No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CASTER DELANEY WHETSTONE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a defendant's challenge to his status as an armed career criminal, where the sentence is in excess of the otherwise applicable statutory maximum, is outside the scope of an appellate waiver in a plea agreement because the defendant is contesting an illegal sentence.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Caster Delaney Whetstone, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 18-4396, entered on November 9, 2018.

OPINION BELOW

The Fourth Circuit panel issued its order dismissing Whetstone's appeal on November 9, 2018, leaving the judgment of the United States District Court for the District of South Carolina intact. The Fourth Circuit's order is attached as App. 1A-2A. The Fourth Circuit issued its judgment dismissing the appeal on November 9, 2018. App. 3A. Whetstone did not file a petition for rehearing and rehearing *en banc*. The order of the United States District Court for the District of South Carolina held that South Carolina assault with intent to kill ("AWIK") is a violent felony, making Whetstone an armed career criminal. App. 4A-9A. Whetstone's appeal challenged the designation because AWIK can be committed recklessly, it fails to meet the definition of a violent felony, and the *mens rea* cannot transform the non-violent *actus reus* element into a violent act.

JURISDICTION

The Fourth Circuit Court of Appeals issued its order dismissing the appeal and entered its judgment on November 9, 2018. App. 1A-3A. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. V.

The ACCA,18 U.S.C. § 924 (e)(1), states:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection - -
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . . .

STATEMENT OF THE CASE

Petitioner Caster Delaney Whetstone pled guilty to the unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §922(g)(1) and a drug count. Whetstone's plea agreement included an appeal waiver, precluding an appeal except for three narrow exceptions. Joint Appendix ("JA") 23-24.[1] The maximum penalty for a §922(g)(1) conviction, as outlined in 18 U.S.C. §924(a)(2), is 10 years. However, if a person has three prior convictions for a "violent felony or a serious drug offense, or both," the penalty increases to a mandatory minimum of 15 years under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924(e)(1). A defendant sentenced under the ACCA also may be required to serve a five-year term of supervised release (*i.e.*, two additional years). 18 U.S.C. §3559 and 18 U.S.C. §3583(b)(1). The basis for jurisdiction in the district court is 18 U.S.C. §3231, which provides in pertinent part that the district courts shall have original jurisdiction, exclusive of the state courts, of all offenses against the laws of the United States.

After additional briefing and two sentencing hearings, the district court held that Whetstone had the requisite number of convictions to be an armed career criminal. App. 4A-9A. The parties' arguments revolved around whether Whetstone's conviction for AWIK was violent. The district court held that AWIK was violent. *Id.*

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Whetstone*, No. 18-4396 (4th Cir. docketed June 8, 2018) at Docket Entry Nos. 14, 15.

Therefore, the district court sentenced Whetstone to 180 months and five years of supervised release. JA 90-91.

Whetstone appealed pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742. In his brief, Whetstone asserted that the appeal waiver was inapplicable because he was not an armed career criminal, and, therefore, was serving an illegal sentence. He also asserted substantive arguments about why AWIK is not a violent felony.

The government did not file a brief, but instead submitted a motion to dismiss. The government's position was that an appellant can validly waive his appellate rights and that the Rule 11 colloquy demonstrated that Whetstone had knowingly and voluntarily entered into a plea agreement with the government. The government's position, without addressing the arguments raised by Whetstone in his brief, was that a challenge to AWIK as a violent felony was precluded by the appeal waiver.

Whetstone opposed the government's motion to dismiss. Whetstone pointed out that, even if "a waiver has been entered into knowingly and voluntarily, [the court] . . . will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice", which includes illegal sentences. *United States v. Andis*, 333 F.3d 886, 891-92 (8th Cir. 2003) (*en banc*). Whetstone pointed out that many circuits do not enforce appeal waivers when the appeal involves a miscarriage of justice. *United States v. Litos*, 847 F.3d 906, 910 (7th Cir. 2017) (collecting cases from the First, Third, Fourth, Eighth and Tenth Circuits, who will not enforce knowing

and voluntary appeal waivers if a miscarriage of justice occurs). Whetstone also cited to Fourth Circuit precedent that recognized that miscarriages of justice can be corrected on appeal even if there is an appeal waiver. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016).

However, the Fourth Circuit dismissed Whetstone's appeal based on the appeal waiver in the plea agreement. The Court did not address Whetstone's argument that his challenge to an illegal sentence was outside the purview of the waiver. Instead, the Fourth Circuit held that "the issues Whetstone seeks to raise on appeal fall squarely within the compass of his waiver of appellate rights." App. 1A-2A.

The position taken by the Fourth Circuit is contrary to that taken by the majority of circuits. Therefore, this important constitutional issue should be settled by this Court.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Fourth Circuit erroneously held that Whetstone's appeal was barred by the appeal waiver, which does not apply when the challenge is to an illegal sentence. There is a circuit split on this issue, with the Sixth Circuit, and now Fourth Circuit, taking positions contrary to that in every other circuit.

