No. 20-1095

IN THE

Supreme Court of the United States

DARIUS WAYNE HAWS,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

BRIEF FOR IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Idaho Association of Criminal Defense Lawyers (IACDL) is a nonprofit voluntary organization of lawyers in Idaho whose members work exclusively in criminal defense. IACDL's objective is to promote the integrity and fairness of the judicial system and the advancement of criminal defense practice. IACDL's leadership accomplishes the organization's mission by encouraging study and research in the field of criminal law, disseminating knowledge of criminal defense practice and procedure, and providing a forum for defense lawyers to exchange information regarding the administration of criminal justice. Membership in IACDL includes state public defenders from around the state of Idaho, in addition to private counsel, Federal Public Defenders, and defense investigators. IACDL also advocates for criminal justice by actively participating as amicus curiae in cases throughout the country.

In terms of the specific issue presented by the instant case, IACDL members have extensive experience with appellate waivers and their consequences, especially in Idaho. IACDL members deal with appellate waivers at trial while negotiating plea agreements; on appeal in challenging the validity of such waivers or finding claims that survive the waivers; and in state post-conviction and federal habeas proceedings by asserting grounds for attacking the waiver, such as by alleging ineffective assistance of counsel. IACDL previously offered its insights into the operation of appellate

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[1] Pursuant to Supreme Court Rule 37.6, amici represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the filing of this brief pursuant to Rule 37.2 and each has consented to its filing.

waivers in *Garza v. Idaho*, U.S. Sup. Ct., No. 17-1026. In that case, IACDL filed and co-signed amicus briefs in support of the petitioner at both the certiorari and the merits stages. Recognizing IACDL's contribution, the majority opinion cited its amicus brief twice. *See Garza v. Idaho*, 139 S. Ct. 738, 744 n.5 & 749 (2019). In the present case, IACDL believes it has a relevant perspective to share with the Court based on its exposure to appellate waivers, the many problems that have arisen when trial judges misstate their terms—as they frequently do—and the consequences that flow from such mischaracterizations, all of which are articulated below.

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.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellate waivers in plea agreements have become a deeply rooted aspect of the criminal justice system, appearing in huge numbers of cases. Such waivers pose troubling equitable concerns, as defendants are forfeiting

challenges ahead of time to sentences that may turn out to be highly objectionable for any number of reasons. They also pose institutional concerns, for without appeals the courts are powerless to create uniformity in the processing of pleas, which is how the vast majority of criminal cases are resolved. Because appellate waivers are now solidly entrenched in the day-to-day business of the criminal courts, and because they potentially undermine the integrity of the judiciary, the practice should be carefully regulated. When a mistake arises in the handling of appellate waivers—as it has in the case below and the others like it—the issue merits the Court's consideration, so that efficiency gains are not given priority over the rule of law.

Furthermore, the mistake at issue here has become a common one. Trial judges around the country often get the terms of appellate waivers wrong at plea colloquies. Such errors exact a high price from the judicial system. When mistakes of this sort are excused and appellate waivers nevertheless enforced—as happened in the case at bar—grave sentencing errors become virtually impervious to meaningful review.

Collectively, these issues show that the problem of judicial misstatements at plea hearings is a large and important one, impacting numerous cases in dramatic ways. They therefore militate in favor of this Court intervening, for it to explain to lower tribunals and practitioners how to deal with the errors and ensure that any waiver of the right to challenge an unlawful sentence is knowing, intelligent, and voluntary, as due process requires.

ARGUMENT

I. APPELLATE WAIVERS ARE PERVASIVE AND CALL FOR SPECIAL SCRUTINY.

Appellate waivers are everywhere, and they raise difficult questions about fairness in the bargaining process and about the ability of higher courts to guarantee that defendants' legal rights are being protected in trial proceedings. That means that when a compelling question arises in relation to appellate waivers—as it has in the instant case—there is a heightened need for the Court to intercede and make sure the process surrounding waivers has not eclipsed the important constitutional rights defendants have when entering pleas.

