ORAL ARGUMENT SET FOR MAY 10, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5314

WILLIAM S. PRICE, Appellant,

v.

U.S. DEPARTMENT OF JUSTICE, *et al.*, Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and *Amicus Curiae*

Appellant is William S. Price, plaintiff in the District Court. Appellees are the United States Department of Justice (DOJ) and three of its components, the Federal Bureau of Investigation (FBI), the Executive Office for United States Attorneys (EOUSA), and the Office of Information Policy (OIP), which were each named as defendants below. The Court appointed counsel from Georgetown University Law Center's Appellate Litigation Program, Steven H. Goldblatt, Director, to serve as *amicus curiae* to present arguments in favor of appellant's position.

Ruling Under Review

The ruling under review is the August 25, 2015, memorandum opinion and order by the Honorable Richard J. Leon granting the Government's motion for summary judgment, denying all other motions as moot, and dismissing the case. *See* Notice of Appeal, JA241-42. Subsequently, on November 22, 2015, the Honorable Richard J. Leon issued an order, JA245, denying Mr. Price's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), A18-19. Mr. Price, however, did not amend his notice of appeal as required by Fed. R. App. P. 4(a)(4)(B)(ii), and accordingly this ruling may not be challenged by Mr. Price before this Court. *E.g.*, *Wattleton v. Holder*, 534 Fed. Appx. 3, 4 (D.C. Cir. 2013);

Parks v. Williams, No. 04-7157, 2005 U.S. App. LEXIS 12687, *2 (D.C. Cir. June 24, 2005).

Related Cases

This case has not previously been before this Court. Counsel is unaware of any cases that are related within the meaning of Circuit Rule 28(a)(1)(C), but a case also seeking information from the Department of Justice about Tami Lynn Price and considering the effect of the waiver of FOIA rights in his plea agreement was previously brought by Mr. Price's aunt. *See Ebling v. Dep't of Justice*, 796 F. Supp. 2d 52, 64 (D.D.C. 2011) (finding that waiver in Price's plea agreement did not preclude his aunt from requesting, under FOIA, records from the FBI and EOUSA about either the criminal investigation / prosecution of Mr. Price, or about his former spouse, Tami Lynn Price; Mr. Price could only waive "'*his* rights,'" and question of whether his aunt was serving as his "'representative'" was, "quite simply, irrelevant" because she possessed her own independent statutory rights); *see also* Status Report, *Ebling v. Dep't of Justice*, No. 10-914 (CKK) (D.D.C. filed Sept. 22, 2011) (explaining that, after the district court's ruling, EOUSA had provided the aunt 125 pages in full and 5 pages in part, and the FBI had provided 224 pages; other pages had been withheld pursuant to a variety of FOIA exemptions).

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TABLE OF AUTHORITIES

Federal Cases

***Cases chiefly relied upon are marked with an asterisk.**

Federal Statutes

GLOSSARY

2255R.[#]	Docket entry number in *William S. Price v. United States*, No. 5:10-cv-06120-NKL (W.D. Mo.)
Br.	Brief of *Amicus Curiae*
CrimR.[#]	Docket entry number in *United States v. William S. Price*, No. 06-6012-01-CR-SJ-NKL (W.D. Mo.)
DOJ	Department of Justice
EOUSA	Executive Office for United States Attorneys
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act
JA[#]	Joint Appendix filed by *amicus curiae*
SA[#]	Supplemental Appendix of Appellees

RELEVANT STATUTES

The relevant statutory provisions are set forth in the statutory addendum to the brief filed by *Amicus Curiae*.

STATEMENT OF JURISDICTION

Mr. Price invoked District Court jurisdiction under 5 U.S.C. § 552(a)(4)(B). JA8. As explained herein, because of the waiver in his plea agreement of FOIA rights pertaining to his investigation and prosecution, he lacked authority to bring suit under FOIA concerning his requests, which fell within the waiver's scope.[1] The District Court, however, did have jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291 because the August 25, 2015 order of the District Court is a final, appealable order. Mr. Price timely filed a notice of appeal as to that order (only). *See* JA241-43; Fed. R. App. P. 4(a)(1)(B)(iv).

ISSUE PRESENTED

Whether summary judgment in favor of DOJ was correct because Mr. Price waived, in his plea agreement in a criminal case, any right under the Freedom of Information Act to seek "from any department or agency of the United States any records pertaining to the investigation or prosecution of" *United States v. Price*, No. 06-CR-6012 (W.D. Mo.), especially where Mr. Price already unsuccessfully challenged the inclusion of the FOIA waiver in a 28 U.S.C. § 2255 petition denied by the sentencing court, which ruling estops this collateral attack on his sentence.

[1] Assuming *arguendo* that FOIA's jurisdictional provision applies, the Department of Justice is the only proper agency Appellee in this suit, *see* 5 U.S.C. § 552(f)(1), but the identity of the Appellee is immaterial to resolution of this appeal. *See Peralta v. U.S. Attorney's Office*, 136 F.3d 169, 173-74 (D.C. Cir. 1998).

STATEMENT OF THE CASE

William Price, an inmate representing himself, brought a complaint, JA7-26, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking to compel disclosure of records he had sought from the Federal Bureau of Investigation (FBI) and the Executive Office of United States Attorneys (EOUSA). JA7-98.

DOJ and its components moved to dismiss or for summary judgment. JA103-19. In response, Mr. Price cross-moved for summary judgment, and moved for default judgment and for judicial notice. JA4-5. Mr. Price subsequently also filed a "motion to disregard and disallow the FOIA waiver." JA213-17.

On August 25, 2015, the District Court granted the Government summary judgment based on Mr. Price's waiver, in his plea agreement, of FOIA rights to request law enforcement records pertaining to his criminal case. JA224-29.

On October 2, 2015, Mr. Price moved for relief from the judgment under Rule 60(b)(1). JA237-39. On October 23, 2015, prior to a decision on that motion, he appealed the judgment. JA241-42. On November 22, 2015, the District Court denied reconsideration, finding that Mr. Price's motion "convey[ed] nothing more than [his] disagreement with the order from which he has appealed." JA 245.

On October 3, 2016, this Court denied a motion for summary affirmance and appointed *amicus curiae* to present arguments in favor of Mr. Price. On November 18, 2016, Mr. Price submitted a Notice of Adoption, wherein he indicated that he

adopts the arguments in *amicus*' brief and he will not be filing a separate brief. *See also* Br. at i n.1.

STATEMENT OF FACTS

Mr. Price's Plea Agreement and Conviction

Mr. Price was charged with sexually assaulting his 15-year old stepdaughter, who was the daughter of his then-wife, Tami Lynn Price. *See* JA175. On March 22, 2007, Mr. Price pled guilty to knowingly attempting to use a minor to engage in sexually explicit activity for purposes of producing a visual depiction, in violation of 18 U.S.C. § 2251(a), and knowingly receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2). *See* JA122-41. On October 9, 2008, the United States District Court for the Western District of Missouri sentenced Mr. Price to 50 years' imprisonment without parole, payment of $271,675 in restitution to the victim, *i.e.*, his stepdaughter, and a term of supervised release for life. SA10-11, SA53-67 (CrimR.83, CrimR.92-94[2]); *accord United States v. Price*, 326 Fed. Appx. 985, 986 (8th Cir. 2009).

On June 28, 2006, a grand jury had issued a five-count indictment against Mr. Price. On March 22, 2007, Mr. Price entered a plea agreement with the United States, whereby he pled guilty to violations of 18 U.S.C. §§ 2251(a) and

[2] This Court "may take judicial notice of official court records." *See Veg–Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); Fed. R. Evid. 201(a).

2252(a)(2), and the United States "agree[d] to forego prosecution" of the additional charges, which could have resulted in a maximum period of imprisonment of 110 years. JA122-41 (plea agreement); *see infra* at 8-9.

