenez's Section 2255 motion, relying on the 2019 federal plea agreement's collateral attack waiver. The district court agreed with the government, and this appeal followed.

ARGUMENT

"Collateral attacks for constitutional violations—the equivalent of a writ of habeas corpus—hold a vital place in United States constitutional jurisprudence." *United States v. Chua*, 349 F. Supp. 3d 214, 216 (E.D.N.Y. 2018). Their continued availability is a "bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). While "the constitutional Great Writ has been seriously constricted by statute"—including the Anti-Terrorism and Effective Death Penalty Act—"and case law, it is imperative that its effectiveness not be reduced further by improper

waivers required by the government in plea agreements." *Chua*, 349 F. Supp. 3d at 217.

The government has deployed the collateral attack waiver in this case to protect a sentence that (1) punishes Mr. Jimenez based on a vacated, unconstitutional state-court conviction and (2) works a miscarriage of justice. Worse, enforcing it would give the government the green light to request and then enforce similarly troubling waivers in future cases. This Court should therefore reverse the district court's order enforcing Mr. Jimenez's collateral attack waiver.[1]

A. A criminal defendant cannot waive the right to collaterally attack a term of imprisonment based on a vacated and unconstitutional state-court conviction.

This Court has long recognized that a defendant may waive his right to collaterally attack his conviction in appropriate circumstances. *Watson v. United States*, 165 F.3d 486, 488–89 (6th Cir. 1999). And indeed—formal waiver or not—forgoing the right to attack a conviction based on the absence of certain constitutional protections is a natural consequence of pleading guilty. *Haring v. Prosise*, 462 U.S. 306, 320–22 (1983). After all, a defendant could not very well protest in habeas the lack of a jury trial or ability to confront witnesses after agreeing to forgo a trial and plead guilty.

[1] Mr. Jimenez also argues that he validly raised a claim of ineffective assistance of plea-bargaining counsel. Amicus NACDL does not address that issue in this brief.

But the parties' ability to waive certain constitutional protections is neither unlimited nor unreviewable. For example, in *Wheat v. United States*, the Supreme Court held that a criminal defendant cannot waive his constitutional right to counsel unincumbered by a conflict of interest. 486 U.S. 153, 160 (1988). "Federal courts," the justices declared "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id.* Private parties are not free to undermine the integrity of the judiciary—both perceived and actual—in the name of administrative convenience. *See also Menna v. New York*, 423 U.S. 61, 62 (1975) (guilty plea did not foreclose defendant from raising a constitutional double jeopardy claim in federal habeas proceedings).

Nor can private parties compel the federal courts to lend their imprimatur to unconstitutional bargains by cloaking them in the language of contract. More than seventy years ago, the Supreme Court refused to allow state courts to enforce racially restrictive covenants in private real estate contracts, emphasizing that the courts—no less than the other branches of government—are prohibited from using their power to give force to contracts based on racial discrimination. *Shelley v. Kraemer*, 334 U.S. 1 (1948). And the Circuit Courts of Appeal have extended this prohibition into the plea-bargaining context: refusing to enforce waivers purporting to allow a

defendant to be sentenced based on a constitutionally impermissible factor, such as race. *See, e.g. United States v. Jacobsen*, 15 F.3d 19, 23 (2d Cir. 1994).

Building on these decisions, several Circuits have refused to enforce collateral attack waivers where a defendant alleges that the government withheld exculpatory evidence at the time he pleaded guilty. *See* Cameron Casey, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea Bargaining*, 61 B.C.L. Rev. E. Supp. II 73 (2020), available at https://tinyurl.com/549xkn8 (describing the Circuit split on the question). "Given the high rate at which defendants plead guilty in federal criminal cases and the forced circumstances under which they do so, it seems an anathema that a defendant could waive the right to challenge a conviction on the basis of a plea when the government withheld exculpatory evidence." *Chua*, 349 F. Supp. 3d. at 219. One can hardly imagine a situation more likely to bring the federal courts into public disrepute than allowing prosecutors to stand by while courts imprison a defendant the prosecutor knows to be innocent.

In fact, considered in terms of pure destructiveness to public faith in the judiciary, perhaps the only rule that could match it would be one allowing the federal courts to punish defendants based on invalid and unconstitutional state court convictions. Yet that is the upshot of what the government asks the Court to do here.

