No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ALJ HILTON,
Petitioner,

v.

UNITED STATES OF AMERICA

_____

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

_____

PETITION FOR WRIT OF CERTIORARI

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October 10, 2018

I. QUESTION PRESENTED FOR REVIEW

I. Whether Petitioner's Appeal Waiver Is Inapplicable to Issues of Trial Court Error in Applying Sentencing Guidelines' Enhancements or in Calculating Criminal History Points When Such Errors Are Subsequent to the Execution of the Waiver, and Are Plain and Affect Petitioner's Substantial Rights.

II. LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

The Petitioner is an individual and thus no parent corporations or publicly held corporations are involved in this matter.

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Petitioner, by and through his undersigned counsel, hereby respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in the herein-referenced matter.

V. OPINION BELOW

The Eleventh Circuit Court of Appeals dismissed the appeal of the Petitioner's conviction and sentence in an unpublished opinion appended hereto. (App., infra, 4a). United States v. Hilton, 731 Fed. Appx. 948, 2018 U.S. App. LEXIS 19789 (11th Cir. July 18, 2018).

VI. STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the court of appeals was entered on July 18, 2018. (App., infra, 4a) The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

VII. RULE INVOLVED IN THIS CASE

Amendment V, Constitution of the United States of America (emphasis added):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

VIII. STATEMENT OF THE CASE

Petitioner, Alj Hilton (herein also referred to as "defendant" or "Mr. Hilton") was named in a one-count indictment by the July 2017 Federal Grand Jury for the Southern District of Alabama, Mobile, Alabama. The sole count charged that on or about February 20, 2017, the Petitioner did knowingly possess with the intent to distribute approximately 453.4 grams of methamphetamine, in violation of 21 U.S.C. §841(a)(1).

Mr. Hilton was arrested on August 25, 2017, in the District of Colorado, and released on bond on August 31, 2017. On November 15, 2017, Mr. Hilton pled guilty to the one-count indictment, pursuant to a written plea agreement. (App.,infra, 1a, Plea Agreement) The terms of the Plea Agreement provide that the United States will not bring any additional charges against the defendant related to the facts underlying

the indictment, and will recommend a sentence at the low end of the guideline range. The Government also agreed to recommend a downward departure, pursuant to U.S.S.G. §5K1.1 or Rule 35, if the defendant provides substantial assistance to the Government.

In addition, Paragraph 24 of the Plea Agreement included a limited waiver of the right to appeal and a limited waiver of collateral attack. Id., at 11-12. This limitation, however, reserved a right to appeal any sentence which constituted an upward departure or variance from the advisory guideline range.

The Petitioner was sentenced on March 15, 2018 to a term of incarceration of 210 months and a subsequent term of supervised release of five years. (App., infra, 2a, Sentencing Hearing Transcript) The judgment of the district court was entered on March 15, 2018. (See, App., infra, 3a, Judgment). A Notice of Appeal was filed by Petitioner's counsel on March 16, 2018, appealing the district court's sentence. In response, the Government sought to dismiss the appeal, before it was heard on its merits, based on a limited appeal waiver included in the subject Plea Agreement.

Appellant is currently in the care and custody of the Federal

Bureau of Prisons at FCI Yazoo City (Low), Yazoo City, Mississippi.

IX. STATEMENT OF FACTS

The instant drug offense was investigated by the Mobile County Street Enforcement Narcotics Team (MCSENT), the Drug Enforcement Administration (DEA), and Homeland Security Investigations (HSI), all of Mobile, Alabama. On February 20, 2017, MCSENT Officer Brian Smith was contacted by a Confidential Informant (CI) who advised that he had made several unrecorded phone calls with an individual in Mississippi named Alj Hilton. The CI had arranged for Mr. Hilton to deliver him one pound of methamphetamine later that same day.

Mr. Hilton and the CI continued to communicate over the course of the day, and law enforcement setup an undercover position in the Tillman's Corner area of Mobile, where the CI and Mr. Hilton agreed to meet. During their surveillance, officers observed the Petitioner and another male, later identified as Arthur Burney, standing near Mr. Hilton's vehicle in the parking lot of an auto parts store. After receiving confirmation from the CI that Mr. Hilton was entering the CI's vehicle, officers converged on the area, and Mr. Hilton was taken into custody without incident.

