No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GUADALUPE AVENDANO-VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ELAINE MITTLEMAN
2040 Arch Drive
Falls Church, VA 22043
elainemittleman@msn.com
(703) 734-0482
(202) 297-2338 cell phone

Counsel of Record for Petitioner

QUESTIONS PRESENTED

Whether an appeal waiver precludes review of the sentence of supervised release when the defendant has been deported.

Whether an appeal waiver is enforceable when the defendant has not been advised about the effects of the term of supervised release, particularly when the probation office does not monitor or supervise the term of supervised release.

Whether the district court erred in failing to consider U.S.S.G. § 5D1.1 in imposing a term of supervised release.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

SENTENCING GUIDELINES PROVISION INVOLVED.... 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

I. Appeal waivers are routinely used to preclude appeals. .. 5

II. There are questions about the treatment of supervised release for defendants who are likely to be deported. 9

III. This Case Presents Issues of Importance. 11

CONCLUSION 12

APPENDIX

Unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, filed on September 27, 2018..... 1a

Judgment in the United States District Court, Middle District of Florida (Tampa Division), filed on May 7, 2015 ..... 3a

TABLE OF AUTHORITIES

Page(s)

Cases:

Class v. United States, __ U.S. __. 138 S.Ct. 798 (2018) 5

United States v. Bonds, No. 18-4519 (4th Cir. January 24, 2019) ... 7

United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993) 4, 5, 6

United States v. Cofield, No. 18-12807 (11th Cir. February 4, 2019) .. 6

United States v. Cuellar, No. 17-13523 (11th Cir. January 11, 2019) .. 6

United States v. Duartez-Zevayos, No. 17-15567 (11th Cir. January 17, 2019) 6

United States v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005) 4

United States v. Kankolenski, No. 18-13434 (11th Cir. January 17, 2019) 6

United States v. Kaufman, 791 F.3d 86 (D.C. Cir. 2015) 7

United States v. Landazuri, No. 18-10750 (11th Cir. January 14, 2019) 6

United States v. Menard, No. 18-12835 (11th Cir. February 14, 2019) . 6

United States v. Miles, 902 F.3d 1159 (10th Cir. 2018) 8

United States v. Noel, No. 18-12233 (11th Cir. February 11, 2019) 6

United States v. Payan, No. 18-12400 (11th Cir. January 24, 2019) 7

United States v. Rivers, No. 18-12716 (11th Cir. January 11, 2019) 6

United States v. Sosa, No. 18-13886 (11th Cir. February 13, 2019) 6

United States v. Trotter, 321 F.Supp.3d 337 (E.D.N.Y. 2018) ... 9, 10, 11

United States v. Uadiale, No. 18-13470 (11th Cir. January 15, 2019) .. 7

United States v. Wilson, 707 F.3d 412 (3d Cir. 2013) 8

Statutes and Sentencing Guidelines:

18 U.S.C. § 982 3

18 U.S.C. §§ 1028(a)(2), 1028(b)(1)(A)(i), and 1028(c)(1) 3

18 U.S.C. § 1546(a) 3

28 U.S.C. § 1254(1) 1

42 U.S.C. § 408(a)(7)(C) 3

U.S.S.G. § 5D1.1 ..... 1, 2, 4, 10

Other Authorities:

Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180 (2013) 10

U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release* (July 2010) 11

PETITION FOR A WRIT OF CERTIORARI

Petitioner Guadalupe Avendano-Vasquez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, App., *infra*, 1a-2a, is not reported.

The district court's judgment was filed on May 7, 2015, in the United States District Court, Middle District of Florida (Tampa). App., *infra*, 3a-9a.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2018. The time to file a petition was extended to February 24, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISION INVOLVED

U.S.S.G. § 5D1.1. Imposition of a Term of Supervised Release

...

(c) The court ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

Commentary
Application Notes:

...

5. Application of Subsection (c). – In a case in which the defendant

is a deportable alien specified in subsection (c) and supervised release is not required by statute, the court ordinarily should not impose a term of supervised release. Unless such a defendant legally returns to the United States, supervised release is unnecessary. If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution. The court should, however, consider imposing a term of supervised release on such a defendant if the court determines it would provide an added measure of deterrence and protection based on the facts and circumstances of a particular case.

