No. _____

In The

Supreme Court of the United States

QUINCY ANDRE JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an appeal waiver in a plea agreement can prohibit a defendant from challenging on direct appeal unforeseeable fundamental errors committed by the sentencing court, such as failing to allow the defendant to allocute at a meaningful time and treating the Sentencing Guidelines as mandatory?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, Quincy Jones, was the defendant in the district court and the appellant in the Fourth Circuit. Quincy Jones is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Quincy Jones petitions for a writ of certiorari to review the Fourth Circuit Court of Appeal's judgment in *United States v. Jones*, No. 17-4462 (4th Cir).

ORDERS AND OPINIONS OF THE COURTS BELOW

The Fourth Circuit's April 5, 2018, Order dismissing Mr. Jones' appeal is unpublished. The District Court for the Eastern District of North Carolina issued no decisions relevant to the issue raised herein.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2018. (Appendix A). The court of appeals denied petitioner's timely petition for rehearing en banc on May 8, 2018. (Appendix B). This Court his jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law. . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

Section 3742 of Title 18 of the United States Code provides, in relevant part:

> (a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [1] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and Disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

INTRODUCTION[1]

This Court recognized in *Missouri v. Frye*, 556 U.S. 134, 143-44 (2012), and *Lafler v. Cooper*, 566 U.S. 156, 162 (2012), that "'plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system,'" *Frye*, 556 U.S. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 Yale L.J. 1909, 1912 (1992)).

This Court has also recognized that the federal sentencing regime is designed to encourage plea agreements. *Id*. ("[Defendants] who take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because *the longer sentences exist on the books largely for bargaining purposes*.'" (emphasis added) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006))).

Courts have long recognized that "the Government has certain awesome advantages in bargaining power" in the plea negotiation process. *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996). As the D.C. Circuit noted in a recent waiver case, "this uneven power dynamic lurks in the background in cases like these and calls for a careful consideration of [a defendant's] claim" that certain plea waiver provisions are unenforceable for being against public policy. *Price v. U.S. Dep't of Justice Attorney Office*, 865 F.3d 676, 683 (D.C. Cir. 2017).

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[1] This section quotes extensively from the Brief of *Amici Curiae* National Association of Criminal Defense Lawyers and American Civil Liberties Union of North Carolina in Opposition to the Motion to Dismiss Appeal, filed in support of Petitioner's Response in Opposition to the Government's Motion to Dismiss the Appeal below.

The Government has utilized its "awesome advantages in bargaining power," *Ready*, 82 F.3d at 559, to require broad waivers of appellate rights as boilerplate language in plea agreements. *See, e.g.,* Susan R. Klein, et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 86 (2015). A recent study shows that, as of 2013, appeal waivers have become a boilerplate term in the plea agreements used by 88 of the 94 U.S. Attorney's offices across the country. *Id*. at 122 (Appendix H). In all of the federal districts within the Fourth Circuit, these waivers are standard terms in plea agreements. *See id.*

These circumstances led the Kentucky Supreme Court to conclude that in federal court, "plea agreements are often essentially contracts of adhesion." *United States, ex rel. U.S. Attorneys v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 157 (Ky. 2014) (holding that federal prosecutors' inclusion of a provision purporting to waive claims for ineffective assistance of counsel violated state ethics rules).

Consequently, the notion that a typical federal defendant who wants to preserve a sentencing issue for appeal can simply negotiate to remove the appeal waiver runs contrary to the reality of the "marketplace" for plea deals. *See, e.g.*, *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("As the Government conceded during oral argument, defendants are generally in no position to challenge demands for [waivers of evidentiary protections for statements made in plea negotiations], and the use of waiver provisions as contracts of adhesion has become accepted practice.").