(After taking Petitioner into custody, officers noticed that Burney was no longer at Hilton's vehicle. Officers entered the adjacent auto parts store, and observed Burney walk to an end cap and toss a gun into the display. Burney was subsequently taken into custody and officers recovered a .32-caliber Beretta pistol. Unlike Petitioner, Burney was charged with firearm possession.)

A search of Mr. Hilton's vehicle revealed 453.4 grams of methamphetamine. After recovering the methamphetamine, Appellant was read his Miranda rights, and agreed to speak with officers. Mr. Hilton confirmed that he and Burney had traveled together from Mississippi, but declined to make any further statement to law enforcement. He was subsequently indicted in the Southern District of Alabama.

X. ISSUE PRESENTED

I. Whether Petitioner's Appeal Waiver Is Inapplicable to Issues of Trial Court Error in Applying Sentencing Guidelines' Enhancements or in Calculating Criminal History Points When Such Errors Are Subsequent to the Execution of the Waiver, and Are Plain and Affect Petitioner's Substantial Rights.

XI. WHY THE WRIT SHOULD BE GRANTED

The Government moved to dismiss Petitioner's appeal based upon

a limited appeal waiver contained in the Petitioner's plea agreement. "As part of the bargained-for exchange represented in this plea agreement, and subject to the limited exceptions below, the defendant knowingly and voluntarily waives the right to file any direct appeal. . ." Motion to Dismiss, p. 5 [1] Though some defendants among the circuits have unsuccessfully attempted to categorize such an appeal challenging the application of Sentencing Guidelines' enhancements or the calculation of criminal history points as an appeal falling within the standard appeal waiver exception, Petitioner maintains that sentencing errors in applying Sentencing Guidelines' enhancements or in calculating criminal history points when such errors are plain and affect Petitioner's substantial rights cannot and should not fall within the unilateral, asymmetric, prospective restrictions of limited appeal waivers.

The sentencing issues sought to be challenged on appeal do not go

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[1]A standard exception in many such limited waivers, including the subject agreement, was that a sentence imposed which constitutes a variance from the statutory maximum or variance from the advisory guideline range could still be challenged on appeal.

to matters of guilt nor evidence. As the Government affirmed in its Motion to Dismiss, at his trial proceedings, the Petitioner admitted to the evidence described in the plea agreement's factual resume. Contrary though to the Government's representation, the Petitioner is not suggesting innocence but rather seeking error-correction in both plain error sentencing calculation and constitutional applications.

> How does a litigant engage in error-correction if the trial court makes an error at sentencing in light of the limited appeal waiver?

Paragraph 15 of the subject Presentence Investigation Report ("PSI")[2] provided a specific offense characteristic of two levels pursuant to U.S.S.G. §2D1.1(b)(1). This enhancement to the total offense level was objected to at sentencing, an objection which the trial court denied. (See, Sentencing Hearing, p.3-4, (App.,infra, 2a))

However, denying this objection was in error but because of the limited appeal waiver, Petitioner did not have the right of appellate review.

In Paragraph 15 of the PSI, the Probation Officer cited that these

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[2]The subject PSI is referenced in the Appellant Brief. It is found as Doc. 28 in the trial court docket.

two levels were included "because a dangerous weapon was possessed by a co-conspirator." The record, though, is devoid of any evidence (a) that Mr. Hilton possessed a weapon, (b) that Mr. Hilton was aware that anyone at the scene of the offense possessed a dangerous weapon, or (c) that Mr. Hilton even had a co-conspirator.

While it is uncontroverted that Mr. Hilton had a passenger in his car in driving to the subject drug transaction, nowhere is that passenger deemed a "co-conspirator." Based on the definition of the Supreme Court of the United States, "co-conspirators" are two or more individuals who have reached an agreement between two or more individuals to commit the same criminal offense. See, e.g., Rogers v. United States, 340 U.S. 367, 95 L. Ed. 344, 71 S. Ct. 438 (1951) Nowhere is there evidence of the existence or necessity of an accomplice with Mr. Hilton in the charged offense.

The Application Notes, in the Commentary to U.S.S.G. §2D1.1(b)(1), reflect that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." As the record reflects, no weapon (dangerous or otherwise) was present at the time of the subject drug

transaction. Logic dictates that it is clearly improbable that any weapon was connected with the offense.