Petitioner Jimenez's 2015 state court conviction is a legal nullity. *See State v. Castillo-Alvarez*, 836 N.W.2d 527 (Minn. 2013) ("[A] conviction that has been reversed is a legal nullity."). Worse still, it was voided because the State obtained it only by violating the constitution. It violates fundamental notions of fairness to allow the collateral consequences of that conviction to survive as part of his sentence in this case.

This Court made exactly that point in 2006 when it rejected a State's claim that habeas could not be used to challenge the collateral consequences of a conviction. "A state acts *ultra vires* when it obtains a criminal conviction in violation of the United States Constitution," it declared, "and *ultra vires* acts bear no legitimate force in a government under law." *Gentry v. Deuth*, 456 F.3d 687, 697 (6th Cir. 2006). "A public act without legitimate force is indistinct under the law from an act that never was, or an act that has been voided." *Id.* The federal courts cannot and should not allow the consequences of unconstitutional state-court convictions to linger on, zombie-like in federal sentences.

To do so strikes at the very core of the right the writ of habeas corpus was designed to protect—giving effect to convictions obtained through irregular processes defying the law of the land. *See* 1 Blackstone, *supra* at 135 ("[P]ersonal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law. …

[I]f any person be restrained of his liberty by order or decree of any illegal court [or other irregular process], he shall, upon demand of his counsel, have a writ of *habeas corpus*."). And it undermines the role and reputation of the federal courts as the guardians of equal justice under law.

Private parties can no more invoke contract law to compel this result than they can force the courts to enforce a racially discriminatory restrictive covenant or sentence. This court should hold as much and refuse to enforce Mr. Jimenez's collateral attack waiver to the extent that it precludes him from challenging the district court's use of an invalid and unconstitutional prior conviction to enhance his sentence.

B. This Court should join the majority of its sister Circuits in refusing to enforce collateral attack waivers that work a miscarriage of justice.

Even if this Court is not inclined to categorically reject collateral-attack waivers under these circumstances, it should join eight of its sister circuits in recognizing that collateral-attack waivers are not valid when their enforcement would result in a miscarriage of justice. *See United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016); *United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007); *United States v. Hahn*, 359 F.3d 1315, 1325, 1327 (10th Cir. 2004); *United States v. Johnson*, 347 F.3d 412, 415 (2d Cir. 2003); *United States v. Andis*, 333 F.3d 886,

889-90 (8th Cir. 2003) (en banc); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001).

Panels of this Court have suggested for years that the Circuit would join its sister Circuits in an appropriate case. *See e.g.*, *United States v. Allen*, 635 F. App'x 311, 315–316 (6th Cir. 2016). These decisions implicitly recognize that "because [collateral attack] waivers are made before any manifestation of sentencing error emerges, appellate courts must remain free to grant relief from them in egregious cases. When all is said and done, such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries . . . ." *Teeter*, 257 F.3d at 25.

But while this Court has waited for a case squarely presenting the miscarriage of justice question, defense counsel in this Circuit are daily confronted with proposed plea agreements with their clients which include extremely broad collateral-attack waivers, often narrowly excepting challenges based on ineffective assistance of counsel and prosecutorial misconduct. In light of the unsettled law of this Circuit, defense counsel cannot definitively advise their clients what rights they are and are not waiving by agreeing to such waivers—compromising the knowing and voluntary nature of guilty pleas across four States.

Respectfully, the time has come to recognize the miscarriage of justice exception once and for all. Indeed, because the district court here refused to

vacate Petitioner Jimenez's conviction explicitly because of the lack of definitive guidance from this Court, this case presents the perfect vehicle for resolving the question. And the unanimous support for a miscarriage of justice exception to collateral attack waivers among the Circuits that have considered the question makes it an easy one to answer.

By explicitly recognizing a miscarriage of justice exception, the Sixth Circuit will allow district courts and magistrate judges to consider challenges to collateral attack waivers in various contexts and, in so doing, develop a body of caselaw clarifying the boundaries of the exception. That clarity, in turn, will permit defense counsel across the Circuit to correctly advise their clients about the consequences of collateral attack waivers.

