No. 22-536

In the Supreme Court of the United States

ELIEZER ALBERTO JIMENEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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At oral argument in *United States v. Mezzanatto*, 513 U.S. 196 (1995), the assistant to the Solicitor General conceded that the government could not require waiver of Federal Rule of Criminal Procedure 11(b) as a condition of a plea because "the point of that part of the rule is to make sure that a clear record will be made of a guilty plea so that we can in effect dispose quickly and efficiently of baseless collateral attacks later." Transcript of Oral Argument, *Mezzanatto*, 513 U.S. 196 (No. 93-1340). According to the United States' current view, he overlooked a much easier way to achieve the same result: The government can simply condition the plea on a collateral-attack waiver directly.

The current view is wrong. The reason the United States volunteered that concession in *Mezzanatto* is because in 1994 it would have been inconceivable for federal prosecutors routinely to condition guilty pleas on collateral-attack waivers. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 219-21 (2005). But now the

practice is ubiquitous. Thousands of pleas now include waivers of a constitutional right so significant that it was written into the Constitution before the Bill of Rights. And, critically, unlike other constitutional rights that criminal defendants waive by the very act of pleading guilty, collateral-attack waivers are not necessary to effectuate plea bargains. If this Court held it unlawful to seek collateral-attack waivers, plea bargaining would go on just as it did for the decades before their dramatic rise.

This Court has never passed on the lawfulness of collateral-attack waivers. It should. Given the importance of the interests at stake, the evidence that these waivers are the product of significant settlement pressure, and their lack of public benefit, the Court should grant review and hold that these waivers violate the unconstitutional-conditions doctrine.

Even if the Court ultimately concludes that collateral-attack waivers are sometimes permissible, it should place restrictions on their use, just as it has placed limits on bargaining in other contexts involving the waiver of constitutional rights. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-06 (2013) (requiring "nexus" and "rough proportionality"); *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (rules for waiver "depend on the right at stake"). The Court should recognize that the constitutional dimensions of these agreements mean they are not enforceable when their enforcement would work a "miscarriage of justice." The United States does not dispute that the courts are intractably divided about how to apply the miscarriage-of-justice exception—or, indeed, whether it exists at all. Opp. 13-16.

This case is the ideal vehicle to recognize the miscarriage-of-justice exception and provide guidance to the courts of appeals regarding its application. This Court has held three times that denying a prisoner the ability to

collaterally attack his conviction in circumstances like those presented here works a miscarriage of justice. Pet. 25-26. The United States claims not to see how that is so. Opp. 14-15. Here is how: at petitioner's sentencing hearing in this case, he was barred from putting on any evidence, or even arguing, that he had not in fact committed the crime for which he was convicted in Minnesota or that his conviction (and probation) should not have increased his criminal history points. Pet. App. 36a-43a. That sentencing hearing—at which petitioner was sentenced on the basis of facts that he was not allowed to dispute—was a fundamental denial of due process, and allowing a sentence that results from such a hearing to stand is a miscarriage of justice. *Id.*; *see* Pet. 25-26. The miscarriage is magnified because petitioner's sentencing enhancement was based on an unconstitutionally procured conviction. Pet. App. 42a-43a; *cf. Burgett v. Texas*, 389 U.S. 109, 115 (1967). As the magistrate judge recognized, "[i]f the Sixth Circuit were to endorse a 'miscarriage of justice' exception to the waiver rule, [petitioner] might well obtain relief." Pet. App. 52a.

The issues in this case recur repeatedly in the federal courts. The United States does not claim that further percolation would aid the Court's consideration of either of the questions presented. This case presents the Court an ideal opportunity to review these questions. The Court should grant certiorari.

ARGUMENT

I. Question One Should Be Granted

1. As the petition established, conditioning guilty pleas on collateral-attack waivers violates the unconstitutional-conditions doctrine. Plea bargaining is a coercive context in which criminal defendants are especially vulnerable to being extorted into forfeiting

their constitutionally and statutorily guaranteed collateral-attack rights in exchange for a plea. Pet. 15-20.