I. The Circuits Are Split on Whether a Challenge to an Illegal ACCA Sentence Is Outside the Scope of an Appeal Waiver

Almost every circuit recognizes that an appeal waiver does not bar a challenge to an error amounting to a miscarriage of justice. *See United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) ("if denying a right of appeal would work a miscarriage of justice" then the courts can decline to enforce appeal waivers); *United States v. Riggi*, 649 F.3d 143, 147 (2nd Cir. 2011) (waiver may be voided when the sentence is based on unconstitutional factors or the district court abdicates its duties, such as failing to provide a rationale for the sentence imposed); *United States v. Khattak*, 273 F.3d 557, 562 (3rd Cir. 2001) ("an error amounting to a miscarriage of justice may invalidate the waiver."); *United States v. Hollins*, 97 Fed. Appx. 477, 479 (5th Cir. 2004) (holding that a waiver to file a 28 U.S.C. §2255 motion did not preclude an appeal about a sentence in excess of the statutory maximum); *United States v.*

Bownes, 405 F.3d 634, 637–38 (7th Cir. 2005) (recognizing limitations on appeal waivers required by due process and listing examples such as a sentence imposed above the statutory maximum); *Andis*, 333 F.3d at 890 ("[W]e will not enforce a waiver where to do so would result in a miscarriage of justice."); *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (recognizing an exception to enforcing the appeal waiver when the sentence is illegal); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (*en banc*) (listing circumstances which qualify for "miscarriage of justice" exception); *United States v. Bushert*, 997 F.2d 1343, 1350 n.18 (11th Cir. 1993) (recognizing exception to waiver, including imposition of a sentence above the statutory maximum); *United States v. Adams*, 780 F.3d 1182, 1183–84 (D.C. Cir. 2015) (citation omitted) (recognizing exception where "sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice").

Even if "a waiver has been entered into knowingly and voluntarily, [the court] . . . will still refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *Andis*, 333 F.3d at 891. An appellant has the right to appeal an illegal sentence even if the plea agreement contains an appeal waiver because that is a component of miscarriage of justice. *Id.* at 891-92. *See Litos*, 847 F.3d at 910 (collecting cases from the First, Third, Fourth, Eighth and Tenth Circuits, who will not enforce knowing and voluntary appeal waivers if a miscarriage of justice occurs).

Miscarriage of justice encompasses sentences based on impermissible factors, such as race, illegal sentences, such as those greater than the statutory maximum, and cases asserting ineffective assistance of counsel. *Andis*, 333 F.3d at 891. An illegal sentence has been defined to include a sentence that "exceeds the permissible statutory penalty for the crime or violates the Constitution." *Bibler*, 495 F.3d at 624 (citation omitted). An appeal waiver will not apply to a claim of an illegal sentence where, but for the error, a lower "permissible statutory penalty for the crime" would apply. *Id.* A waiver to the right to appeal would not preclude a challenge to an illegal sentence, "such as a sentence imposed in excess of the maximum penalty provided by statute". *United States v. Michelson*, 141 F.3d 867, 872, n.3 (8th Cir. 1998). "[A] defendant does not waive his right to appeal a sentence that is unlawful because it exceeds the statutory maximum." *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009). The Tenth Circuit *en banc* also held that a miscarriage of justice exception to appellate waivers includes "where the sentence exceeds the statutory maximum". *Hahn*, 359 F.3d at 1327 (citation omitted).

Although usual contract principles apply to plea agreements, including waivers, courts must ensure that the defendant's right to fundamental fairness under the due process clause is not violated. *United States v. Schilling*, 142 F.3d 338, 394 (7th Cir. 1998) (citations omitted). Appellants can be relieved from the constraints of appellate waivers based on the inherent powers of the courts of appeal, particularly when miscarriages of justice have occurred. *Teeter*, 257 F.3d at 25-26.

Considerations for determining miscarriages of justice include the character of the error, such as whether it involves a statutory maximum; the gravity of the error; the impact of the error on the defendant; the impact on the government if the error is corrected; and whether the defendant acquiesced in the outcome. *Id.* at 26. As the Eleventh Circuit has explained, "there are certain fundamental and immutable legal landmarks within which the district court must operate regardless of the existence of sentence appeal waivers. . . . It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute." *Bushert*, 997 F.2d at 1350, n.18.

Furthermore, the Department of Justice recognizes that appeal waivers do not bar challenges to illegal sentences. Its Criminal Resource Manual states that "[a] sentencing appeal waiver provision does not waive *all* claims on appeal." U.S. Dep't of Justice, Criminal Resource Manual §626(1) (emphasis added).[1] For example, "a defendant's claim that . . . *the sentence exceeded the statutory maximum . . .* will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement." *Id.* (emphasis added) (citing *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)). Reflecting this principle, the Department of Justice provides suggested waiver language:

[1] The Department of Justice's manual can be found at: https://www.justice.gov/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law (last viewed on Jan. 17, 2019).