STATEMENT OF THE CASE

The decision below is an example of the widespread practice of dismissing appeals because of appeal waivers. In this case, petitioner had already been deported when his appeal was considered. In addition, petitioner was sentenced to a term of supervised release. The district court did not consider or discuss the sentencing guidelines provision, U.S.S.G. § 5D1.1, which provides that a defendant deportable alien ordinarily should not be given a term of supervised release. The probation office considered the case inactive and did not supervise or monitor the petitioner after deportation, even though he had a sentence that included a term of supervised release.

1. Petitioner was charged in a nine-count indictment. Count Three charged the petitioner with the transfer of false identification documents,

including a Permanent Resident Alien Card (Form I-551) and a Social Security card, in violation of 18 U.S.C. §§ 1028(a)(2), 1028(b)(1)(A)(i), and 1028(c)(1). The charges also included violations of 18 U.S.C. § 1546(a), 42 U.S.C. § 408(a)(7)(C) and a forfeiture provision, 18 U.S.C. § 982.

2. A change of plea hearing was conducted by the magistrate judge on December 3, 2014. On December 19, 2014, the district court adopted the magistrate judge's report and recommendation and ordered that petitioner be adjudicated guilty as to Count Three.

3. A sentencing hearing was conducted on May 7, 2015, before Judge Virginia M. Hernandez Covington. Petitioner was sentenced to 24 months imprisonment on Count Three. He was placed on supervised release for a term of 36 months. He was ordered to pay a special monetary assessment of $100. The fine was waived.

4. A judgment was entered in the district court on May 7, 2015. The court adjudicated that the petitioner was guilty on Count Three. Counts One, Two, and Four through Nine were dismissed on the motion of the United States.

5. According to the Bureau of Prisons website, petitioner was released on June 29, 2016. In an email dated January 23, 2018, a probation officer stated that "[o]ur records show that he was removed from the U.S. on

08/11/2016. However, I highly recommend you contact ICE. They are the ultimate authority on the matter."

6. In an unpublished per curiam opinion, the Eleventh Circuit granted the government's motion to dismiss the appeal pursuant to the appeal waiver. The court noted that petitioner had contended that there was a question whether his conviction was considered final for removal purposes. Also, petitioner contended that his term of supervised release should be vacated because the district court did not consider his status as a defendant likely to be deported. The district court had not addressed or discussed U.S.S.G. § 5D1.1. App., 1a-2a.

7. In granting the government's motion to dismiss, the Eleventh Circuit relied upon *United States v. Bushert*, 997 F.2d 1343, 1350-51 (11th Cir. 1993) (sentence appeal waiver will be enforced if it was made knowingly and voluntarily), and *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005) (waiver of the right to appeal includes waiver of the right to appeal difficult or debatable legal issues or even blatant error). App., 2a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address the conflict among the circuit courts about enforcing appeal waivers and the pervasiveness of

appeal waivers. In addition, it appears that a great majority of appeal waivers are enforced. The result is that the appellate process is essentially denied to many, if not most, criminal appeals in federal courts. There should be much stricter review of the appeal waiver process.

This Court recently discussed guilty pleas and held that that a guilty plea, by itself. does not bar a defendant from challenging the constitutionality of the pertinent statute on direct appeal. *Class v. United States*, __ U.S. __. 138 S.Ct. 798, 802 (2018).

Justice Alito, in dissent, discussed guilty pleas, as follows:

> Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas. Therefore it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas. In this case, the parties have asked us to identify the claims that a defendant can raise on appeal after entering an unconditional guilty plea. Regrettably, the Court provides no clear answer.

Class v. United States, __ U.S. __. 138 S.Ct. at 807 (Justice Alito, dissenting) (footnote omitted).

I. Appeal waivers are routinely used to preclude appeals.

Appeal waivers result in often summary or cursory dismissal of appeals by the circuit courts. The Eleventh Circuit held that an appeal waiver will be enforced if it was made knowingly and voluntarily. *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993). The waiver is valid

if the government shows either that (1) the district court specifically questioned the defendant about the waiver during the plea colloquy, or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver.