Like any other participant in the criminal justice system in America in 2021, the members of amici's organizations deal with appellate waivers every day. Simply put, the practice is ubiquitous. The certiorari petition contains the basic data reflecting the prevalence of appellate waivers. *See* Pet. at 21–22. Judicial and academic commentary further reinforce the centrality of appellate waivers, and the need for appellate guidance regarding their use.

Starting with the judicial opinions, the U.S. District Court in Seattle has noted the "now nationwide practice of routinely approving plea agreements containing unilateral waivers of the right to appeal." *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1333 (W.D. Wash. 2016). And although the lower courts ultimately allowed appellate waivers of sentencing errors, the trend was not without controversy. At the time when appellate waivers were first being tested in federal court, a concurring opinion at the Fifth Circuit criticized the idea that a defendant could "ever knowingly and intelligently waive . . . the right to appeal a

sentence that has yet to be imposed" as a "manipulat[ion of] the concept of knowing, intelligent and voluntary waiver so as to insulate from appellate review the decision-making by lower courts in an important area of the criminal law." *United States v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring); *see United States v. Raynor*, 989 F. Supp. 43, 48 (D.D.C. 1997) (refusing to accept any plea agreements with appellate waivers because they would "insulate from appellate review erroneous factual findings, interpretations and applications of the Guidelines by trial judges and thus, ultimately, [would] undermine uniformity" and call into question "[t]he integrity of the system"), *abrogation recognized by United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018).

Apart from these objections to appellate waivers, other courts have expressed concern about the risks they pose by motivating the defense attorney, the prosecutor, and the judge to strip the defendant of his right to review by a higher judicial body. *See Merriweather v. State*, 151 N.E.3d 1281, 1285 (Ind. Ct. App. 2020) (chiding both the government and the defense attorney for remaining silent as the trial court erroneously advised the defendant that he retained his right to an appeal, and remarking that "[n]either party should be rewarded for behavior that is contrary to the administration of justice"); *see also United States v. Murraye*, 596 F. App'x 219, 229–30 (4th Cir. 2015) (per curiam) (voicing dissatisfaction with the lawyers on both sides for allowing a district judge to accept an appellate waiver without discussing the provision with the defendant, and reminding the government that it "should stand as a conservator of the plea process, not a silent beneficiary of shortcuts").

Scholars have likewise picked up on how dependent the system has become on appellate waivers, and have

likewise articulated reservations about the equities of the device. One author noted at the outset of his article that "sentencing appellate waivers have become more prevalent than ever in the federal courts" and went on to summarize the flaws in the convention, including that they prevent the parties from accurately weighing their rights while plea bargaining and that district judges "know the sentence is virtually unreviewable and therefore lack incentives to observe proper sentencing practices." Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. Mich. J.L. Reform 347, 347 (2015). An earlier article outlined how appellate waivers were fast becoming the norm and warned that the "development conflicts with our traditional notion that judicial safeguards are needed in the application of penal sanctions and should be examined thoroughly before we signal assent." Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 129 (1995).

In overview, both courts and academics have noticed that appellate waivers are now squarely in the mainstream, and both have also noticed that they create potent dangers to a robust system for vindicating constitutional rights at the trial level. These same facts also indicate that when authorities split on a matter involving appellate waivers and their enforceability in a particular circumstance, as they have on the question presented by Mr. Haws, it is especially vital for this Court to step in and provide consistency in this sensitive area. Indeed, the Court acknowledged as much by granting certiorari in *Garza* and resolving one important question concerning appellate waivers: whether there should be a presumption that counsel's deficient performance is prejudicial when she refuses to file a notice of appeal, despite the client's instructions, because of an appellate waiver. *See* 139 S. Ct. at 742. Another important question has now emerged in

connection with appellate waivers. It, too, should be answered.

II. JUDGES ROUTINELY MAKE SERIOUS MISTAKES IN DESCRIBING APPELLATE WAIVERS AT PLEA HEARINGS AND THE ADVERSE CONSEQUENCES ARE SEVERE.