In the plea agreement, Mr. Price admitted to numerous details of his crimes. JA123-28. He admitted that, on or about June 9, 2006, his then-wife had taken the family's home computer to a local technician to seek to gain access to a hard drive that Mr. Price had password-protected. JA123; *accord* JA64-65 (technician aff. (attesting that Ms. Price informed technician that she wanted the computer evaluated to determine if it contained "any pornography"; technician then scrutinized two hard drives from the Prices' computer – one which did not have "anything out of the ordinary," and another that had hidden folders, which included videos of her husband and her 15 year-old daughter, which made Ms. Price "shak[e]" upon watching one); JA68 (FBI report) ("William told Tami [Price] one of the hard drives was for him and the other was for her and the kids to use. William gave Tami the password for her hard drive, but did not give her the password for his hard drive.").[3]

[3] Ms. Price informed the investigating FBI Special Agent that Mr. Price was "addicted to pornography and computer games." SA115 (2255R.13-1 at 7) (unredacted, complete version of FBI report partially produced with redactions as JA67-68) (detailing multiple prior incidents when Tami Price had found pornography in her husband's possession, as well as multiple investigations of him for "inappropriately touching a patient at the hospital" where he worked, and assertions by Mr. Price's prior wife that, when their daughter was three years old,

On that hard drive, the technician and Mr. Price's then-wife discovered multiple files bearing the name of Mr. Price's stepdaughter, one of which was a video depicting Ms. Price's daughter "drugged and unconscious ... with an adult man sexually molesting and mounting her." JA 123-24. Tami Price identified the unconscious rape victim as her 15 year-old daughter and the man as her husband, the Appellant. JA 124. The technician immediately called law enforcement. *Id.*

A search ensued of Mr. Price's home and workplace, a veterans' home where he was a nurse supervisor. *Id*. Mr. Price admitted that a Government expert would testify that items seized from the home included "heavy sedatives, tranquilizers, muscle relaxers, and anesthesia…. Several of the drugs found are not sold in this country." *Id.* Other items recovered during the searches included "needles, syringes, laxatives, condoms, KY ultra gel, viagra, en-care packages, camera and a camera tripod." *Id.*

Further review of the hard drive revealed eight more videos, recorded on several discrete occasions, "depict[ing] different stages of similar illegal sexually explicit conduct with [Mr. Price] and his drugged to unconscious stepdaughter."

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he had "inappropriately touched" the girl repeatedly); SA31 (CrimR.103, sentencing hearing tr., at 67) (testimony on divorce deposition transcript wherein Mr. Price acknowledged using his then-three year old daughter "as a masturbation tool"); SA21-24 (*id.* at 57-60) (FBI Special Agent recounting statement of that daughter, who by time of the interview was 24, detailing her father's sexual abuse of her at age three or four and Mr. Price's warning: "Don't tell mommy or you'll go to hell").

JA125-26. Mr. Price admitted that he and his stepdaughter "are clearly identifiable in the images." *Id.* at 125. He admitted that in one of the videos he, after undressing "his unconscious stepdaughter" and applying lubricant to himself, "mounted and sexually molested and raped" her while she was unconscious. *Id.*

Mr. Price admitted that the hard drive also included still images of intimate parts of his stepdaughter's body and edited clips of portions of the nine videos. *See* JA126. Moreover, Mr. Price installed a hidden camera in his stepdaughter's bedroom, which he used to record her undressing and going to bed. *Id*. He then used those images, in combination with "the sexually explicit videos[,] to make a montage of still images from each video episode." *Id.* Mr. Price also made child pornography videos available online, JA126-27, and downloaded such videos produced by others, which he renamed to include the name of his stepdaughter. JA127 ("[f]or example, one file originally named, 'BOHOL Scandal Girl drugged and forced to sex' was renamed 'This is YOU, [stepdaughter's name]!' The video depicted a young female, drugged, molested, and raped by an adult man. Another file depicting [a] young woman drinking a liquid, falling unconscious, and then gang raped by a group of naked adult men, originally carrying the filename, 'drugged girls raped—gang bang,' was renamed, '[stepdaughter's name] gets it, and her teacher, too.'"). On that same hard drive, Mr. Price admitted that law

enforcement also discovered "numerous videos of women being drugged and raped, and a bestiality video involving an adult and a horse." *See* JA126-28.

Mr. Price's plea agreement provides that:

> unless the constitutional implications inherent in plea agreements require otherwise, this plea agreement should be interpreted according to general contract principles and the words employed are to be given their normal and ordinary meanings…. [I]n interpreting this agreement, any drafting errors or ambiguities are not to be automatically construed against either party, whether or not that party was involved in drafting or modifying this agreement.

JA140-41 (¶ 23). Mr. Price "acknowledge[d] that he [] entered into this plea agreement freely and voluntarily after receiving the effective assistance, advice, and approval of counsel." JA139 (¶ 19). In addition to waiving constitutional rights, including the right to a jury trial and to confront and cross-examine witnesses who would testify against him, Mr. Price waived his right to appeal or collaterally attack the finding of guilt, as well as any right to appeal the sentence imposed, with certain, limited exceptions. JA136, 137 (¶¶ 14, 15).[4]

Additionally, as most relevant here, in the plea, Mr. Price agreed that:

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[4] Mr. Price noticed an appeal on October 8, 2008. SA68-73 (CrimR.95). On April 23, 2009, the Eighth Circuit affirmed his sentence, upholding the district court's application of multiple sentencing enhancements. 326 Fed. Appx. at 986-87 (SA74-76). The Supreme Court denied his petition for a writ of *certiorari*. 558 U.S. 913 (2009). On October 25, 2010, Mr. Price filed a 28 U.S.C. § 2255 motion to vacate his sentence, SA77-113 (2255R.1, 2), which the district court denied. *Price v. United States*, 2011 U.S. Dist. LEXIS 39500 (W.D. Mo. Apr. 11, 2011) (SA119-22). Both it and the Eighth Circuit denied certificates of appealability. *Id.*; SA125, Judgment (8th Cir. Aug. 31, 2011).

> The defendant waives all of his rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

JA138 (¶ 16). Moreover, in the space directly above his signature on the plea agreement, Mr. Price affirmatively declared: "I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this plea agreement and I voluntarily agree to it." JA141.

In exchange for pleading guilty to Counts One and Two of the information charging him with producing and receiving child pornography in violation of 18 U.S.C. § 2251(a) (a Class B felony) and 18 U.S.C. § 2252(a)(2) (a Class C felony), as well as the forfeiture allegation (per 18 U.S.C. § 2253), and "forfeiting all interest in the personal property which was used or intended to be used to commit the offenses[,]" (JA123, 139-40) the United States "agree[d] not to bring any additional charges against [Mr. Price] for any federal criminal offenses related to knowingly attempting to induce and use the minor victim to engage in sexually explicit conduct for the purpose of producing child pornography or receiving pornography from the internet and the Kazaa file sharing program[,] ... [and] to dismiss the indictment." JA131. The original indictment contained five counts:

- Controlling a Minor for the Purpose of Attempting to Produce Child Pornography, in violation of 18 U.S.C. § 2251(b) and (e), a Class B felony

carrying a mandatory minimum term of 15 years and maximum term of imprisonment of 30 years, and a fine of up to $250,000;

- Attempting to Publish a Notice of Child Pornography, a Class B felony, in violation of 18 U.S.C. §§ 2251(d)(1)(A) and (e), carrying a mandatory minimum of 15 years and maximum 30 years of imprisonment, and a fine of up to $250,000;
- Attempted Distribution of Child Pornography, a Class C felony, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(2), with a mandatory minimum of five years' imprisonment and a maximum of 20 years, and a fine of up to $250,000;
- Attempted Receipt of Child Pornography, a Class C felony, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(2), with a mandatory term of imprisonment of five years and a maximum of 20 years, and a fine of up to $250,000;
- Possession of Child Pornography, a Class C felony, in violation of 18 U.S.C. §§ 2252(a)(4)(B), with a maximum term of imprisonment of 10 years, and a fine of up to $250,000; as well as a
- Criminal Forfeiture Allegation, 18 U.S.C. § 2253.

SA1-6 (CrimR.5, Indictment). Thus, pursuant to the original indictment (which, via the plea agreement, the United States agreed to dismiss), Mr. Price could have been subject to an imprisonment term of 110 years, as well as a fine of $1 million. *Id.* By pleading guilty, he reduced his prison exposure by more than half and the potential fine by half. *Compare id. with* SA7-9 (CrimR.60, Information).

The district court imposed the maximum sentence permitted under law for the statutes to which Mr. Price pled guilty. SA63 (CrimR.94 at 2, Am. Judgment). It further ordered him to pay $271,675 as restitution to his child victim. SA59-61 (CrimR.93, Restitution Judgment). The Eighth Circuit affirmed Mr. Price's

sentence. *Price*, 326 Fed. Appx. at 987-98 (upholding district court's findings, on five discrete sentencing enhancements, as supported by a preponderance of the evidence, and crediting Mr. Price's waivers of his rights in his plea agreement).

Denial of Mr. Price's Petition Under 28 U.S.C. § 2255

In a 28 U.S.C. § 2255 petition, Mr. Price alleged ineffective assistance of his counsel for failure to file motions to suppress and under *Brady v. Maryland*, 373 U.S. 83 (1963), to adequately investigate exculpatory evidence, and to explain the options or consequences relating to changing his plea, including the implications of waiving his rights of appeal and to submit certain FOIA requests. SA80-84 (§ 12) (2255R.1 (also docketed as CrimR.106), 2255R.2 (W.D. Mo. filed Oct. 5, 2010)).

On April 11, 2011, the sentencing court denied Mr. Price's motion to vacate his conviction or sentence. *Price*, 2011 U.S. Dist. LEXIS 39500. In its decision, the district court addressed, among other things, Mr. Price's specific challenge to the circumstances of his waiver of a right, under the FOIA, to request records associated with his criminal case. *Id.* at *11. The district court found that the waiver was knowing, intelligent, and adequately explained:

> Price is incorrect. The Court adequately complied with Fed. R. Crim. P. 11(b)(N). The Court read to Price the list of rights he would be forfeiting and Price agreed that he understood the rights and had discussed them with his attorney. [Doc. # 11 at 11.] Price also specifically agreed that he read, understood, and voluntarily signed the plea agreement as well as his agreement to be charged by information rather than indictment before the grand jury. [Doc. # 11

> at 12, 13.] Indeed, Price was very carefully questioned at the plea hearing to ensure that his plea was knowing, voluntary and accurate.