In response, the United States disputes very little. The United States does not dispute, for example, that the unconstitutional-conditions doctrine applies to plea bargaining. Pet. 7-8. The United States does not dispute that it would apply here. *Id.* The United States does not dispute that the doctrine requires the Court to weigh the coerciveness of certain bargains against the public interest in permitting them. Pet. 8-10. And on the facts, the United States does not dispute that the right to habeas corpus is fundamental, Pet. 10-11, that plea bargaining is coercive, *id.*, that criminal defendants typically cannot accurately assess the future value of the right to bring a collateral attack, Pet. 11, that these waivers do not achieve their cost-saving aims by reducing the number of collateral attacks, Pet. 11-12, and that they often foreclose clearly meritorious collateral attacks, Pet. 11-13.

2. Thus, if this Court grants certiorari on question one, the only question it will be called upon to answer is whether these waivers meet the test for unconstitutional conditions. They do. Pet. 9-24. The United States' contrary arguments lack merit.

a. The United States contends (at 7-8) that collateral-attack waivers are permissible because a defendant may waive "even the 'most fundamental protections afforded by the Constitution.'" Opp. 8 (quoting *Mezzanatto*, 513 U.S. at 201). But that argument proves too much. The United States does not dispute that a criminal defendant cannot waive *any* constitutional right, no matter its nexus to the plea agreement or the underlying crime.

If, in the name of public safety, federal prosecutors routinely demanded that criminal defendants agree to forego permanently the right to carry a gun as the price of every guilty plea, no one would doubt that practice

would violate the unconstitutional-conditions doctrine. To be sure, Second Amendment rights might be a valuable "bargaining chip" to federal prosecutors, and some criminal defendants might even jump at the chance to waive that right. An overzealous prosecutor might therefore see every fraud case as an opportunity to advance the cause of gun safety. But that is a decision for Congress to make. The mere fact that permitting Second Amendment waivers might also "conserve prosecutorial and judicial resources," Opp. 12, does not make gun safety the purview of prosecutors. In contrast with the rights one must necessarily waive to plead guilty, such a waiver would have no nexus with the plea agreement itself. *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Permitting prosecutors to demand such waivers would fundamentally undermine the criminal justice system, the role of the legislative branch in determining appropriate criminal consequences, and the fundamental right protected by the Second Amendment. Collateral-attack waivers are no different.

2. The United States argues that collateral-attack waivers should survive because they really benefit criminal defendants. Opp. 11-12. The government provides no evidence showing that is true. Prosecutors routinely claim that criminal defendants benefit from collateral-attack waivers, yet no criminal defense lawyers share that view.

Even if some criminal defendants genuinely benefit from the ability to bargain away collateral-attack rights, the United States' argument fails. "No doubt there are limits to waiver … regardless of what the defendant wants or is willing to accept." *Mezzanatto*, 513 U.S. at 204. A collateral-attack waiver surpasses that limit: it erodes the constitutional right to habeas corpus by forcing criminal defendants to bargain with prosecutors over a right that neither the defendants nor their lawyers can intelligently

value. The fundamental fairness and integrity of plea bargaining is called into question every time a prisoner with a meritorious claim is denied collateral relief because of one of these waivers.

3. Contrary to the United States' argument, collateral-attack waivers are nothing like DC's post-and-forfeit statute. *Contra* Opp. 10. "Under that law, certain individuals arrested for misdemeanor crimes receive an opportunity to resolve their criminal charges immediately by paying a relatively small sum of money, typically $25 to $50." *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 724 (D.C. Cir. 2017) (Kavanaugh, J.). Of course the unconstitutional-conditions challenge in *Kincaid* failed. It is difficult to imagine an arrestee who *wouldn't* prefer the opportunity to pay a small fine in lieu of a criminal trial and criminal conviction. A collateral-attack waiver (as in this case) can result in additional years in prison on the basis of an unlawful sentence. Paying $25 to settle a misdemeanor costs two movie tickets. There is no comparison.