Given the popularity of appellate waivers, there is a lot of room for error, and it should come as no surprise that there is a heavy volume of cases in which they are mishandled by trial judges at plea hearings. When the terms of such waivers aren't properly communicated to defendants, a wide variety of constitutional infirmities becomes effectively invincible to appellate challenges. This creates a systemic challenge that weighs heavily in favor of certiorari review.

A. The Errors Are Numerous And Widespread.

In discussing cases in which trial judges have mistakenly conveyed the terms of appellate waivers to defendants, the certiorari petition concentrates on the published opinions establishing the split in the lower courts over whether a waiver is knowing, intelligent, and voluntary when the trial court incorrectly informs the defendant, during the plea colloquy, that he has reserved the right to appeal. *See* Pet. at 8–16. Although the petition's list of cases is substantial in its own right, it is only the tip of the iceberg. There are far more examples of similar errors.

Trial judges have incorrectly approached appellate waivers at plea hearings in many different ways. Perhaps the most straightforward category encompasses the scenarios in which, as in Mr. Haws' case, the trial judge flatly tells the defendant that he can appeal his sentence, despite a plea agreement to the contrary. *See, e.g.*, *United States v. Rand*, 758 F. App'x 596, 598 (9th Cir. 2019) (per

curiam); *United States v. Kaufman*, 791 F.3d 86, 88 (D.C. Cir. 2015); *United States v. Rios-Hernandez*, 645 F.3d 456, 460–61 (1st Cir. 2011); *United States v. Rios-Pinela*, 272 F. App'x 714, 715–16 (10th Cir. 2008); *Dickerhoff v. State*, 33 N.E.3d 1211, 2015 WL 3453759, at *1 (Ind. Ct. App. 2015) (table).

In another large class of cases, the judge makes a comment at the plea hearing that falls short of a definitive endorsement of the defendant's absolute right to appeal any sentence, but is still either too misleading or ambiguous to preclude review by the higher court. *See United States v. Baptista*, 738 F. App'x 384, 386 (9th Cir. 2018) (per curiam) (declining to enforce a waiver because the district judge represented to the defendant that if he wished to appeal, he had to do so within fourteen days); *United States v. Salery*, 681 F. App'x 854, 857 (11th Cir. 2017) (per curiam) (invalidating a waiver in part because the district judge explained to the defendant—who had mental health issues—that he could appeal his sentence "under some circumstances"); *United States v. Fareri*, 712 F. 3d 593, 594 (D.C. Cir. 2013) (concluding that a waiver was unenforceable where the district judge admonished the defendant that he "probably" could challenge an illegal sentence on appeal); *United States v. Scott*, 626 F. App'x 722, 724 (9th Cir. 2015) (per curiam) (voiding a waiver because the district judge informed the defendant that if he "want[ed] to appeal," he should let his lawyer know); *United States v. Melvin*, 557 F. App'x 390, 395–96 (6th Cir. 2013) (considering the defendant's claim notwithstanding the waiver because the district judge confirmed that he had a right to pursue an appeal if the law changed in his favor); *United States v. Padilla-Colón*, 578 F.3d 23, 28–29 (1st Cir. 2009) (reaching a sentencing challenge because the district judge asked the defendant a question "so misleading that it nullified" the "waiver of appeal"); *People v. Parker*, 189

A.D.3d 2065, 2066 (N.Y. App. Div. 2020) (per curiam) (taking up an appeal because the colloquy had only "generic, fleeting statements of unnamed rights surviving the waiver"); *Merriweather*, 151 N.E.3d at 1285 (determining that a waiver was unlawful where the judge advised the defendant that he could appeal the sentence if it was fundamentally unfair); *State v. Neff*, 181 P.3d 819, 823 (Wash. 2008) (en banc) (deeming a waiver illegitimate where the defendant couldn't explain the plea and the colloquy "further clouded the issue").