Id. A certificate of appealability was denied, both by the district court and the Eighth Circuit. *Id.* at *12; SA125 (2255R.23, Judgment (8th Cir. Aug. 31, 2011)).[5]

Mr. Price's FOIA Requests to DOJ About Tami Lynn Price

On October 25, 2011, Mr. Price sent a letter dated October 21, 2011, to the FBI stating: "Pursuant to the Freedom of Information Act, I hereby request any and all records, both main and reference, regarding Tami Lynn Price[.]" JA49, 51; *see* JA176. Mr. Price's request went on to specify eight categories of records and printouts from FBI databases that he sought. JA 49-51. He further requested "all records in case file number 305-KC-89543." JA50. Mr. Price included with his FOIA request a waiver of privacy rights signed by Tami Lynn Price. JA52.

By letter dated December 1, 2011, the FBI responded in two ways. JA53-54. First, as to the parts of the FOIA request relating to evidence of searches in the FBI's computer systems, databases, electronic indices, and other similar items, the FBI asserted that all such material was exempt from disclosure under Exemption 7(E) because these systems and items were law enforcement records, the disclosure of which would disclose law enforcement techniques and procedures and would

[5] Mr. Price later filed two motions, one for judicial notice and one for a "judicial determination." CrimR.110, 118. Each was denied. CrimR.112, 119. The Eighth Circuit dismissed an appeal of the former for lack of jurisdiction, CrimR.116, and summarily affirmed the latter. CrimR.124.

reasonably risk circumvention of the law. JA53. As for the request for "all documents in case file number 305-KC-89543" and other records relating to contacts and communications between law enforcement and Tami Lynn Price, the FBI rejected the request based on the FOIA waiver in paragraph 16 of Mr. Price's plea agreement, which encompassed all records "pertaining to the investigation or prosecution of []his [criminal] case." JA 53-54; 177. FBI thus declined to process the request. *Id.* The FBI further explained that responding to the requests would require it to create records, which the FOIA does not mandate. *Id.*

Mr. Price appealed FBI's response to the Office of Information Policy by letter dated December 7, 2011, and, on July 23, 2012, the Office of Information Policy affirmed the FBI's response. JA55-59.

On the same day he sent a FOIA request to the FBI, Mr. Price also sent a request to the EOUSA, stating: "Pursuant to the Freedom of Information Act, I hereby request any and all records, whether main or reference, regarding [] Tami Lynn Price." JA28. In the EOUSA request, Mr. Price also included sub-parts requesting records associated with the search for responsive records. *Id.* at 28-30. He submitted a Certificate of Identity by Tami Lynn Price. JA30. EOUSA initially responded by informing Mr. Price by letter dated December 16, 2011, that it had not located any records relating to Tami Lynn Price. JA32. In his subsequent appeal of that initial denial, Mr. Price described Tami Price "[]as

instrumental in the initiation, investigation, and prosecution of a federal criminal case[] ... presented by the U.S. Attorney in Kansas City, Missouri[.]" JA33.

EOUSA ultimately released a screen shot of its case tracking system (JA36-37) on August 22, 2012, and a single record on October 31, 2012. JA40-41. The screen shot EOUSA released showed a single, closed file associated with the name Tami Price, for which no court number ever was assigned but which bears a "USAO ID" number beginning with "2007." JA37. The other record is a United States Attorney for the Western District of Missouri case jacket identifying Tami Price as a potential defendant, an approximate date of offense of "6/1/06," and a violation of Code Section 18 [U.S.C. §] 1501.[6] JA41. Mr. Price appealed to the

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[6] 18 U.S.C. § 1501 is the first section of Chapter 73, "Obstruction of Justice."

Although the closed file screen shot, JA37 (indicating "C," for "closed," and "NC," for "not in court"), and the absence of any court docket number or other criminal complaint details on the case jacket, JA41, show that no criminal matter ultimately was pursued against Tami Price, records show that she may have been suspected of obstructing justice by destroying a camera and memory stick her husband used surreptitiously to record his rapes of her daughter. (Indeed, Mr. Price alleges that the charge against her would have been "Obstruction of Justice." JA18 (Compl. ¶ 5).)

During sentencing, the district court found by a preponderance of the evidence that, after Mr. Price was taken into custody on the same day in June 2006 when the hard drive password had been cracked, he had later solicited his wife to destroy a memory stick and camera used in the crime, and accordingly the district court imposed a 2-level obstruction of justice enhancement when sentencing him—a ruling that the Eighth Circuit upheld. SA48-49 (CrimR.103, sentencing hearing tr., at 166-67 (granting enhancement for obstruction of justice); *see* 326 Fed. Appx. at 987 (summarizing, and upholding, enhancements). At the sentencing hearing, an FBI Special Agent testified that, during the investigation of Mr. Price's crimes, Tami Price had admitted to burning the camera and memory stick used to record

Office of Information Policy, essentially arguing that other responsive records must exist based on what had already been disclosed. JA44-45.

Mr. Price's FOIA Requests to DOJ Seeking Records About His Earlier FOIA Requests About Tami Lynn Price

Mr. Price sent a second FOIA request to FBI by letter dated March 15, 2012. JA178. This time he requested all documents and communications and other records associated with the search in response to his above-described FOIA request to the FBI. *See* JA178. Because the FBI had not conducted any search, it had no responsive records. *See id*. The Office of Information Policy affirmed. *See* JA179. After Mr. Price brought suit in federal court, the FBI searched its Central Records System and confirmed that all of the records it has about Tami Price "involve the investigative file on plaintiff's sexual assault / child porn case involving her daughter." JA179.

Similarly, Mr. Price sent a FOIA request to EOUSA on March 15, 2012, and again on May 18, 2012, requesting "the records created by EOUSA's search in

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her daughter, and thereby destroying their contents, after being asked to do so by her husband during a prison visit. SA16-17 (CrimR.103 at 52-53); *accord* SA42-45 (*id*. at 144-47) (recounting Mr. Price's court testimony that he had told location of the camera and memory stick to Tami Price in the expectation that she would destroy it); *see also* JA139-40 (Mar. 22, 2007 Plea Agreement ¶ 20 (indicating that, at that time, the Government had not yet determined the whereabouts of the camera and memory stick, but that Mr. Price agreed to, at sentencing, inform the court of its location or "to identify who had destroyed the memory stick on his behalf"). Thus, any facts about Ms. Price's potential, and ultimately unprosecuted, obstruction of justice pertained to the investigation of Mr. Price's criminal conduct.

response to [his] previous request." JA20, 70-71, 74. Although Mr. Price appealed EOUSA's silence to the Office of Information Policy, EOUSA did not respond to this request prior to Mr. Price initiating this case in May 2014. JA 21; *see also* JA74-77.

SUMMARY OF ARGUMENT

This case presents an issue of first impression in this Court: the validity of a knowing and voluntary limited, prospective waiver, as part of a plea agreement, of Freedom of Information Act rights — particularly where there is not even an allegation, much less a showing, that enforcement of the waiver would cause a miscarriage of justice. Because in his plea agreement Mr. Price waived his right to seek records pertaining to his criminal case, and the sentencing court already rejected his claim that the waiver is invalid, this Court should enforce it. The FOIA does not specifically address waivers, but their availability should be presumed, as with other statutory rights. Neither Mr. Price nor *amicus* shows any reason why he should be relieved of his waiver — for which he received valuable benefits, including a substantially reduced potential sentence. Because the FOIA does not apply, DOJ was not required to search or substantially respond to the FOIA requests pertaining to Mr. Price's criminal files. Thus, the District Court's denial of *in camera* review was proper and not an abuse of discretion.

As to the broader, systemic or institutional issues associated with inclusion of FOIA waivers in plea agreements that *amicus* raises, DOJ respectfully urges the Court to refrain from announcing a rigid rule on FOIA waivers in plea agreements, and instead to treat such waivers as at least presumptively enforceable unless a FOIA requester, unlike Mr. Price, can show (not merely allege) circumstances that would amount to a miscarriage of justice. Mr. Price makes no such claim in this case, and the Court should hold him to the terms of his plea agreement by affirming summary judgment in favor of DOJ. Respect for sister federal courts, such as the Eighth Circuit and the Western District of Missouri district court, warrant treading cautiously in this area. It is only "the sentencing court [that] is authorized" under 28 U.S.C. § 2255 to alter a sentence, *United States v. Abbonizio*, 442 U.S. 178, 185 (1979), and for good reason: it is the court closest to the plea agreements and colloquies at issue, and, if it errs, it is for the applicable Circuit Court, not this one, to remedy.