> The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal *any sentence within the maximum provided in the statute(s) of conviction* (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

Id. (emphasis added).

Likewise, the government has recognized that "some limits upon the applicability of the waiver provision must inherently survive," and that these limits must include the case in which a defendant "wants to appeal a sentence of 11 years' imprisonment for a crime that statutorily carries a maximum of 10 years." *United States v. Rosa*, 123 F.3d 94, 100, n.5 (2nd Cir. 1997). The government acknowledged "that the sentencing range was limited by the maximum sentence provided for by the offense statute," and "that this sentence would be appealable despite the waiver." *Id.*

Yet, despite the agreement of the vast majority of circuits and the guidance from the Department of Justice, the government here filed a motion to dismiss based on the appellate waiver, in spite of Whetstone's argument in his brief that a challenge to the legality of his sentence fell outside the scope of the appeal waiver.

In his appeal to the Fourth Circuit, Whetstone asserted that he was sentenced in excess of the statutory maximum because he was wrongly deemed an armed career

criminal and that he was convicted of a crime where the government had entrapped him. This resulted in an illegal sentence. Whetstone argued in his opening brief and in the opposition to the government's motion to dismiss that his appeal issues were outside the scope of the waiver.

In this case, the Fourth Circuit widened the circuit spilt, joining the Sixth Circuit, in holding that a challenge to an illegal sentence in excess of the statutory maximum "fall[s] squarely within the compass of his waiver of appellate rights." App. 2A. This position is contrary to the majority of circuits.

Even the Fourth and Sixth Circuits, which now hold appeal waivers bar claims of that an illegal sentence was imposed, previously agreed with the majority of circuits that appeal waivers could not preclude the appeal. *Compare United States v. Whetstone*, Order (ECF No. 25), No. 18-4396 (4th Cir. docketed June 8,2018) at App. 1A-2A to *Adams*, 814 F.3d at 182. ("We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice."); *compare Slusser v. United States*, 895 F.3d 437 (6th Cir. 2018), *petition for cert. filed*, No. 18-6807 (U.S. Nov. 20, 2018)[2] to *United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2006). Furthermore, the Fourth Circuit has recognized sentences that are the subject of appeals "survive an appellate waiver" when they are illegal, defined as "beyond the authority of the

[2] The government's response to Slusser's petition is currently due to this Court on January 25, 2019. The issue in *Slusser* is identical to the issue raised here, except it involves an appeal waiver of 28 U.S.C. §2255 rights.

district court to impose." *United States v. Thornsbury*, 670 F.3d 532, 539 (4th Cir. 2012).

The Fourth Circuit summarily dismissed Whetstone's appeal even though Whetstone asserted that he was serving an illegal sentence based on the district court's erroneous conclusion that he was an armed career criminal. Without addressing the contrary authority cited by Whetstone, or its previous cases holding to the contrary, the Fourth Circuit dismissed Whetstone's appeal without consideration that Whetstone asserted he was serving an illegal sentence.

Now, with the its decision below, the Fourth Circuit has diverged from other circuits and its previous case law that a defendant cannot waive the right to challenge an illegal sentence. The Fourth Circuit refused to allow Whetstone to pursue his claim, argued extensively in the district court, that he was not an armed career offender and could not be subject to a penalty in excess on the ten-year statutory maximum. This position effectively eradicates appellate oversight of legal mistakes made during the sentencing process, leaving the district courts as the final word on certain legal matters.

The Sixth Circuit also recently changed positons when it held that appeal waivers precluded challenges to illegal sentences on collateral review. *Slusser*, 895 F.3d at 439. The Sixth Circuit noted that the "indication in *Caruthers* that appellate waiver does not preclude a collateral attack on an above-statutory maximum sentence was dicta, not the holding of the Court." *Id.* at 440.

A sentence exceeding the statutory maximum violates a "constitutional protection of surpassing importance: the proscription of any deprivation of liberty without 'due process of law.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000) (quoting U.S. Const. Amend. XIV). A resolution of the circuits' divergence will provide more certainty and fairness to defendants who might enter into a plea agreement and who are subject to an appeal waiver.

II. This Case Presents an Ideal Vehicle for This Court to Settle the Circuit Split About Whether Contesting an Illegal Sentence is Outside the Scope of a Waiver.

This case squarely presents the question whether an appeal waiver bars review of a defendant's claim that his ACCA sentence is unconstitutional and thus exceeds the statutory maximum. Whetstone's case is a direct appeal where the Fourth Circuit summarily dismissed his case without reaching the merits. The question presented is a straightforward matter, dealing solely with dismissal of a specific claim based on an appeal waiver. This Court has the ability to settle the narrow question of whether an illegal sentence challenge is a matter excluded from the scope of an appeal waiver. In settling this issue, defendants will be free from uncertainty, divisiveness and unfairly applied waiver law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted.

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