A third species of error can be found in cases where the trial judge fails to canvass the defendant about the waiver, either in its entirety or just with respect to sentencing issues. In other words, these are cases in which the judge makes no effort to obtain a knowing, intelligent, and voluntary waiver of the defendant's entitlement to challenge his sentence on appeal. *See United States v. Zapata Espinoza*, 830 F. App'x 324, 328 (D.C. Cir. 2020) (per curiam); *Murraye*, 596 F. App'x at 229; *United States v. Nguyen*, 343 F. App'x 385, 391 (10th Cir. 2009) (per curiam); *United States v. Tang*, 214 F.3d 365, 367 (2d Cir. 2000); *Harper v. State*, 155 N.E.3d 675, 2020 WL 5638547, at *5 (Ind. Ct. App. 2020) (table), *transfer denied*, 2021 WL 195257 (Ind. 2021); *People v. Eduardo S.*, 186 A.D.3d 1265, 1267 (N.Y. App. Div.) (per curiam), *leave to appeal denied*, 159 N.E.3d 1107 (N.Y. 2020); *State v. Bellville*, 705 N.W.2d 506, 2005 WL 2086000, at *2 (Iowa Ct. App. 2005) (table); *State v. Doggett*, 680 N.W.2d 377, 2004 WL 370249, at *2 (Iowa Ct. App.) (table), *vacated in part on other grounds*, 687 N.W.2d 97 (Iowa 2004).

In short, miscommunications of appellate waivers by trial judges are legion. By marshalling these cases, amici by no means intend to disparage the work of trial judges. Without doubt, the vast majority of problems at plea

hearings are the innocent product of excessive caseloads, as well as insufficient time and resources. And the modern sentencing regime in America is complicated, which makes it even easier for a plea hearing to go awry in some form or another when the waiver is—or is not—addressed. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1141 (2011) (observing that "sentencing laws have grown more complex"); Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, 246 (2005) ("The federal sentencing system is the most complex ever devised.").

The intricacy of contemporary sentencing schemes is yet another factor cutting in favor of certiorari review. In addition to periods of incarceration, criminal penalties today can include restitution orders, fines, terms of supervised release, structuring of consecutive and concurrent prison terms, and many other types of provisions. Indeed, issues arise about the scope of appellate waivers with respect to each of these areas, and judges' inaccurate assertions about them from the bench play a role there too. *See, e.g.*, *United States v. Zink*, 107 F.3d 716, 718 (9th Cir. 1997) (reviewing a restitution order despite an appellate waiver in part because of the district judge's flawed handling of the plea hearing); *United States v. Ready*, 82 F.3d 551, 557–58 (2d Cir. 1996) (same), *superseded by rule as stated in United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013); *United States v. Hunt*, 843 F.3d 1022, 1028–29 (D.C. Cir. 2016) (finding a waiver unenforceable with respect to a condition of supervised release based in part on the district judge's errors at the plea hearing). The multifaceted nature of sentences lengthens the list of possible errors that can be made in connection with appellate waivers, and lengthens the list of ways in which the errors can compromise a

defendant's rights. That reinforces the need for the Court to attend to the phenomenon and set forth guidelines for all participants in the criminal justice system.

Though most of the deficiencies in plea colloquies identified here are borne of no ill will from anyone—judge, attorney, or defendant—they nonetheless remain a highly visible reality, and the Court must contend with it. The petition at bar gives the Court a chance to do so, and to provide direction to the legal system on how the knowing, intelligent, and voluntary standard applies where a district court incorrectly informs a defendant that he will have the right to appeal.

B. The Errors Have Extreme Ramifications.

Many decades ago, the right to an appeal in a criminal case was already "so established that [it led] to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law." *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring). When appellate waivers are enforced despite contradictory assurances by trial judges, a defendant's basic entitlement to review by a higher court is improperly sacrificed, with potentially severe consequences for the rule of law.