In spite of the severe results from the holding that an appeal will be dismissed, it appears that motions to dismiss the appeal based on an appeal waiver are granted summarily and without analysis of the facts of the individual case. A review of recent Eleventh Circuit cases from 2019 shows a number of appeals that were dismissed in one paragraph per curiam unpublished opinions in reliance upon *Bushert* and other cases.

These recent Eleventh Circuit opinions are *United States v. Cuellar*, No. 17-13523 (11th Cir. January 11, 2019); *United States v. Rivers*, No. 18-12716 (11th Cir. January 11, 2019); *United States v. Landazuri*, No. 18-10750 (11th Cir. January 14, 2019); *United States v. Duartez-Zevayos*, No. 17-15567 (11th Cir. January 17, 2019); *United States v. Kankolenski*, No. 18-13434 (11th Cir. January 17, 2019); *United States v. Cofield*, No. 18-12807 (11th Cir. February 4, 2019); *United States v. Noel*, No. 18-12233 (11th Cir. February 11, 2019); *United States v. Sosa*, No. 18-13886 (11th Cir. February 13, 2019); *United States v. Menard*, No. 18-12835 (11th Cir. February 14, 2019).

Other recent Eleventh Circuit unpublished opinions that have more than one paragraph and dismiss appeals are *United States v. Uadiale*, No. 18-13470 (11th Cir. January 15, 2019), and *United States v. Payan*, No. 18-12400 (11th Cir. January 24, 2019).

A recent unpublished Fourth Circuit opinion provides another example of the impact of appeal waivers. In *United States v. Bonds*, No. 18-4519 (4th Cir. January 24, 2019), the appeal was dismissed in part and affirmed in part. The appeal was dismissed as to the sentencing claims and any other issues covered by the appeal waiver. The court then explained that it had reviewed the entire record and had found no meritorious grounds for appeal that were outside the scope of the valid appeal waiver. The district court's judgment was affirmed for any issues not precluded by the appeal waiver. This opinion is merely an example of the treatment of appeal waivers. There are presumably numerous unpublished opinions by the circuit courts that dismiss appeals because of appeal waivers.

The issues about appeal waivers have been given more detailed analysis by other circuits. The District of Columbia Circuit held, in *United States v. Kaufman*, 791 F.3d 86, 88 (D.C. Cir. 2015), that the appeal was not barred. At the plea hearing, the district court had made two problematic statements in explaining the waiver provision.

The Tenth Circuit, in *United States v. Miles*, 902 F.3d 1159, 1160 (10th Cir. 2018), addressed whether an appeal waiver is contrary to public policy because it is one-sided. The court explained that it had not addressed the issue, but that several other circuits had rejected that argument and similar contentions. The court stated that it agreed with the other circuits' reasoning in upholding the non-mutual appeal waiver. *Id.* at 1161.

The Third Circuit addressed the question of an appeal waiver in the context of a modification of the terms and conditions of supervised release. In *United States v. Wilson*, 707 F.3d 412, 414 (3d Cir. 2013), the court noted that Wilson had appealed. The court enforced the appeal waiver and affirmed the judgment of sentence.

After Wilson began serving his term of supervised release, the court ordered that the conditions be modified to add that he undergo a mental health assessment. On appeal, *id.* at 416, the court explained that the appeal waiver was a waiver of the right to appeal the sentence that was imposed at sentencing and memorialized in the judgment and commitment order. This appeal was not barred by the waiver because Wilson had not explicitly waived a right to appeal a later modification of his sentence.