In addition, appeal waivers that purport to preclude appellate review of sentencing errors present special concerns that are absent in the commercial setting. The District of Massachusetts, in a decision striking a presentence appeal waiver from a plea agreement, highlighted this concern by analogizing to a contract in which a buyer agrees to purchase something, yet the price is to be determined by a mediator at some point in the future, and the mediator's determination on price may be influenced by information that is not yet known to the buyer. *United States v. Perez*, 46 F. Supp. 2d 59, 70–71 (D. Mass. 1999). The court then showed that the analogy would be more fitting to the plea bargain context if the alternative to accepting the deal was the "loss of a lifetime's worth of savings and investment," and the other party to the agreement was a "repeat player with vastly superior bargaining power." *Id.* at 71. Under such circumstances, "a court would have good reason" to find such a contract unconscionable. *Id.* Consequently, in the plea agreement context, where "courts are supposed to be *more* scrupulous in the protection of defendants" than they are in protecting parties in the commercial context, the same result should hold. *Id.* (citing *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). Given these realities, many courts have recognized the need to carefully scrutinize contracted-for waivers by criminal defendants. *See Ready*, 82 F.3d at 558 (collecting cases). And circuit courts have explicitly recognized the need to "temper[]" the traditional rules of contract interpretation when interpreting plea agreements, concluding that the concerns at issue "differ fundamentally from and run wider than those of commercial contract law." *Harvey*, 791 F.2d at 300.

In light of this "reality . . . that plea bargains have become . . . central to the administration of the criminal justice system," *Frye*, 566 U.S. at 143, maintaining the integrity of the criminal justice system requires appellate courts to protect their role of regulating the errors defendants can prospectively waive and necessitates striking waiver provisions that would prohibit defendants from challenging fundamental defects in their sentencing that undermine the integrity of the system.

While many courts of appeals have enforced appeal waivers in various circumstances, this Court has never ruled on the validity of appeal waivers, and appeal waivers remain "as controversial as ever." Nancy J. Petitioner's case squarely presents the Court with an opportunity to define King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 224 (2005).

Demonstrating the lack of clear authorization for such waivers, in addition to the lack of guidance by this Court, is the fact that the Advisory Committee on the Federal Rules of Criminal Procedure has declined to approve of this practice. *See* Fed. R. Crim. P. 11 advisory committee's note to 1999 amendments ("Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.").

Several district court judges have refused to accept plea agreements that contain a waiver of appellate rights, taking particular issue with the fact that, at the time a defendant enters a guilty plea, it is impossible to anticipate the type or egregiousness of sentencing errors that have yet to occur. *E.g.*, *United States v.*

Mutschler, 152 F. Supp. 3d 1332, 1340–41 (W.D. Wash. 2016); *United States v. Soon Dong Han*, 181 F. Supp. 2d 1039, 1044–45 (N.D. Cal. 2002); *Perez*, 46 F. Supp. 2d at 70–71; *United States v. Raynor*, 989 F. Supp. 43, 47–48 (D.D.C. 1997); *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997); *see also United States v. Medina-Carrasco*, 815 F.3d 457, 464 (9th Cir. 2016) (Friedman, J., dissenting); *United States v. Melancon*, 972 F.2d 566, 571–73 (5th Cir. 1992) (Parker, J., concurring specially).

Some state courts, recognizing the negative effects that presentencing appeal waivers may have on the criminal justice system when liberally applied, have also prohibited such waivers. *See Spann v. State*, 704 N.W.2d 486, 494–95 (Minn. 2005); *State v. Ethington*, 592 P.2d 768, 769 (Ariz. 1979); *People v. Orozco*, 103 Cal. Rptr. 3d 646, 649 (Cal. Ct. App. 2010); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972). Other state courts have prohibited analogous waivers of unknown prospective errors. *See State v. LaPlaca*, 27 A.3d 719, 725–26 (N.H. 2011) (refusing to enforce waiver of right to hearing for probation revocation where the grounds for such revocation are unforeseen at the time of the plea); *Ex parte Reedy*, 282 S.W.3d 492, 498 (Tex. Crim. App. 2009) (refusing to enforce waiver of a habeas claim of ineffective assistance of counsel because the defendant did not "know[] about the existence of the facts that support such claims at the time of his waiver").

Moreover, while the federal courts of appeals have enforced appeal waivers in many cases, there are several critical exceptions, which vary by circuit. Collectively, those exceptions recognize that plea agreements warrant special scrutiny due to the Court's "constitutional, supervisory, and private law concerns," including the concern

for "public confidence in the fair administration of justice." *Harvey*, 791 F.2d at 300 (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)).

Petitioner's case squarely presents the Court with an opportunity to resolve the issue of whether the Government in a criminal case can exercise its "awesome advantages in bargaining power" to require defendants to waive unforeseen fundamental errors by the sentencing court. Here, for example, the sentencing court deprived Mr. Jones the opportunity to allocute before the court determining whether to impose a sentence within the career offender Guideline range of 262-327 months, and it erroneously treated the career offender Guideline as mandatory. Those errors constitute fundamental defects in the sentencing process that Mr. Jones did not—and should not have been required to—foresee, and those errors did not "occur[] prior to the entry of the guilty plea," and thus "[t]hey c[an]not . . be[] cured" absent appellate review. *Class v. United States*, 138 S. Ct. 798, 805 (2018).