C. Enforcing Petitioner Jimenez's sentence would lead to a miscarriage of justice by enforcing an unconstitutional conviction and sanctioning poor representation.

This case cries out for application of the miscarriage of justice exception recognized by other Circuits. The miscarriage of justice exception applies where the balance of factors weighs in favor of refusing to enforce a waiver. *Teeter*, 257 F.3d at 25–26; *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001). Those factors—as first set forth by the First Circuit and as endorsed and adopted by the Third Circuit—include: (1) the clarity of the error raised in habeas; (2) the gravity of that error; (3) the character of the error; (4) the impact of the error of the defendant; (5) the impact of correcting the error on

the government; (6) the extent to which the defendant acquiesced in the result; and (7) any other facts or circumstances that may be relevant. *Id.*

Amicus NACDL echoes Petitioner Jimenez's arguments with respect to the application of these factors to his case. It pauses here only to emphasize a few aspects of the nature and impact of the error here.

First, as described in Section A, *supra*, the error here is clear, grave, and fundamental in that it punishes Mr. Jimenez based on a state-court conviction that has been vacated on constitutional grounds. Moreover, as Mr. Jimenez has argued, permitting it to stand would sanction trial counsel's conduct in downplaying and failing to investigate his client's well-placed concerns about allowing his 2015 Minnesota cocaine conviction to be included in the PSR.

Second, as it relates to "acquiescence," the circumstances here approach, if they do not surpass, the bounds of what a defendant could reasonably be said to waive "knowingly." Assessing the effect of the waiver and error at issue here would require Mr. Jimenez not only to understand federal habeas law—an area of law even lawyers at times struggle to understand—but the intricacies of Minnesota collateral attack procedure and the United States Sentencing Guidelines. It is a stretch to suggest that a defendant, no matter how well counseled, could peer through these three thick layers of procedural gauze and "knowingly" acquiesce to being punished for an unconstitutional conviction.

Finally, the balance of harms in this case militates in favor of refusing to enforce the collateral attack waiver. The Supreme Court recognizes that "[t]he private interest [of the defendant] in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by [the justices] over the years to diminish the risk of erroneous conviction stands as a testament to that concern." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985). That interest is both "obvious and" should "weigh[ ] heavily in [this Court's] analysis." *Id.*

In contrast, the government's "interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in fair and accurate adjudication of criminal cases." *Id.* at 79. And it may not "legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* After all, while a prosecutor is entitled to "strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction [or sentence] as it is to use every legitimate means to bring about a just one." *See Berger v. United States*, 295 U.S. 78, 88 (1935). The government has no legitimate interest in preserving an increased term of incarceration based on an unconstitutional and now-vacated sentence from 2015.

CONCLUSION

In a world where plea bargains and their attendant waivers are the norm and trials are increasingly rare exceptions, this Court must be careful to police the legitimate bounds of plea agreements that purport to waive fundamental constitutional rights. To that end, it should refuse to enforce a collateral attack waiver that requires courts to give effect to a void and unconstitutional state criminal conviction or works a miscarriage of justice. Amicus NACDL therefore joins Petitioner Jimenez in asking this Court to reverse the decision of the district court denying his petition under Section 2255.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i), I certify that this brief complies with the type-volume limitations of Rule 32 in that it contains 4,688 words, excluding the sections listed in Rule 32(f). In certifying the word count above, counsel has relied on the word count feature of the word-processing software used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 29, 2021, a copy of this brief was filed electronically with the Clerk of the Court using the CM/ECF system, which will serve by email counsel of record for all parties. I certify that all participants in the case are registered CM/ECF users.

/s/ Stephanie Franxman Kessler
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(g)(1), the following filings from the district court's records are designated as relevant to this appeal:

DESCRIPTION OF ENTRY	RECORD ENTRY NO.	PAGE ID RANGE
Plea Agreement	114	328-34
Jimenez Letter	112	324
Benitez July 12, 2019 Rearraignment Hr'g Tr.	230	3-4
PSR	213	874-75
Recommended Disposition & Order	212	845
Pro Se Objections	140	410-11
Objection Withdraw	141	417-18
Mem. Opinion & Order	221	972-73
Minn. Order Vacating Conviction	210-1	834-36