Unless the Court finds that Mr. Price's limited FOIA waiver is invalid, the Court need not decide whether records responsive to his law enforcement records requests would be exempt under Exemption 7, because the FBI did not conduct any search for records about Tami Price (until after the litigation began) due to Mr. Price's FOIA waiver. JA166, 179. In all events, because the District Court relied exclusively on Mr. Price's waiver of rights, were this Court to reverse, it should

follow its usual practice of remanding the case to allow the District Court to conduct further proceedings and address other arguments in the first instance. *Piersall v. Winter*, 435 F.3d 319, 325 (D.C. Cir. 2006).

ARGUMENT

I. STANDARD OF REVIEW AND GUIDING LEGAL PRINCIPLES

This Court reviews *de novo* "a decision granting summary judgment to an agency claiming to have complied with FOIA." *See Schrecker v. U.S. DOJ*, 349 F.3d 657, 661-62 (D.C. Cir. 2003) (citation omitted). Because this case does not turn on "compl[iance] with the FOIA," but rather on the validity of Mr. Price's subject-limited waiver of his FOIA rights in his 2007 plea agreement, the review here is different and limited, however.

Where this Court reviews a plea agreement waiver of rights during direct appeal of a criminal judgment, the Court "decides *de novo* whether the record demonstrates a knowing, intelligent waiver of a defendant's right." *United States v. Cunningham*, 145 F.3d 1385, 1392 (D.C. Cir. 1998) (right to counsel); *accord United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009) (same, for right to appeal). But whether the defendant actually intelligently understood what he was waiving, "'despite defendant's unambiguous answers indicating comprehension, is a pure question of fact which depends primarily on the demeanor, conduct, and intonations of the defendant' and, thus, is reviewed for clear error." *Cunningham*,

145 F.3d at 1392 (citation omitted). This Court will not enforce a waiver if the sentencing court "fail[s] in some material way to follow a prescribed sentencing procedure[, which] results in a miscarriage of justice." *Guillen*, 561 F.3d at 531. "'[T]he miscarriage of justice exception is a very narrow exception to the general rule that waivers of appellate rights are enforceable.'" *United States v. Adams*, 780 F.3d 1182, 1184 (D.C. Cir. 2015) (quoting *United States v. Blue Coat*, 340 F.3d 539, 542 (8th Cir. 2003)).

On direct review by the Eighth Circuit, Mr. Price failed to challenge the validity of his limited waiver of his FOIA rights, *see Price*, 326 Fed. Appx. at 987, and thus he missed a chance to challenge that facet of his plea agreement. *United States v. Hughes*, 514 F.3d 15, 17 (D.C. Cir. 2008) ("The procedural default rule generally precludes consideration of an argument made on collateral review that was not made on direct appeal, unless the defendant shows cause and prejudice…. This rule 'respect[s] the law's important interest in the finality of judgments' and conserves judicial resources."); *United States v. Maybeck*, 23 F.3d 888, 891-92 (11th Cir. 1994) ("'If defendants could routinely raise, in a § 2255 collateral proceeding, errors in sentencing not raised on direct appeal which the sentencing court had not had an opportunity to correct, Congress's intent of encouraging direct appellate review of sentences under the Sentencing Guidelines would be frustrated.'" (citation omitted)) (also applying cause and prejudice standard to

"attacks on sentences following guilty pleas"); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992), *superseded in part by statute* (cause and prejudice standard serves interests in "finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum"). In all events, the Eighth Circuit expressly credited another waiver in Mr. Price's plea agreement, *see* 326 Fed. Appx. at 987-88, thereby showing that the waivers were valid on the facts of his case and under the law of the Circuit with jurisdiction over a challenge to his plea.

If Mr. Price could colorably show, however, that he had received ineffective assistance of counsel, then "because the defendant's attorney failed to ensure the defendant understood the consequences of his waiver, the waiver was not knowing, intelligent, and voluntary." *Guillen*, 561 F.3d at 530. Mr. Price pursued such an argument in his 28 U.S.C. § 2255 petition in the sentencing court, where he contended that he did not knowingly waive his FOIA rights. *Price*, 2011 U.S. Dist. LEXIS 39500, at *10-11. As the sentencing judge found, however, she had "carefully questioned" him "to ensure that his plea was knowing, voluntary, and accurate," *id.* at *11, and he had, after being read the list of rights being forfeited, agreed that he "understood [them] and had discussed them with his attorney." *Id.* Those factual findings would be reviewed for clear error, but Mr. Price's arguments were so insubstantial that he was not granted a certificate of appealability under 28 U.S.C. § 2253(c)(2). *Id.* at *12; SA125 (8th Cir. Judgment);

see also United States v. Arrington, 763 F.3d 17, 22 (D.C. Cir. 2014) (court of appeals lacks jurisdiction over § 2255 appeal absent certificate of appealability). As explained more fully below, Mr. Price is collaterally estopped from re-raising the question of the voluntariness of his waiver of FOIA rights. *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015) (explaining issue preclusion).

Further, Mr. Price should not be permitted to avail himself of *de novo* review in this Court, because what he seeks is effectively collateral relief to enable him to "skirt[]" the statutes and precedents that steer such challenges to the sentencing court, which is best positioned to evaluate as a factual matter whether a waiver was knowing and intelligent. *See In re Al-Nashiri*, 835 F.3d 110, 118 (D.C. Cir. 2016). Mr. Price may not sidestep applicable clear error review, *see Cunningham*, 145 F.3d at 1392, by bringing his plea agreement challenge in the guise of a FOIA claim in this forum and at this late date. *Cf. Arrington*, 763 F.3d at 23 (a party may not "'circumvent' the limitations on § 2255 motions, including, as is relevant here, the limitations on second or successive motions") (*inter alia* citing *United States v. Washington*, 653 F.3d 1057, 1059-60 (9th Cir. 2011) ("Because of the difficulty of meeting this standard [for successive § 2255 motions], petitioners often attempt to characterize their motions in a way that will avoid the strictures of § 2255(h).")).

Even when this Court does have properly before it a challenge to enforcement of a waiver in a plea agreement, its review is "limited" if the waiver

was knowing, intelligent, and voluntary. *Guillen*, 561 F.3d at 529. But, as noted, here the question of voluntariness and intelligence already has been determined, with no appeal permitted or taken. *Price*, 2011 U.S. Dist. LEXIS 39500, at *10-11. Moreover, a certificate of appealability could not have issued absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Mr. Price would need to establish that reasonable jurists would find that the district court's decision on a constitutional claim is debatable or wrong and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).[7] Again, Mr. Price may not advance a collateral attack on his sentence through this appeal, nor may he sidestep the limitations and deferential standards that apply under § 2253(c).

Amicus, however, proceeds as though this case involves waiver of a statutory right divorced from any criminal proceedings. Br. at 25 (citing standards from two civil cases, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) & *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981)). As such, *amicus* urges the Court to find that, although there is a presumption that statutory rights can be waived, that presumption is overcome here, in *amicus*' view, because either

[7] In the only appellate decision to consider the validity of a FOIA waiver in a plea agreement, the Fourth Circuit applied these standards. *United States v. Lucas*, 141 Fed. App'x 169, 170 (4th Cir. 2005) (per curiam).

there is an affirmative expression of congressional intent to preclude FOIA waivers, or because allowing waiver would contravene public policy. *Id*. at 17-25. As argued below, even were this analytical framework to apply (which it does not), Mr. Price's FOIA waiver would pass muster.

In articulating a standard for enforcing FOIA waivers in plea agreements, should the Court not limit its review as urged by DOJ, at most the Court should permit voiding of limited FOIA waivers in plea agreements only if there is a showing by "clear evidence" that the waiver was imposed without the assistance of effective counsel (such that the waiver was not intelligent and voluntary) or that enforcement of the limited FOIA waiver would result in a miscarriage of justice. *Cf. NARA v. Favish*, 541 U.S. 157, 174 (2004). More than mere allegations of ineffectiveness or abuse should be required to reinstate FOIA rights to a requester who, as reflected in court records, has voluntarily and willingly waived rights to request records associated with a criminal case. *See Mezzanatto*, 513 U.S. at 210 (rejecting waiver preclusion argument that was premised on risk of prosecutorial misconduct, as "'tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty'" (citation omitted)); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991) (if allegations were enough to override personal privacy interest, it would be worthless).

Importantly, in this particular case, issue preclusion bars any argument that the FOIA waiver was not voluntary and intelligent. Nor has Mr. Price shown that a miscarriage of justice would result if this Court enforces his limited FOIA waiver. Thus, even were the Court to adopt the alternative standards suggested above, it should enforce the waiver.[8] In sum, and in all events, *de novo* review does not apply to the issue of whether the plea agreement waiver of FOIA rights is valid, but instead the Court should undertake only "limited" review.