4. The United States concludes by retreating (at 11-13) to quotes from this Court's cases stating that plea bargaining benefits criminal defendants and, because that is so, that some rights waivers in other contexts are allowed. *See* Opp. 11-12 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 222 (1978)). But the question is not whether some waivers in some other contexts can benefit criminal defendants. *See* Pet. 12. They can and do. The question is whether these waivers in this context do. As this Court recognized in *Mezzanatto*, there are limits to the constitutional rights that a criminal defendant may waive. *See Mezzanatto*, 513 U.S. at 204. Collateral-attack waivers transgress those limits.

II. Question Two Should Be Granted

1. The petition established that this case presents an ideal opportunity to resolve a 9-3 circuit split regarding whether there is an exception to collateral-attack waivers

when their enforcement would work a miscarriage of justice. Pet. 26-30. The petition also established that enforcement of petitioner's waiver would fall within the exception. Pet. 25-26; Pet. App. 27a-28a, 42a, 44a.

2. The United States claims (at 15) that this case does not really involve a circuit conflict because the courts on the short side of the split—the Fifth, Sixth, and Seventh—have never rejected the miscarriage-of-justice exception in a published opinion. But if the measure of a circuit conflict is whether different litigants get different law based solely on geography, the miscarriage-of-justice circuit conflict is one of the most important and deeply entrenched in federal law. The three circuits that have *never* granted relief on the basis of an identified miscarriage of justice have declined to recognize the exception dozens of times at the appellate level. In those circuits, the miscarriage-of-justice exception does not exist. This case is a prototypical example—the district court declined to provide relief solely because the Sixth Circuit has not recognized the exception. *See* Pet. App. 28a-29a, 52a.

And as the United States tacitly concedes (at 15-16), the miscarriage-of-justice exception has vastly different scopes and meanings even among the courts of appeals that have recognized the exception. In the First and Third Circuits, the miscarriage-of-justice exception is a flexible fact-based standard that is capable of awarding relief in the circumstances of petitioner's case. *See United States v. Foley*, 273 F. Supp. 3d 562, 570-71 (W.D. Pa. 2017). In the Fourth Circuit, actual innocence is the standard, and the Fourth Circuit has consistently granted relief under that standard. *See, e.g.*, *United States v. McKinney*, 60 F.4th 188, 192 (4th Cir. 2023); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016). In other circuits, the exception is sometimes treated as more limited, and its precise contours remain ill-defined. Given this Court's

role in bringing uniformity and stability to federal law, that variation is a reason to *grant* certiorari not deny it.

The United States asserts (at 15) that, even if a split existed, no circuit court has found a miscarriage of justice in petitioner's circumstances. But the "miscarriage of justice" exception is a general legal standard. And under that standard, as understood in the First and Third Circuits, petitioner would have been entitled to relief. The United States does not point to an appellate case in which any circuit—including the First or Third—has considered the application of the exception to circumstances like those here. But the only case on point found a miscarriage of justice under the Third Circuit's test in circumstances virtually identical to this case. *See Foley*, 273 F. Supp. 3d at 570-71; Pet. App. 52a.

Courts address miscarriage-of-justice claims in dozens of cases each year. Just in the time that this petition has been pending, more than 20 cases involving miscarriage-of-justice claims have been decided at the appellate level. In some circuits, these attacks are successful. *See, e.g.*, *McKinney*, 60 F.4th at 192-93. In others, they fail. *See, e.g.*, *United States v. D.B.*, 61 F.4th 608, 612 (8th Cir. 2023). This Court will eventually have to resolve this issue.