Courts of this circuit have been quite clear that to justify the dangerous weapon enhancement, the Government must show by a preponderance of the evidence that either the firearm was present at the site of the charged conduct or prove that the defendant possessed a firearm during conduct associated with the offense. United States v. Stallings, 463 F.3d 1218, 1220 (11th Cir. 2006). (Only if the Government meets its burden, then the burden shifts to the defendant to demonstrate that a connection between the weapon and the offense was "clearly improbable." Id.; also see, United States v. Ortuna-Herrera, 397 Fed. Appx. 535 (11th Cir. 2010))

The Government, as reflected in the trial court record, failed to meet its burden.

No evidence was presented that Mr. Hilton possessed a firearm. (App.,infra, 1a). While it is conceded that since possession of a firearm by a co-conspirator is reasonably foreseeable and in furtherance of a conspiracy, such a possession could trigger an enhancement to a defendant if a conspiracy was charged. Such a charge was not made.

In the subject case, the alleged firearm was allegedly possessed by a third party. The indictment at bar cites one count and only one defendant. This alleged possession was not in furtherance of any conspiracy as no conspiracy was alleged, charged, or included in Mr. Hilton's Plea Agreement. (App., infra, 1a) Mr. Hilton was not a member of any conspiracy and the only reference to a firearm was made by the Government in arguments and not by evidence in the record or in the Factual Resume of the Appellant.(Id.)

Consequently, it was error for the trial court to apply the Sentencing Guidelines as it did in enhancing Mr. Hilton's total offense level for a weapon that did not exist.

How does a litigant engage in error-correction with regard to acceptance of responsibility if the trial court makes an error at sentencing in light of the limited appeal waiver?

The United States Sentencing Guidelines provide that a defendant can be credited up to three levels for acceptance of responsibility at sentencing against a total offense level. This credit is established in §3E1.1:

Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of

responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

In the Commentary to this Guideline, the Application Notes reflects that in determining whether a defendant qualifies under subsection (a), appropriate considerations include truthfully admitting the conduct comprising the offense(s) of conviction; voluntary payment of restitution prior to adjudication of guilt; voluntary surrender to authorities promptly after commission of the offense; and the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Petitioner fulfilled these suggestive factors. He truthfully admitted the conduct comprising the offense(s) of conviction. Although he was arrested in Denver, Colorado, he voluntarily consented to being arraigned in Mobile, Alabama. In general, the timeliness of Mr. Hilton's conduct in manifesting the acceptance of responsibility deserves application of both U.S.S.G. §3E1.1(a) and (b).

The Government's position regarding this issue is that Petitioner's subsequent misdemeanor charges for careless driving, disorderly conduct, and driving under the influence abrogates any privilege to receive this beneficial credit. (See, Sentencing Transcript, (App.,infra, 2a) As support, the government cites United States v. Wright, 862 F.3d 1265 (11th Cir. 2017).

In Wright, the defendant, while out of jail on pretrial supervision, was arrested, convicted, and sentenced for the crime of possession of marijuana. Although Wright had cooperated and entered a guilty plea in her federal case, the district court denied Wright a reduction for acceptance of responsibility because of her marijuana conviction during pretrial release.

On appeal, the court affirmed. In its opinion, it discussed the factors to consider under the Guidelines including whether a defendant voluntarily terminated or withdrew from criminal conduct or associations. U.S.S.G. § 3E1.1 cmt. n.1(B). However, in that case, the subsequent drug possession charge was the type of criminal conduct that reflects on a pattern of behavior, conduct expressly sought to avoid in order to receive acceptance of responsibility credits. The types of

offenses committed by the Petitioner while awaiting sentencing, to the contrary, were misdemeanors. They were punishable by a fine and simply represent an inadvertent minor breach of the law. They do not represent a continuation of criminal conduct or associations as envisioned by the Sentencing Guidelines.

The determination of whether a defendant has adequately manifested acceptance of responsibility is a flexible, fact sensitive inquiry. United States v. Smith, 127 F.3d 987 (11th Cir. 1997) (en banc). "The defendant bears the burden of clearly demonstrating acceptance of responsibility and must present more than just a guilty plea." United States v. Sawyer, 180 F.3d 1319, 1323 (11th Cir. 1999). A flexible inquiry and a full review of Appellant's history at sentencing, especially in light of 18 U.S.C. §3553 would clearly indicate a three level departure for acceptance of responsibility. The trial court's refusal to conduct such an inquiry and review in light of §3553 was clear error and should have been reviewed on appeal.

Whether a prospective appeal waiver is enforceable?