II. PRICE'S FOIA CLAIMS ARE FORECLOSED BY THE LIMITED WAIVER OF HIS FOIA RIGHTS, THE SCOPE OF THE REQUESTS AT ISSUE, AND THE SENTENCING COURT'S REJECTION OF PRICE'S CLAIM THAT THE FOIA WAIVER WAS IMPROPER.

In his 2007 plea agreement, Mr. Price waived the claims he seeks to press in this appeal. In the plea, he did not waive all his FOIA rights; instead, he waived only the right to seek certain records—those pertaining to the Government's investigation and prosecution of him. Unlike certain other waivers in the plea agreement, the provision relating to the FOIA did not contain any exceptions. Further, the sentencing court already has expressly found that there was no error concerning the inclusion of a limited waiver of FOIA rights. Thus, Mr. Price's claims fail.

[8] Because Mr. Price is the requester of the records at issue in this case, the Court need not address the scope or application of Mr. Price's waiver with respect to a request made by a representative.

A. Statutory Rights Are Presumptively Waivable In Plea Agreements, and Plea Agreements Should Be Enforced.

"The most basic rights of criminal defendants are ... subject to waiver." *Peretz v. United States*, 501 U.S. 923, 936 (1991). Indeed, one "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," *Mezzanatto*, 513 U.S. at 201, including a double jeopardy defense, *Ricketts v. Adamson*, 483 U.S. 1, 12 (1987); the right to jury trial and to confront accusers, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); and the Sixth Amendment right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

Likewise, statutory rights are presumptively waivable via voluntary agreement of the parties, "absent some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 513 U.S. at 201 (citing *Evans v. Jeff D.*, 475 U.S. 717, 730-732 (1986) (prevailing civil rights party may waive statutory attorney's fees eligibility)); *accord 14 Penn Plaza Corp. v. Pyett*, 556 U.S. 247, 258 (2009) (waiver in collective bargaining agreement of right to judicial forum for Age Discrimination in Employment Act claims was knowing and binds individual union members, notwithstanding assertion that arbitration inhibits "'vindicat[ion of] a statutory discrimination claim'"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("'If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum,

that intention will be deducible from text or legislative history.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

Here, Mr. Price's waiver is contained within a plea agreement. "[A] plea agreement is a contract," *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995) (citations omitted), and, as such, the parties are free to negotiate the terms in order to reach an agreed-upon bargain. In addition to those noted above, other waivers of substantial rights also may be included in a plea agreement. *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (collecting cases regarding plea agreement waivers of appeal right); *Libretti v. United States*, 516 U.S. 29, 49 (1995) ("Given that the right to a jury determination of forfeitability is merely statutory in origin, we do not accept [Petitioner's] suggestion that the plea agreement must make specific reference to Rule 31(e). Nor must the district court specifically advise a defendant that a plea of guilty will result in waiver of the Rule 31(e) right."); *Guillen*, 561 F.3d at 529 ("A defendant may waive his right to appeal his sentence as long as his decision is knowing, intelligent, and voluntary. An anticipatory waiver—that is, one made before the defendant knows what the sentence will be—is nonetheless a knowing waiver if the defendant is aware of and understands the risks involved in his decision.").

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses

of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (internal quotations marks and citations omitted). Thus, the inquiry most focuses on the intent and conduct of the criminal defendant seeking to escape the plea bargain, rather than on the intent of Congress or public policy. Regardless, all such factors favor enforcement of the limited FOIA waiver in Mr. Price's plea agreement.

As the Supreme Court explained:

> [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances — even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. Ruiz, 536 U.S. 622, 629-33 (2002) (holding that Constitution does not require government to disclose material impeachment evidence for defendant to "knowingly" enter plea agreement) (emphases in original); *see also Iowa v. Tovar*, 541 U.S. 77, 92 (2004) (waiver of right to counsel may be "knowing" and "intelligent" even where court has not specifically warned defendant that waiving right may risk overlooking viable defense or losing opportunity to obtain valuable opinion about wisdom of pleading guilty). Here, as explained *infra* at 45, the sentencing court already has rejected, under 28 U.S.C. § 2255, Mr. Price's claim that the FOIA waiver was involuntary, and the district court and the Eighth Circuit

each denied a certificate of appealability. *Price*, 2011 U.S. Dist. LEXIS 39500, at *11-12; SA125 (8th Cir.). Under issue preclusion, those rulings decide the matter.

B. Congress Did Not Bar FOIA Waivers, Which Should Be Enforced.

The Freedom of Information Act creates a statutory right requiring covered federal agencies to provide certain records responsive to a request. 5 U.S.C. § 552(a)(3)(A), (f)(1) (defining "agency"), (f)(2) (defining "record"); *see also id.* § 552(c) (excluding certain law enforcement records from FOIA). As a statutory right, it is presumptively waivable. *Mezzanatto*, 513 U.S. at 203-04. Just like the myriad other protections subject to waiver in plea negotiations, a criminal defendant may waive his or her right to file a FOIA request.[9]

FOIA's plain language neither permits nor prohibits waivers of the rights it creates. That supports finding waivers permissible because "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). It is a well-established "canon of construction that statutes should be

[9] With a proper privacy waiver, a third party may, however, request the documents as to which Mr. Price waived his FOIA rights. Indeed, his aunt requested such documents and was provided with hundreds of responsive pages. The district court concluded that Mr. Price only could waive "'*his* rights"; he could not waive the FOIA rights of a third party. *See Ebling*, 796 F. Supp. 2d at 64; Status Report, *Ebling*, No. 10-914 (CKK) (D.D.C. filed Sept. 22, 2011) (detailing providing of responsive records by EOUSA and FBI). However, were a third party to affirm that she was only seeking the records as Mr. Price's representative, not in her own right, then the terms of the plea waiver could apply to block such request.

interpreted consistently with the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010). "'In order to abrogate a common-law principle, [a] statute must speak directly to the question addressed by the common law.'" *Manoharan v. Rajapaksa*, 711 F.3d 178, 179-80 (D.C. Cir. 2013) (internal quotation marks and citation omitted). Here, because there is no direct statement in the FOIA regarding the availability of waiver, the Court should hold that, as under common-law principles, the statutory rights established by the FOIA are waivable. *Mezzanatto*, 513 U.S. at 203-4 (because a law was "enacted against a background presumption that legal rights generally ... are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability").

Contrary to *amicus*' claims, rights under FOIA are not absolute. For example, through its fees and fee waiver provisions, FOIA recognizes variations in treatment among FOIA requesters. *See* 5 U.S.C. § 552(a)(4)(A). Similarly, even though the central purpose of FOIA is to let the public know what its government is up to, this Court has recognized that the public (as compared to a requester's personal) interest in criminal prosecutions and investigations often is minimal. *E.g., Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 999 (D.C. Cir. 1998) (no public interest in information pertaining to suspects and law enforcement officers absent "'compelling evidence'" of alleged misconduct by agency); *Oguaju v. United States*, 378 F.3d 1115, 1117 (D.C. Cir. 2004) (requester's self-serving sworn

assertion of Government malfeasance, including mishandling of *Brady* request, "too insubstantial" to enable public interest to overcome privacy interests); *Boyd v. Crim. Div. of U.S. DOJ*, 475 F.3d 381, 387 (D.C. Cir. 2007), (similar); *Quiñon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) ("Disclosure of information that 'reveals little or nothing about an agency's own conduct' does not further the public interest envisaged by FOIA."; permitting withholding of records about criminal investigation); *Schiffer v. FBI*, 78 F.3d 1405, 1410 (D.C. Cir. 1996) ("little to no" public interest in records about FBI decision to investigate requester, and requester's "personal interest" is insufficient to warrant records' release).

Amicus asserts that 5 U.S.C. § 552(d) expressly precludes FOIA waivers, but that argument rests on a misinterpretation of its language: "This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section." The provision nowhere prohibits a private party from bargaining away his rights. Instead, it merely prohibits agencies from withholding records for reasons not explicitly articulated in the FOIA when responding to an otherwise valid request.

Significantly, FOIA allows agencies to decline to process invalid requests, *i.e.*, those that are improperly made in the first instance. 5 U.S.C. § 552(a)(3)(A) ("[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place,

fees (if any), and procedures to be followed, shall make the records promptly available to any person."). If a party has waived his or her right to file a specific request, any such request is per se invalid. Thus, there is no specific statutory directive precluding waivers of FOIA rights, and such waivers should be enforced. *Mezzanatto*, 513 U.S. at 201.

Rather than proscribing agencies from declining to process requests on any basis other than the articulated exemptions, Congress in fact provided for agencies to decline to answer improper requests. Indeed, the Supreme Court focuses specifically on whether an agency is acting "improperly" in withholding records when deciding whether an agency is obliged to respond. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386-87 (1980). Where an agency declines to respond due to a court order – which includes Mr. Price's plea – an agency acts in "lawful obedience" to the decree and in compliance with FOIA. *Id.* To require disclosures in such circumstances "would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." *Id.* at 387. Similarly, this Court held that requested records are not improperly withheld if they are subject to a sealing order and the sealing order "prohibits the agency from disclosing the records." *Morgan v. U.S. Dep't of State*, 923 F.2d 195, 197 (D.C. Cir. 1991).