Petitioner briefed this issue, supported by *amici curiae*, before the court of appeals. The issues involved in this petition do not concern Petitioner's factual guilt, but instead only involve whether a broad waiver of Petitioner's right "to appeal the conviction and whatever sentence is imposed on any ground" validly prohibits Petitioner from raising fundamental errors committed by the district court at sentencing.

The Court should grant the petition, resolve this important and recurring issue and to protect the integrity of the criminal justice system.

STATEMENT OF THE CASE

A. Background Facts

i. Petitioner pleads guilty to a plea agreement containing a broad appeal waiver before receiving discovery.

Prior to receiving discovery, Petitioner Jones, an indigent person, pled guilty to a federal drug offense and an offense under 18 U.S.C. § 924(c) (possession of a firearm in furtherance of a drug trafficking crime). The plea agreement contained a blanket appeal waiver, which prevented any appeal on nearly any ground, unless Petitioner received a sentence above the advisory guideline range.

Petitioner Jones qualified as a career offender and therefore faced tremendous pressure to plead guilty. Specifically, the applicable guideline, U.S.S.G. § 4B1.1(c)(3)), provides that a career offender being sentenced for violating § 924(c) will face a guideline range determined *solely* by whether the defendant receives an acceptance of responsibility reduction under U.S.S.G. § 3E1.1. If Petitioner did not receive the acceptance of responsibility reduction, his guideline range would be 360-life. U.S.S.G. § 4B1.1(c)(3).

ii. Discovery provided after entry of plea undermined the factual basis for the guilty plea.

After entry of his plea, the Government provided a lab report that established that the substance Petitioner pled guilty to selling was not a controlled substance. Petitioner then moved to withdraw his plea. Petitioner's appointed counsel then withdrew, citing a conflict of interest and new counsel was appointed.

iii. The Government threatens to dramatically increase Petitioner's sentencing exposure if his motion to withdraw his guilty plea is granted, causing Petitioner to rescind his motion to withdraw his plea.

In response to Petitioner's motion to withdraw his guilty plea, the Government, on the record, set forth its position that the Government would supersede the indictment to add a second § 924(c) count and would proceed to trial (*i.e.*, refuse to offer any plea agreement) if Petitioner's motion to withdraw his plea were granted. The Government's threat left Petitioner to choose between a five-year mandatory minimum and 262-327-month guideline range under the current plea (which was factually unsupported), or continue with attempt to withdraw his plea and be forced to trial facing a guideline range of 360-life and a mandatory minimum of 30 years.

Faced with this pressure, Petitioner reluctantly rescinded his motion to withdraw his guilty plea.

iv. At sentencing, the district court treats the draconian § 924(c) career offender guideline as mandatory and fails to allow Petitioner to allocute before "making up its mind" to sentence Petitioner within the guideline range.

At sentencing, among other things, Petitioner raised a racial disparity argument, noting that only five of the 126 offenders (four percent) who have faced the § 924(c) guideline (U.S.S.C. § 4B1.1(c)) in the Eastern District of North Carolina over the last decade have been white, and only 31 of the 585 defendants (five percent) facing this guideline in the Fourth Circuit over that time have been white.[2]

The district court expressed dismay at these disparities. However, the court stated that, by seeking a variance below the § 924(c) career offender guideline, Petitioner was "asking [the court] to base a different ruling than what the black letter of the law says . . . ." The court also stated, "[T]he career offender status . . . [i]s still

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[2] The Government provided the following table to support its argument that the racial disparities in the district of prosecution (the Eastern District of North Carolina) mirrored the disparities throughout the Fourth Circuit:

District	Percentage of 924(c) Career-Offenders Who Are Minorities ("Black", "Hispanic", or "Other")[1]
NCE	96.03% (121/126 cases)
NCM	93.55% (58/62 cases)
NCW	93.85% (61/65 cases)
MD	95.96% (95/99 cases)
SC	95.41% (104/109 cases)
VAE	97.70% (85/87 cases)
VAW	74.07% (20/27 cases)
AVERAGE	**94.70% (554/585 cases)**

a part of the law," and that "3553(a) does give judges some latitude. But this is more Black Letter than latitude in my judgment." Finally, the court stated, "You're asking for something . . . unseasoned by circuit opinion . . . ."