When reviewing the concept of appeal waivers, a concept

unexamined for many years by this Court[3] , it is posited that the legal existence of an appeal waiver is ethically and constitutionally suspect as it is grounded purely in resource conservation considerations advocated by prosecutors and judges. See, Nancy J. King & Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 DUKE L.J. 209, 219 (2005).

The right to appeal one's sentence in plea agreements derives from federal statute, which permits filing an appeal by the defendant if the sentenced imposed by the judge was greater than the sentence set forth in the plea agreement, or by the government if the sentence imposed was less. 18 U.S.C. §3742(c)(1)-(2). Appeal waivers are implicitly authorized by Federal Rule of Civil Procedure 11 that acknowledges the existence of the waiver of the right to appeal by requiring the court to discuss any such terms in a plea agreement explicitly with defendants. Fed. R. Civ. Proc. 11.

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[3]FED. R. CIV. PROC. 11, note 15, at 224 ("Despite the near-uniform acceptance of appeal waivers by the courts of appeals, their validity is as controversial as ever and has yet to be addressed by the Supreme Court.").

Appeal waivers, the unilateral prospective waiver of the constitutional right of appellate review, is now a recognized national practice. With roughly 97% of all federal convictions resulting from guilty pleas[4], and the majority of guilty pleas including appeal waivers, the enforceability of these provisions is quite fundamental especially in light of the context of such waivers involving unequal bargaining positions. Recognizing this unilateral leverage, federal prosecutors have outlined the parameters and the legality in their U.S. Attorneys Manual, Criminal Resource Manual ("CRM"), Section 626.

In the CRM, the legality of these provisions generally is confirmed. See United States v. Mezzanatto, 513 U.S. 1965 (1995); Tollett v. Henderson, 411 U.S. 258 (1973); Blackledge v. Allison, 431 U.S. 63 (1977), cert. denied, 116 S. Ct. 548 (1995). Consistent with that principle, the courts of appeals have upheld the general validity of a sentencing appeal waiver in a plea agreement. See, e.g., United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993), cert. denied, 115 S. Ct. 652 (1994); however, see Boles v. United States, 2016 U.S. App. LEXIS

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

20583 (11th Cir. November 17, 2016) (double jeopardy claim is not barred by a knowing and voluntary waiver). However, it is important to note that the United States Sentencing Commission's policy statements allow judges to accept plea agreements as long as the agreements do not undermine the statutory purposes of sentencing or the Sentencing Guidelines. USSG §§6B1.2 and 6B1.4 (Nov. 1994).

A plea bargain is a contract between the prosecutor and the defendant, and an appeal waiver is part of that contract[5]. Plea agreements must be construed in light of the rights and obligations created by the Constitution. Id. Guilty pleas are generally negotiated outside the courtroom, between just the lawyers, without the defendant, and in the absence of any witness or recording mechanism. See Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L. J. 1909, 1911 (1992). This "scandalously casual" process of "horse trading," which determines who goes to prison and for how long, is "not

[5]Arizona Dept. of Corrections v. Adamson, 483 U.S. 1,15, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987)("…it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. It is also clear, however, that …plea agreements are constitutional contracts."

some adjunct to the criminal justice system; it is the criminal justice system." Id. at 1911-12 (emphasis in original).

"Although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and 'subject to contract-law standards.'" United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980) (quoting United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979)). The terms of a plea agreement are interpreted according to "objective standards" and, in the event of a dispute, the "dispositive question" is what the parties "reasonably understood." Arnett, 628 F.2d at 1164. Plea agreements are contracts of adhesion, and must be strictly construed against the Government. See United States v. Mezzanatto, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995)(Souter, J., dissenting)

Notwithstanding the utilitarian acceptance of appeal waiver provisions in plea agreements, there are major issues of fairness and equity impacted by requiring a defendant to enter into an asymmetric provision, requiring a defendant to waive appellate rights, but leaving the Government fully able to seek review for any reason. See, App., infra, 1a, Plea Agreement, 22. Under the well-established provisions of

contract law, this lack of mutuality directly impacts the enforceability of the contractual plea agreement. See, Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985)