Of course, FOIA's plain text is the basis for construing the statute, and the Court "assum[es] that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). That language nowhere addresses, much less precludes, waivers.[10] *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (disregarding purportedly contrary legislative history, because "judicial inquiry ... begins and ends with what [a statute] does say and with what [a statute] does not"). Thus, *amicus*' legislative history discourse is beside the point.

In any event, none of that history addresses waivers at all, much less waivers by criminal defendants who use them to secure valuable benefits, like substantial reductions in their sentences. *See Mezzanatto*, 513 U.S. at 203-4 ("we will not interpret Congress' silence as an implicit rejection of waivability"). Congress legislated against the backdrop of existing rights, including the presumption that statutory rights are waivable. *See supra* at 27-28; *Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."); *see also Administrator, FAA v. Robertson*, 422 U.S. 255, 264 (1975) (interpreting legislative history of FOIA and determining

[10] *Amicus* cites *Milner v. Dep't of Navy*, 562 U.S. 562 (2011), and *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976), which merely reaffirm that courts should enforce FOIA as written and, where exemptions are construed, do so narrowly. But the FOIA is silent on waiver, and thus there is nothing to construe narrowly.

that Congress did not intend FOIA to "[]affect" other laws). Although Congress over time broadened the pool of requesters to those with no specific interest in the subject of the request, *see* Br. at 22, nothing in the amended language addressed whether "any person" could waive his rights under the statute. *See* 5 U.S.C. § 552(a)(3). Similarly, that Congress broadened access to certain law enforcement investigatory files, *see* Br. at 24, says nothing about whether a person can waive his right to access such files. Thus, Congress' silence as to waiver confirms that waiver is available and should be enforced.[11]

Each court that has considered whether FOIA waivers in plea agreements may be enforced has answered in the affirmative. *E.g.*, *Lucas*, 141 Fed. App'x at 170 (affirming denial of FOIA request in part because "in Lucas' valid and binding

[11] *Amicus* (at 16-17) adverts to the preclusion of prospective waivers under the Speedy Trial Act and to the unavailability of waiver of the right to be present under Fed. R. Crim. P. 43. But in both of those cases, a principal purpose of the rights at issue is protection of the interests of criminal defendants, which purpose might be subverted if waiver were available. *See Zedner v. United States*, 547 U.S. 489, 499, 503 n.5 (2006) (Speedy Trial Act serves "public's and defendant's interests in a speedy trial" and provides defendants with "[t]he possibility of obtaining a dismissal with prejudice"); *Crosby v. United States*, 506 U.S. 255, 259-262 (1993) (Rule 43 protects "interest of the defendant and society in having the defendant present"; "a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence"). FOIA, by contrast, is a statute of general application, and permitting criminal defendants to bargain with FOIA rights, as they can with other statutory rights, in exchange for a shorter sentence, etc., does not affect a right designed *inter alia* specifically to benefit criminal defendants and which would be undermined if waiver were permitted. Accordingly, the analogies *amicus* draws are inapposite.

plea agreement, he waived his right to bring the FOIA claim"); *Thyer v. U.S. DOJ*, 2013 WL 140244, at *4 (D.D.C. Jan. 11, 2013) (dismissing because "plaintiff's FOIA claim is barred under the terms of her plea agreement"); *Caston v. EOUSA*, 572 F. Supp. 2d 125, 129 (D.D.C. 2008) (same); *Patterson v. FBI*, 2008 WL 2597656, at *2 (E.D. Va. June 27, 2008) ("a FOIA waiver in a valid and binding plea agreement is an enforceable provision that this Court must respect"); *Scholl v. Various Agencies*, 2016 U.S. Dist. LEXIS 129421, at *19 (D.D.C. Sept. 22, 2016) ("There is no indication that Mr. Scholl's plea agreements have been invalidated; therefore, the unambiguous [FOIA] Waiver Provision is legally binding and dispositive of this case."); *see also Boyce v. United States*, 2010 U.S. Dist. LEXIS 79195, at *1 (W.D.N.C. July 6, 2010) (denying, on basis of FOIA waiver in plea, petitioner's 28 U.S.C. § 2255 motion, in which he sought evidence from his criminal case). This Court should reach the same result and hold that the waiver in the plea agreement precludes judicial review under the FOIA because the records requests in this case are invalid and failed to trigger DOJ's obligations under the FOIA at all.

In responding to FOIA requests, federal agencies ordinarily will not have access to information needed to evaluate whether a plea agreement was entered into knowingly and voluntarily, and the FOIA does not envision their having to conduct research or obtain information like transcripts from courts. The same is

true for courts adjudicating typical lawsuits brought under the FOIA. The entity in the strongest position to consider the validity of the plea or its components is the sentencing court or the federal appellate court reviewing its decisions. Accordingly, FOIA waivers should be deemed presumptively valid unless they have been voided by the sentencing court, or unless the requester makes an affirmative showing—not merely an allegation—that the waiver may not be enforced because to do so would effect a miscarriage of justice. *See Adams*, 780 F.3d at 1184 (holding that miscarriage exception is "very narrow").

C. FOIA Waivers in Plea Agreements Do Not Violate Public Policy.

Amicus advances several policy reasons why the Court should not enforce waivers of FOIA rights to request criminal files pertaining to the prosecution of the case in which the plea was entered. None has merit.

1. A FOIA Waiver's Anticipatory Nature Is Irrelevant.

Amicus paints enforcement of plea agreements as a threat to public policy because only the individual supplying the waiver has knowledge and interest to lodge a FOIA request. Br. at 27. This recognizes that the waiver is anticipatory, for a defendant entering a plea agreement is in the best position to anticipate (or perhaps, through criminal discovery, even to know) what evidence the Government has in its files concerning the crime. This Circuit has generally upheld anticipatory waivers, so long as "the defendant is aware of and understands the risks involved

in his decision." *Guillen*, 561 F.3d at 529 (if a defendant "knows what he is doing, ... then the Court will enforce an anticipatory waiver"). That the defendant might labor "under various forms of misapprehension" about what the records to which he is forgoing access via a plea waiver of FOIA rights is not unusual and does not diminish the waiver's effectiveness. *See Ruiz*, 536 U.S. at 630-31.

2. Subject-Limited FOIA Waivers Are Consistent With Broad Public Interests In Effective Prosecution of Serious Crimes.

The absence of an incentive, or even a disincentive, sufficient to persuade a criminal defendant to refuse to waive his FOIA rights in a plea agreement suggests that the public interest in that particular criminal case is low, because the records of investigation and/or prosecution of the offense reveal more what the defendant was "up to," rather than the Government. *See Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011) (requests for third party records "'strongly disfavored,'" particularly when "the requester asserts a public interest – however it might be styled – in obtaining information that relates to a criminal prosecution"). That such records may have been subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), to a defendant in a criminal case "has no bearing" on whether the records should be provided under FOIA. *Williams & Connolly v. SEC*, 662 F.3d 1240, 1244-45 (D.C. Cir. 2011) ("disclosure in criminal trials is based on different legal standards than disclosure under FOIA, which turns on whether a document would usually be discoverable in a civil case"); *Boyd*, 475 F.3d at 390 ("The disclosure obligation

that *Brady* imposes at a defendant's criminal trial based on constitutional considerations is not the same disclosure obligation imposed under FOIA…. [T]he disclosure requirements are not coextensive…. Amicus's contention that wrongfully withheld *Brady* material may never be protected under [FOIA] Exemption 7(D) would rewrite Congress's statutory scheme.").

Thus, that FOIA requests occasionally may have helped expose *Brady* violations (*see* Br. at 29) does not preclude a criminal defendant from knowingly waiving his FOIA rights, the exercise of which might have exposed such violations. *See Boyd*, 475 F.3d at 390 (rejecting "conflat[ion of] two separate procedures [*Brady* and FOIA] by which a defendant may obtain information from the government").

After all, the public interest in the efficient and effective prosecution and conviction of sex offenders – particularly ones like Mr. Price, who held a position of public trust as a nurse at a hospital, where he allegedly improperly touched multiple patients, *e.g.*, SA38-40 (CrimR.103 at 74-76), along with his crimes involving videoing his rapes of his unconscious stepdaughter, in which he admitted he was "clearly identifiable," JA125 – is considerable and outweighs whatever public interest may exist in the investigation and prosecution files of that single defendant. *See Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972) (acknowledging that, although requiring news reporters to reveal their sources constitutes an

imposition on freedom of the press, nonetheless holding that public's interest in "[f]air and effective law enforcement" outweighed the concerns of the press); *cf. Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("the public interest in effective law enforcement" may require withholding law enforcement information). Not all of the public interest is in disclosure. *See also Schrecker v. U.S. DOJ*, 349 F.3d 657, 666 (D.C. Cir. 2003) (noting the strong privacy interest of "persons involved in law enforcement investigations—witnesses, informants, and the investigating agents—... 'in seeing that their participation remains secret'").