In other words, the court expressed its belief that the § 924(c) career offender guideline was mandatory. The district court then "ma[de] up [his] mind" and announced "the ruling of the Court" to sentence Petitioner to a guideline sentence before allowing Petitioner allocute. Specifically, before allowing Mr. Jones to allocute, the district court stated, "I've made up my mind in this matter. . . . [Y]ou can be seated, Mr. Jones. I'll come around to you later. I cannot find a basis for a variance under 3553(a) . . . . That's the ruling of the Court . . . ."

Finally, notwithstanding the trial court's "very significant . . . concern . . . that there is some sort of race issue with 924(c) and criminal history category VI," the district court provided no response to Mr. Jones' arguments other than to state that the § 924(c) career offender guideline is "black letter law," and to incorrectly state that a guideline provision prevents it from considering Mr. Jones' § 3553(a) argument that racial disparities indicate that a guideline sentence would be arbitrary.

The district court sentenced Mr. Jones to 262 months (21.8 years) in prison.

B. Defendant appeals, and the Fourth Circuit grants a Government motion to dismiss the appeal based on the appeal waiver.

Petitioner appealed. The Government moved to dismiss the appeal. Petitioner responded in opposition. The National Association of Criminal Defense Lawyers and the American Civil Liberties Union of North Carolina moved for leave to file an *amicus curiae* brief in opposition to the motion to dismiss. The Government

responded in opposition to amici's motion for leave. The Fourth Circuit denied the motion for leave and granted the motion to dismiss the appeal.

REASONS FOR GRANTING THE WRIT

Despite their omnipresence in plea agreements, which today define the criminal justice system, *Frye*, 556 U.S. at 144, this Court has never ruled on the validity of appeal waivers. The federal circuits have adopted various rules attempting to police the abuse of such provisions in light of the Government's "awesome advantages in bargaining power," *Ready*, 82 F.3d at 559, several federal district courts have refused to accept plea agreements that contain such waivers, *e.g.*, *Mutschler*, 152 F. Supp. 3d at 1340–41; *Soon Dong Han*, 181 F. Supp. 2d at 1044–45; *Perez*, 46 F. Supp. 2d at 70–71; *Raynor*, 989 F. Supp. at 47–48; *Johnson*, 992 F. Supp. at 439; *see also Medina-Carrasco*, 815 F.3d 464 (Friedman, J., dissenting); *Melancon*, 972 F.2d at 571–73 (Parker, J., concurring), and states differ with respect to the enforceability of such provisions, *Spann*, 704 N.W.2d at 494–95; *Ethington*, 592 P.2d at 769; *Orozco*, 103 Cal. Rptr. 3d at 649; *Butler*, 204 N.W.2d at 330; *LaPlaca*, 27 A.3d at 725–26; *Reedy*, 282 S.W.3d at 498.

The interest of uniformity and the overriding interest in the integrity of the criminal justice process are at stake. This case presents an appropriate vehicle for establishing whether appeal waivers purporting to bar defendants from appealing based on unforeseen fundamental errors at sentencing are enforceable.

A. The Circuits Are Divided on the Instant Issue.

The Fourth Circuit ruled in this case that the following errors at sentencing are covered by the appeal waiver: (1) denial of meaningful opportunity to allocute and (2) the district court's treatment of the Guidelines as mandatory.

In contrast, the D.C. Circuit has held, "A waiver . . . does not prevent an appeal if the district court commits an error of law during sentencing." *In re Sealed Case*, 702 F.3d 59, 63 (D.C. Cir. 2012) (citing *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009)). Specifically, the Court noted that "a waiver is not 'enforced if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice'—for instance, an 'utter[ ] fail[ure] to advert to the factors in 18 U.S.C. § 3553(c) . . . .'" *Id.* (quoting *Guillen*, 561 F.3d at 531). And the circuits differ on what issues may be waived. *See, e.g., Price*, 865 F.3d at 684 (FOIA waiver in plea agreement is unenforceable because no adequate criminal justice interest served by such a provision) ("At the end of the day, a plea agreement that attempts to waive a right conferred by a federal statute is, like any other contract, unenforceable if the interest in its enforcement is outweighed under the circumstances by a public policy harmed by enforcement.") (internal quotation marks and alterations omitted); *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000) (challenges to district court's failure to annunciate any rationale for the sentence imposed is unwaivable); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (appeal waiver unenforceable if district court fails to comply with plea agreement).