Almost all of the circuits have concluded that, absent some egregious circumstance or a miscarriage of justice, a unilateral waiver of the right to appeal is generally enforceable, but some opinions limit the grounds for disregarding appellate waivers to situations in which (i) the district court relied on a constitutionally impermissible factor, (ii) counsel was ineffective in connection with the negotiation of the waiver, (iii) the sentence imposed exceeded the statutory maximum, or (iv) the wavier was "otherwise unlawful." See United States v. Mathews, 534 Fed. App'x 418 (6th Cir. 2013); United States v. Chandler, 534 F.3d 45 (1st Cir. 2008); United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004); United States v. Andis, 333 F.3d 886 (8th Cir. 2003); United States v. Khattak, 273 F.3d 557 (3d Cir. 2001); United States v. Brown, 232 F.3d 399 (4th Cir. 2000); United States v. Feichtinger, 105 F.3d 1188 (7th Cir. 1997). Compare United States v. Rivera, 143 Fed. App'x 622, 623 (5th Cir. 2005) (enumerating arithmetic error in guideline calculations as a ground for disregarding an appeal waiver). To require a defendant

to prospectively waive a future unknown is, unlike a contemporaneous waiver, inherently unknowing for the defendant simply does not know what might occur at sentencing. Cf., United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993) Generally, when a guilty plea is entered and the right to appeal the ensuing sentence is waived, the scope of the record that will be considered at sentencing has not yet been defined, the presentence report has not yet been prepared, the applicable USSG range has not yet been calculated, and the sentence has not yet been imposed. Given the quantum of information usually unavailable at the time of the plea, a prospective waiver of appellate rights might often be "unknowing and unintelligent." See, United States v. Johnson, 992 F. Supp. 437 (D.D.C. 1997) (refusing to accept a plea containing a waiver of the right to appeal); United States v. Raynor, 989 F. Supp. 43 (D.D.C. 1997) (same).

Recognizing the dichotomy between contemporaneous and prospective waivers, the District of Columbia Circuit has held that a defendant who waives the right to appeal a sentence does not thereby agree "to accept any defect or error that may be thrust upon him by either an ineffective attorney or an errant sentencing court." United

States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009). According to Guillen, an appellate waiver "relieves neither [the defendant's] attorney nor the district court of their obligations to satisfy applicable constitutional requirements." Id. The District of Columbia Circuit has indicated that it will not enforce a waiver of the right to appeal "if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice." Id. at 531. This pronouncement resonates with the view that the provisions of 18 U.S.C. § 3742 do not merely confer a right to appeal, but rather impose limitations on judicial authority, which cannot be "waived" by the parties. Such a position is underscored by the United States Sentencing Guidelines that observe that, because "a salient purpose of the Guidelines is to reduce sentencing disparity and to create uniformity," an appeal asserting that the district court "misapplied the Guidelines . . . should not be barred by waiver").

In this matter, the trial court erred in two sentencing errors, two mistakes that are plain and affect the defendant's substantive rights. First, the district court erred in applying an enhancement under U.S.S.G. §2D1.1(b)(13)(D) when no evidence or admission of a firearm

was presented. Though the factual support for such an enhancement was allegedly presented in the Petitioner's Presentence Investigation Report prepared by the U.S. Probation Department for the District Court, in fact no evidence was presented before the court that a firearm was present in the course of the offense conduct. The sentencing judge accepted this erroneous presentation and sentenced the defendant accordingly.

The Government claims that because the Petitioner voluntarily entered his plea of guilty, he has waived virtually all defects including the foregoing sentencing errors. The right to error correction through appellate review is a hallmark of due process. A defendant cannot intelligently and prospectively waive such possible, including any probable nor expected, judicial errors.

This writ should be granted because the issue is of fundamental importance and one unaddressed by both the High Court nor any of the circuits in any particularity.

XII. CONCLUSION

As this Court noted in Coppedge v United States, 369 U.S. 438, 449 (1962), "when society acts to deprive one of its members of his life,

liberty, or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."

The global and unrestricted use of appeal waivers deserve to be brought within some constitutional dimensions. Additionally, as the circuit courts have not addressed the specific issue and applicability of double jeopardy, it is incumbent on this Court to provide such a defense to the Fifth Amendment. The Petitioner respectfully requests that this Honorable Court issue the requested writ of certiorari.

Respectfully submitted,
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XIII. CERTIFICATE OF WORD LIMITATIONS

I hereby certify that the foregoing Petition, exclusive of mandated information under S.Ct.R. 33, is 23 pages in length and 5249 in word count, utilizing the word count of the word processing program used to prepare this document.

/s/Robert A Ratliff
Robert A. Ratliff
Attorney for Petitioner

XIV. CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following via regular U.S. Mail, with sufficient postage to ensure delivery, this 10 day of October, 2018, and that all parties required to be served have been served:

Solicitor General of the United States
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APPENDIX

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