3. That An Individual's Waiver May Have An Effect On A Public Interest Does Not Render the Waiver Invalid.

Even if a criminal defendant otherwise might request records in which the public would have an interest, the fact that he may, by waiving his FOIA rights, seek to secure a personal benefit – a reduced sentence, for example – that has an ancillary effect of diminishing the probability that the public will access such records does not militate against enforcing the FOIA waiver. The Supreme Court rejected the argument that where the right being waived "benefits not only the defendant but society generally, … the defendant may not waive society's rights." *New York v. Hill*, 528 U.S. 110, 115-16 (2000). Even where the societal benefit does not accrue unless a defendant (or the State) "files a request," waivers are enforced, because "'a degree of party control [] is consonant with the background presumption of waivability.'" *Id.* at 117-18 (quoting *Mezzanatto*, 513 U.S. at 206).

So too here, that a criminal defendant – the person who might otherwise have the greatest interest in a prosecution file – may waive his right to request it and thus reduce the odds that the file will be requested and become publicly available does not warrant voiding the FOIA waiver.

Indeed, enabling a criminal defendant to employ a FOIA waiver as "'an additional bargaining chip'" during plea negotiations depends on the Government being able to "count upon the waiver being enforced in the mine run of cases." *Adams*, 780 F.3d at 1184. Voiding such a waiver, where there is not a miscarriage of justice showing, would deprive a FOIA waiver of "its value as a 'bargaining chip' for a defendant." *Id.* Thus, permitting such waivers' enforcement not only gives the Government the benefit of its bargain, but also facilitates pleas by giving a criminal defendant another device in his toolbox that he can deploy in order to negotiate a plea agreement that makes it worth both sides' whiles to forgo trial. And, of course, the federal courts rely largely on pleas in order to manage their very large caseloads; removing an item from defendants' toolboxes for plea discussions could mean fewer successfully-negotiated plea deals and correspondingly heavier trial loads for federal district courts. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) ("Properly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the

States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

Amicus claims that, "[a]s conditions of guilty pleas, FOIA waivers allow the Government to keep information about plea agreements hidden from sight." Br. at 28. *Amicus* misapprehends the scope of a plea agreement: the agreement here does not impose conditions on what may be disclosed to the public. Instead, it merely governs a single criminal defendant's future conduct. The suggestion (at 28-29) – that prosecutors may coerce defendants in plea talks to bargain away the public's right to know of government malfeasance – is likewise flawed, particularly in this case, where Mr. Price has not even alleged, much less shown, wrongdoing. Where a FOIA requester asserts a public interest in uncovering government wrongdoing, "the requester must 'produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.'" *Boyd*, 475 F.3d at 387 (quoting *Favish*, 541 U.S. at 174 ("Allegations of government misconduct are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing." (citation omitted)).

A request for the same records made by any person other than Mr. Price or his admitted representative (who disclaims making the request in her own right) would be handled the same way as any other third-party request under the FOIA. Consequently, the FOIA waiver in Mr. Price's plea agreement is distinguishable

from the waiver of 42 U.S.C. § 1983 claims in release-dismissal agreements, which may functionally preclude "injured individuals" – the only persons permitted to vindicate civil rights violations, in contrast to the "public at large," which may not – from exposing such government misconduct in court. *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (plurality op.).

By contrast, nothing in Mr. Price's waiver precludes any non-representative third party from exercising her independent FOIA rights, and indeed his aunt requested, and received, materially similar records. *Ebling*, 796 F. Supp. 2d at 64 (concluding that Mr. Price could only waive "'*his* rights,'" and his aunt possessed her own independent statutory rights to seek the records). In any event, *Rumery* held that release-dismissal agreements should be enforced and are no "more coercive ... than other situations [the Supreme Court] ha[s] accepted." *Id.* at 393 (majority op.). Thus, the possibility of abuse that Justice O'Connor mentioned in her *Rumery* concurrence (which no other Justice joined) did *not* warrant denying enforcement of a knowing and voluntary waiver, despite the risks she hypothesized. And in all events, the Supreme Court later rejected, "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily," concerns similar to those *amicus* asserts (at 31) about "tempt[ed] prosecutors" who negotiate waivers. *See Mezzanatto*, 513 U.S. at 210.

D. The FOIA Waiver in Mr. Price's Plea Agreement Should Be Enforced Both Because It Encompasses the Records He Seeks, and Because the Sentencing Court Specifically Upheld the FOIA Waiver—A Finding That Collaterally Estops Mr. Price's Claims In This Suit.

The Court should only evaluate the adequacy of DOJ's search for responsive records if it finds that Mr. Price still had a right to request them under the FOIA. Because he waived his right to seek "any records pertaining to the investigation or prosecution of [his] case," JA138, that waiver encompasses any right to challenge in court the agency's search for and response to him concerning such records.

Contrary to *amicus*' argument (at 37-41), the record shows that all of the records Mr. Price sought in the requests here at issue pertained to his criminal case. *See Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996) (agency "not obligated to look beyond the four corners of the request for leads to the location of responsive documents"). The correspondence and releases by EOUSA show that it had no records about Tami Price that were not part of Mr. Price's investigation and prosecution, which included his admitted inducement of her to obstruct justice, after his arrest, by having her burn a camera and memory stick he had used to record him raping her 15 year-old, unconscious daughter. *Supra* at 14 & n.6.

The sole records released by EOUSA are: 1) a case jacket listing a potential obstruction of justice charge against Tami Price and an approximate offense date beginning in the month when Mr. Price was arrested, June 2006, JA41; and 2) a screen shot from the U.S. Attorney's Office's Legal Information Office Network

System (LIONS), which lists a matter involving "Price, Tami" with a "USAO ID" beginning with "2007," JA37. 2007 was the year after Mr. Price's crime was discovered, JA17-18 (Compl. ¶ 4), and the year prior to Mr. Price's sentencing, *see* SA53 (CrimR.92 (sentencing date Oct. 8, 2008)), at which the district court imposed an enhancement for obstruction of justice based on inducing Tami Price's destruction of evidence. SA47-48 (CrimR.103 at 166-67 (sentencing hearing tr.)). Moreover, the March 2007 plea agreement (¶ 20) makes clear that the Government at that time knew of a camera and memory stick and feared that they might have been destroyed, but had not yet actually learned what had become of them. *See* JA140. Plainly, the contemplated obstruction of justice charge against Tami Price "pertained to" the criminal investigation and prosecution of Mr. Price, and it arose between the plea in March 2007 and sentencing in October 2008. Records about it thus fall comfortably within the limited scope of his FOIA waiver.

Accordingly, because the only records EOUSA possessed are subject to Mr. Price's FOIA waiver, DOJ was not obligated to respond to his requests. That it exercised its administrative discretion to provide two pages does not undo Mr. Price's waiver and thereby give him a right, under the FOIA, to challenge the agency's response in court.[12] *United States v. Ortega-Hernandez*, 804 F.3d 447,

[12] Because, due to Mr. Price's limited FOIA waiver, he has no right to invoke the courts' jurisdiction under the FOIA, *see* 5 U.S.C. § 552(a)(4)(B), concerning a request for records pertaining to his prosecution and investigation, so too this case

451 (D.C. Cir. 2015) (generally enforcing plea agreement waiver, despite Government's limited waiver of it in one context, because "[s]uch partial invocation of the ... waiver is permissible").

Moreover, the declaration of the FBI, which investigated Mr. Price's crimes, *see* SA13 (CrimR.103 at 10) (sentencing testimony of FBI Special Agent), confirms that "the only records we have on [Tami Price] involve the investigate file on plaintiff's sexual assault/child porn case involving her daughter." JA179 (¶ 17). That the Government did not locate other responsive records is not at issue. *Hodge v. FBI*, 703 F. 3d 575, 579 (D.C. Cir. 2013) ("the adequacy of a search is determined not by the fruits of the search, but by the appropriateness of [its]

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falls outside the body of law on evidence that typically is expected at summary judgment stage in FOIA suits. Although in proper FOIA suits "at the summary judgment phase, an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate," *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995), here the courts are not inquiring whether a search was adequate, but rather whether a search was required at all.

Accordingly, as in summary judgment proceedings generally, the courts should look to the evidence properly before them. As explained, the records about Ms. Price "pertained to" the waived subjects of Mr. Price's prosecution and investigation, a fact about which there can be no reasonable dispute. *See Founding Church of Scientology, Inc. v. NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979) (observing that ordinary summary judgment evidentiary standards also apply in FOIA cases, but allowing that a "trial court *may* ... rely[] upon agency affidavits" in such cases (emphasis added)). And thus relatedly, the District Court properly exercised its "broad discretion" to not conduct *in camera* review. *Carter v. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987).