Thus, no uniformity exists among the circuits about what issues can be waived and what issues are unwaivable, and this Court has never ruled on the enforceability of appeal waivers.

The lack of uniformity on this question leads to uncertainty at the plea bargaining stage and unjust disparities on appeal. For example, in the Fourth Circuit, one panel has concluded that an appeal waiver would not be enforced to prohibit appellant from challenging the District Court for the Eastern District of North Carolina refusing to allow appellant to call a witness to testify at his sentencing. Order Denying Motion to Dismiss Appeal, [Dkt. 41], *United States v. Johnson*, Fourth Circuit Case No. 12-5047 (4th Cir. September 16, 2013).

However, here, the Court granted a motion to dismiss based on the same appeal waiver language to prohibit Petitioner from challenging the same court refusing to allow Petitioner to allocute at a meaningful time and treating the § 924(c) career offender guideline as mandatory.

Such disparate results from the same court, based on the same language, shows the need for this Court to provide uniform guidance to the circuit courts on this important and recurring issue.

B. This Issue Is Recurring and Important.

Today, nearly every federal plea agreement contains an appeal waiver, and nearly every federal criminal case is resolved via a plea agreement. Thus, determining the appropriate scope and enforceability of appeal waivers is important to almost every federal criminal case.

The specific issue presented here—whether appeal waivers can prohibit review of unforeseen fundamental sentencing errors—is particularly important because such a waiver, if enforceable, would bar the only possible review for the unforeseeable circumstance in which the sentencing court violates a defendant's fundamental sentencing rights. Absent an opportunity for review, "a defendant who waives his right to appeal [would] subject himself to being sentenced entirely at the whim of the district court." *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

Moreover, "[p]lea agreements and appeal waivers rest on the basic assumption that a sentencing court will correctly understand the statutory scheme and sentencing guidelines that are to be utilized in sentencing a defendant." *United States v. Hahn*, 359 F.3d 1315, 1330 (10th Cir. 2004) (en banc) (Lucero, J., concurring in part). Thus, defendants who waive appellate rights do so under the assumption that the court that is charged with punishing violations of the law will not itself violate the fundamental rights of the defendant in so doing. *Cf. United States v. Archie*, 771 F.3d 217, 223 (4th Cir. 2014) ("'[A] defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.'" (quoting *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994)).

Defendants should be entitled to rely on the courts to follow the law in imposing a sentence. And, when negotiating plea agreements, Defendants should not be required to anticipate that the court will deprive them of their fundamental right

to allocute, or to anticipate that the sentencing court will erroneously believe that a particular provision in the Guidelines is mandatory. Otherwise, "[b]y waiving the right to appeal his sentence, the defendant [would] agree to accept any defect or error that may be thrust upon him by . . . an errant sentencing court." *Guillen*, 561 F.3d at 530.

The Court should instead adopt the D.C. Circuit's holding that, by signing an appeal waiver, "the defendant waives his right to contest only a sentence within the statutory range and imposed under fair procedures; [and that] his waiver relieves neither his attorney nor the district court of their obligations to satisfy applicable constitutional requirements." *Ibid.*

Addressing this issue will enhance the integrity of the criminal justice system. With trials being virtually extinct in our federal criminal justice system, sentencing has become the most critical proceeding in the system. Trust in the rule of law and confidence in the judicial system suffer when the burden of unanticipated legal errors falls on defendants who have no recourse. That reputational concern is particularly weighty where, as in this case, unanticipated sentencing errors result in the loss of years of a defendant's liberty.

The Court should grant the writ to ensure that defendants are not subject to unanticipated fundamental rights violations at sentencing without recourse to appeal.

C. This Case Is An Appropriate Vehicle.

The Court need not address whether Petitioner's fundamental sentencing rights were indeed violated. Instead, the Court need only determine whether Petitioner is entitled to have that claim heard on direct appeal. Moreover, although the case involves two discrete fundamental sentencing errors: deprivation of the defendant's right to allocute before a determination is made on whether to impose a within-Guideline sentence and treatment of the Guidelines as mandatory, the Court need not specifically address the question of whether those errors qualify as fundamental defects, but instead could craft a much needed uniform rule for the circuits to apply with respect to the enforceability of appeal waivers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, this 6th day of August, 2018.

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