Such consequences are illustrated, first, by the fact that several of the published cases upon which Mr. Haws relies to show the correct side of the split resulted in vacated punishments, due to various illegalities in the sentences. *See United States v. Brown*, 892 F.3d 385, 405–08 (D.C. Cir. 2018) (per curiam) (remanding for resentencing because the district judge inadequately accounted for an upward variance from the guideline range); *United States v. Saferstein*, 673 F.3d 237, 243–44 (3d Cir. 2012) (reversing a sentence because it was imposed on the basis of a guideline

provision promulgated after the offense, in violation of the ex post facto clause); *State v. Macke*, 933 N.W.2d 226, 237 (Iowa 2019) (calling for a new sentencing because the defense attorney rendered ineffective assistance of counsel by neglecting to object to the government's breach of its plea agreement).

These are serious constitutional and statutory violations. And they would have gone uncorrected if the respective appellate waivers had been enforced despite the judges' promises at the plea hearings. In fact, had these errors occurred in an Idaho state court or a federal court in the First Circuit, the defendants would be living with the consequences of their unlawful sentences—often at a price of years of incarceration—even though their judges instructed them they could appeal.

Worse, there are many far more egregious miscarriages of justice that can take place at sentencings, and nearly *all* of them would be insulated from appeal by the minority approach to the question presented. By way of example, a convict can receive a sentence so wildly disproportionate to his offense that it is cruel and unusual. *See, e.g.*, *State v. Davis*, 79 P.3d 64, 67–75 (Ariz. 2003) (en banc) (striking down a sentence as "grossly disproportionate" where the twenty-year-old defendant was imprisoned for fifty-two years because he had "voluntary sex with two post-pubescent teenage girls," which was harsher than any punishment meted out for a similar crime inside or outside the state). Or a defendant could face a parole condition so oppressive that it's unconstitutional. *See, e.g.*, *Mutter v. Ross*, 811 S.E.2d 866, 870–73 (W. Va. 2018) (deeming a parole condition unconstitutional under the First Amendment where it prohibited the defendant from ever using a device with access to the internet, and potentially even from ever being in the same building as

such a device). Perhaps most worrisome of all, a defendant could be treated more severely by the criminal justice system as a result of a wholly inappropriate consideration, such as his race. *See, e.g.*, *In re Hutchins*, 661 S.E.2d 343, 345 (S.C. 2008) (per curiam) (disciplining a judge for using racial epithets); *In re Ferrara*, 582 N.W.2d 817, 819, 827 (Mich. 1998) (same); *In re Goodfarb*, 880 P.2d 620, 621 (Ariz. 1994) (same) (in banc).

All of these extraordinary improprieties—and many more—would presumably be shielded by appellate waivers in Idaho and the First Circuit, regardless of how badly the trial judge misled the defendant at his plea hearing as to his subsequent appellate rights.

Amici understand, of course, that the certiorari petition does not attack the legitimacy of all appellate waivers in all circumstances. As a consequence, it must be accepted that even if the split is resolved in Mr. Haws' favor, there will continue to be situations in which glaring violations at sentencings are never remedied on appeal. For there will obviously be cases where trial judges are faithful to the terms of the plea deal while ensuring that a defendant's appellate waiver is knowing, intelligent, and voluntary. Still, the omnipresence of appellate waivers and the dangers they pose to fair dealing and the healthy functioning of the court system mean that *when* their terms are misstated by judges to defendants, the default rule should be greater review, not less. It is thus a grave problem that defendants in some jurisdictions are unable to seek appellate consideration even though the most authoritative person in the room at their plea hearings—the judge—said they could.

Simply stated, it is a real problem that a defendant in some parts of the country can hear a judge unequivocally declare that he maintains his sentencing-appellate rights,

enter his plea on the basis of that declaration, get a blatantly unlawful punishment, and then discover that he has no appellate rights after all. Because the problem is a salient one with far-ranging and dramatic risks to the legitimacy of the criminal justice system, the Court should accept plenary review and solve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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