Should the Court, however, determine that further proof is needed before EOUSA is entitled to summary judgment, this suit may be remanded so that DOJ may offer further evidence in the first instance in the District Court.

methods") (internal quotation marks omitted). Mr. Price's failure to identify any potential locations that were likely to contain responsive, non-waived records entitles the Government to summary judgment. *See Steinberg v. United States DOJ*, 23 F.3d 548, 552 (D.C. Cir. 1994) ("mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them" (citation omitted)).

The FBI's declaration is entitled to a presumption of good faith. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015). The record makes clear that Ms. Price played a prominent role in the discovery of Mr. Price's crimes and the investigation that followed, and that investigation also revealed the possible obstruction of justice by Ms. Price concerning the case against Mr. Price. *E.g.*, JA67-68 (statement of FBI Special Agent); JA123-24 (agreed basis for plea agreement); *supra* at 13 & n.6. Thus, the record shows that the FBI's search of its Central Records System, which only revealed records for Ms. Price in Mr. Price's criminal investigative file, was reasonable and adequate under these circumstances.[13] *Weisberg v. U.S. DOJ*, 705

[13] The FBI's conduct in a similar case recently decided by the district court (which was not appealed) confirms that the FBI does process criminal defendants' FOIA requests that are outside the scope of a FOIA waiver contained in a plea agreement. *See Scholl*, 2016 U.S. Dist. LEXIS 129421, at *3, 10 (although FBI had declined to process requests that "pertain[ed] to the investigation or prosecution of th[e criminal] matter," when it "determined that [certain other] records 'were not

F.2d 1344, 1351 (D.C. Cir. 1983). Further, because *amicus* (acting on behalf of Mr. Price, who has adopted *amicus*' brief) fails to challenge the adequacy of EOUSA's search in its brief, the Court should deem the issue waived and likewise require nothing further of EOUSA. *See, e.g.*, *United States v. Taylor*, 339 F.3d 973, 977 (D.C. Cir. 2003) (appellant waives right to pursue ripe issues if he fails to raise them in opening brief).

Moreover, the sentencing court already rejected, under 28 U.S.C. § 2255, Mr. Price's claim that the FOIA waiver was not effective. *Price*, 2011 U.S. Dist. LEXIS 39500, at *11. Importantly, in this appeal neither Mr. Price nor *amicus* asserts that his waiver of his right under FOIA to request records pertaining to his investigation and prosecution was anything other than knowing and voluntary, and indeed Mr. Price is collaterally estopped from doing so because he previously challenged the inclusion of the FOIA waiver in his § 2255 petition.

Generally, a party may not re-litigate an issue if three elements are satisfied:

> First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination.

Yamaha Corp. of Am. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992).

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subject to the waiver in plaintiff's plea agreement,'" it processed the request and released responsive, non-exempt records to the plaintiff).

Because all three elements are present in this case, Mr. Price may not argue that his FOIA waiver in his plea agreement was anything other than knowing and voluntary. *Id.* It is appropriate to bind Mr. Price to his waiver, particularly because he has not argued, much less shown, that doing so would be unfair or otherwise cause a miscarriage of justice, and because he already got the benefit of his bargain – a substantial reduction in the maximum possible sentence and associated fines. Given the Missouri court's rejection of Mr. Price's voluntariness challenge to the FOIA waiver, his renewed attempt to litigate that issue "'plainly lack[s] merit, [and the] [C]ourt cannot allow itself to be manipulated' into voiding a bargained-for waiver." *Guillen*, 561 F.3d at 531 (citation omitted).

The circumstances presented in this appeal are not unusual. The Government receives many FOIA requests each year from imprisoned felons.[14] Where a felon, however, has waived his FOIA rights to request records about his investigation and prosecution, it is proper to hold him to his bargain; the corresponding reduction in potential FOIA litigation, which is burdensome both for courts and for agencies, is a benefit that the Government bargained for and should enjoy. *Adams*, 780 F.3d at 1184 (discussing importance, for future plea negotiations, of ensuring that waivers

[14] *See, e.g.*, Compl., *Price v. DOJ*, No. 10-113 (D. Ariz. filed Feb. 19, 2010) (complaint by Mr. Price detailing 34 FOIA requests to ten agencies or agency subcomponents), *dismissal aff'd*, *Price v. U.S. DOJ*, 462 Fed. Appx. 694 (9th Cir. 2011).

are enforced "in the mine run of cases" so that the Government concludes it can "count upon the waiver").

Further, "the chief virtues of the plea system [are] speed, economy, and finality." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). In negotiating a waiver of FOIA rights, as with a waiver of appeal rights, the Government is entitled to the benefits of its bargain – including finality – unless a waiver is involuntary or unknowing. *See Adams*, 780 F.3d at 1184; *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) ("Waivers of appeal in plea agreements preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty. We also note that plea agreements are of value to the accused in order to gain concessions from the government.") (internal citations omitted); *cf. Strickland v. Washington*, 466 U.S. 668, 693 (1984) (invoking "profound importance of finality in criminal proceedings"). The voluntariness of the FOIA waiver here has been established.

Similarly, respect for coordinate courts counsels strongly against declining to enforce plea agreements undertaken outside this jurisdiction. Just as "[i]n the context of criminal prosecutions, federal courts routinely decline to adjudicate petitions that seek collateral relief to prevent a pending prosecution," *In re Al-Nashiri*, 835 F.3d at 118, so too this Court should not opine on the propriety and enforceability of a plea agreement from "a coordinate jurisdiction," *Keeney*, 504

U.S. at 9, especially where, as here, the sentencing court already has determined that the plea agreement is valid.

Relatedly, notwithstanding that FOIA's venue provision allows judicial review in the District of Columbia of FOIA requests by persons anywhere in the country, 5 U.S.C. § 552(a)(4)(B), the Court should exercise caution in adjudicating FOIA waivers in plea agreements that were undertaken in other jurisdictions pursuant to the law of the applicable Circuits. Although the District of Columbia may be a national forum for FOIA challenges, it is not, and should not become, a national forum for challenges to the validity of plea agreements. The questions presented here go far beyond the FOIA, and prudence counsels that this Court accord due regard to the rulings and scope of jurisdiction of its sister courts. *See Consumers Union v. Consumer Health & Safety Comm'n*, 590 F.2d 1209, 1218 (D.C. Cir. 1978) ("Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it without interference from other courts under suits subsequently instituted.").

Section 2255 motions must be disposed of by the sentencing court. *Abbonizio*, 442 U.S. at 185; *United States v. Pollard*, 959 F.2d 1011, 1023 (D.C. Cir. 1992) ("the sentencing judge's unique vantage point is in part why Congress provided that § 2255 motions were to be brought before the sentencing judge"). Here, Mr. Price in fact filed a § 2255 motion in the sentencing court in Missouri,

and that court considered, and rejected, his challenge to the validity of the FOIA waiver in the plea agreement. That decision should not be upended through the backdoor under the guise of FOIA, a law that has no clear link to plea validity issues. To permit such challenges here would offer a perverse incentive for felons to omit challenges to FOIA waivers in plea agreements when proceeding before the sentencing court, and then raise them in collateral FOIA proceedings in this forum. Further, Mr. Price's suit is in actuality an attempt to "'circumvent' the limitations on § 2255 motions, including, as is relevant here, the limitations on second or successive motions," *Arrington*, 763 F.3d at 23, and should not be countenanced.

Finally, requiring some evidence that enforcement of a FOIA waiver would lead to a miscarriage of justice also serves the interests of judicial efficiency. Such allegations "are 'easy to allege and hard to disprove,' so courts must insist on a meaningful evidentiary showing." *Favish*, 541 U.S. at 174 (citation omitted)). If this Court were to hold that FOIA waivers in plea agreements are broadly unenforceable, surely this jurisdiction would become a magnet for FOIA suits by prisoners nationwide who had waived their FOIA rights. Absent a requirement for "'evidence that would warrant a belief by a reasonable person'" that manifest injustice will result from enforcement of a FOIA waiver, this Court and the district court likely will find themselves adjudicating the merits of countless FOIA suits by

such prisoners, even where no manifest injustice is reasonably likely. *See Boyd*, 475 F.3d at 387 (quoting *Favish*, 541 U.S. at 174). Thus, at the very least, the Court should emphasize that FOIA waivers will be deemed unenforceable only where meaningful, reasonable evidence of manifest injustice is shown.

In sum, this Court should uphold Mr. Price's FOIA waiver and find that it encompasses the records sought in the requests here at issue.[15]

[15] Because Mr. Price's requests for FOIA processing records relating to his requests for records about Tami Price are derivative of his barred request for records about her, they too "pertain[] to [his] investigation and prosecution" and thus are barred under the terms of his plea agreement.

CONCLUSION

The Court should affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
FRAP 32(g)(1)

The text for this Brief for Appellee is prepared using Times New Roman, 14 point and —omitting those items described in Fed. R. App. P. 32(f) and D.C. Circuit Rule 32(e)(1) — contains 12,988 words, as counted by Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 2017, I caused a true and correct copy of the foregoing Brief for Appellee to be served upon Appellant by first-class mail, postage pre-paid and addressed as follows:

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