3.a. The United States is incorrect that this case does not implicate the circuit conflict. *Contra* Opp. 13-15. As the magistrate judge recognized, petitioner likely would have been able to obtain relief under the Third Circuit's test. *See* Pet. App. 52a. Were there any doubt, the holding in *Foley* removes it. *See* 273 F. Supp. 3d at 570-71. As in this case, *Foley* involved later-vacated offenses, which, if discounted, would have resulted in a lower advisory guidelines sentence range. *Id.* at 564. As in this case, the United States argued the petitioner could still receive the same sentence at resentencing. *See id.* at 572. But unlike in this case, the court applied the miscarriage-of-justice

exception and found it satisfied. *Id.* at 573. Had the same legal test been applied here, petitioner would have received the same outcome.

b. The collateral-attack waiver in this case works a miscarriage of justice for the reason this Court recognized in *Daniels*, *Custis*, and *Johnson*. *See* Pet. 25-26.

The United States argues (at 14) that the miscarriage-of-justice exception would not apply in this case because the vacated state conviction "affected only [petitioner's] advisory guidelines range." But a proceeding in which a person cannot even make an *argument* as to why he should receive a reduced sentence is fundamentally unfair. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (the "right to be heard" is an "essential" component of procedural fairness); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (similar).

The United States' position also contravenes this Court's sentencing precedents. Failure to correctly calculate a criminal defendant's sentencing guidelines range is presumptively prejudicial. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018); *Peugh v. United States*, 569 U.S. 530, 537 (2013). The United States concedes that the district court miscalculated petitioner's range by adding three criminal history points. *See* Opp. 6, 13; Pet. App. 19a, 38a-39a. And petitioner's current sentence is well above the high-end of the correctly recalculated range.

c. The United States suggests that petitioner's collateral-attack waiver cannot work a miscarriage of justice because he entered the agreement "knowingly and voluntarily." Opp. 13. The general claim is that petitioner knowingly assumed the "risk" that his agreement would foreclose him from relief even if there was a serious defect in his sentencing. But even the Sixth Circuit does not hold that knowledge and voluntariness are enough to render all collateral-attack waivers enforceable. Pet. App. 6a

(waivers unenforceable where punishment is "because of the defendant's race"); Opp. 6. Voluntariness and knowledge are relevant to determining whether a waiver is enforceable, *see, e.g.*, *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004), but the core of the miscarriage-of-justice exception is the clarity and gravity of the error insulated by the waiver, *see, e.g.*, *United States v. Rivera*, No. 21-3133, 2023 WL 2544850, at *4 (3d Cir. Mar. 17, 2023).

As a last gasp, the United States argues (at 14) that *here* petitioner had specific knowledge that his waiver would result in the inability to challenge his sentence on the basis of the vacatur of his state court conviction. The United States claims that the close proximity in time between when petitioner sought vacatur of his conviction and his collateral-attack waiver shows he knew the waiver would preclude any future relief on the basis of the vacatur. Opp. 14. In fact, it shows exactly the opposite. Under the United States' theory, petitioner knowingly waived his ability to get relief based on the vacatur of his state court conviction, but then went ahead and pursued its useless vacatur anyway. That argument makes no sense. Petitioner sought vacatur of his state court conviction because he thought that he would be able to obtain relief under the "miscarriage of justice" exception. That is why he filed a *pro se* habeas petition invoking the exception.

III. This Case Is an Ideal Vehicle To Resolve Both Questions Presented

This case is an optimal vehicle for resolving both questions presented. Pet. 30-31. The United States does not dispute that these questions are of exceptional legal and practical importance or contend that further percolation would aid the Court's resolution of either question presented. These questions are ready for the Court's review.

The United States argues that this case is an "unsuitable vehicle" to review question one because petitioner did not press a futile argument below. Opp. 13. But this Court routinely grants cases in which arguments were not raised below because they were foreclosed by controlling precedent. *See, e.g.*, *Health and Hosp. Corp. of Marion Cty. v. Talevski*, No. 20-1664; Pet. 30-31. And this Court has never barred a party from making an additional *argument* in favor of a *claim* advanced below. *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Unconstitutional conditions is an additional *argument* in support of petitioner's *claim* that his collateral-attack waiver is unenforceable. And the United States does not dispute that there is no barrier to this Court's review of question two.

This case presents a significant conflict over two recurrent and important questions of federal law. Both questions warrant resolution by this Court in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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