II. There are questions about the treatment of supervised release for defendants who are likely to be deported.

The treatment of supervised release for defendants who are likely to be deported presents numerous issues and questions. The website for United States Courts included a section on immigration-related requirements relating to probation and supervised release conditions. It appears from the information on the website that the probation officer identifies the defendant's case file as "inactive" and ceases supervision efforts after the deportation proceedings have been concluded. Also, after six months and annually thereafter until expiration of the term of supervision, a criminal records check is conducted to detect any activity not discovered through use of the flash notice. http://www.uscourts.gov/services-forms/immigration-related-requirements-probation-supervised-release-conditions

Judge Jack B. Weinstein, Senior United States District Judge in the Eastern District of New York, issued a lengthy opinion that discussed supervised release. Judge Weinstein explained that "[t]he purpose of federal supervised release is to assist people who have served prison terms with rehabilitation and reintegration into the law-abiding community. The United States Probation Department monitors individuals on supervised release and can help a supervisee with his or her reintegration ..." *United States v.*

Trotter, 321 F.Supp.3d 337, 339 (E.D.N.Y. 2018).

In spite of the obligation of the United States Probation Department to monitor individuals on supervised release, it appears that the Probation Department does not monitor defendants after they have been deported. Instead, the cases are treated as "inactive." The defendants who have been deported apparently do not receive the benefits that are intended to be provided by supervised release, because the probation officers do not monitor those individuals.

Judge Weinstein emphasized the need to discuss provisions involving supervised release at sentencing, *Trotter*, *id.* at 340, as follows:

> The significance of terms and conditions of supervised release is often ignored when sentencing. *See generally* Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 Berkeley J. Crim. L. 180, 190 (2013). At the sentencing hearing, the term of supervised release is seldom discussed; defense counsel, Assistant United States Attorneys, and the court assume it will be imposed for a significant period (usually three or five years). The sentencing hearing centers on the incarceration term.

U.S.S.G. § 5D1.1(c) provides that the district court ordinarily should not impose a term of supervised release when it is likely that the defendant will be deported after imprisonment. In spite of this provision discouraging the imposition of supervised release, it appears that most district courts continue to impose supervised release. The *Trotter* opinion noted that

"[b]etween 2005 and 2009 courts imposed supervised release in 95% of cases." U.S. Sentencing Commission, *Federal Offenders Sentenced to Supervised Release*, at 55 (July 2010). *Trotter*, *id* at 362.

Whatever the benefits related to supervised release, it appears that defendants who are deported do not receive those benefits, because their cases are treated as "inactive." Defendants who are deported are essentially receiving a different type of supervised release, which involves little or no supervision or assistance by the probation office.

Further, it is not clear how deported defendants are able to ensure compliance with conditions, such as submission to random drug testing, of supervised release if the defendants are not being monitored and are outside the United States. It is not clear to what extent judges advise defendants at sentencing how they are to comply with conditions of supervised release after they are deported.

III. This Case Presents Issues of Importance.

The issues relating to enforcing appeal waivers likely affect a large percentage of criminal cases. The widespread use of guilty pleas and the likelihood that many, if not most, of those pleas include appeal waivers, indicate that the issues relating to appeal waivers affect the functioning of the courts and the criminal justice system. If appeal waivers are included in

most plea agreements, and if those appeal waivers are routinely used to dismiss appeals, then there may be few substantive appeals permitted. The criminal justice system depends on the availability of appeals to ensure fairness. With the overwhelming use of appeal waivers, the existence of appeals may follow the path of the jury trial into becoming a rare event.

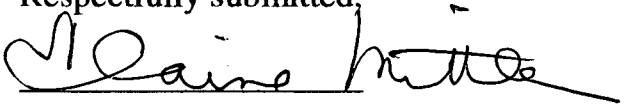
Petitioner would not have known at sentencing that he would be deported before his appeal was completed. Presumably, he was not advised how he would be able to comply with the conditions of supervised release after he was deported. Further, in light of the treatment of his case as "inactive" by the probation office, it is not clear how petitioner could obtain any benefits from the term of supervised release.

In the absence of substantive appeals, many issues, including those involving questions about the Sentencing Guidelines, will not be addressed by the circuit courts. The lack of guidance and analysis by the circuit courts on criminal justice matters as a result of widespread appeal waivers presents a threat to the fairness of the criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Elaine Mittleman
2040 Arch Drive
Falls Church, VA 22043
elainemittleman@msn.com
(703) 734-0482
(202) 297-2338 cell phone
Counsel of Record for Petitioner