**RECORD NO. _____**

# IN THE
# SUPREME COURT OF THE UNITED STATES

RASHAUN SCOTT CARTER,

*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

Does an appellate waiver bar an appeal based upon a flawed, prejudicial presentence investigation report performed between the trial court's acceptance of a guilty plea, and sentencing?

Is failure to object to prejudicial controlled substance equivalency weight ratios ineffective assistance of counsel?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fourth Circuit Court of Appeals at Richmond, Virginia were Petitioner, Rashaun Scott Carter and the Respondent, United States of America.

## RELATED CASES

- *United States of America v. Rashaun Scott Carter*, Criminal Case No. 5:18-cr-00054-1, U.S. District Court for the Southern District of West Virginia. Judgment entered August 1, 2018.

- *Rashaun Scott Carter v. United States of America*, Case No. 18-4559, Fourth Circuit Court of Appeals of Virginia. Judgment entered September 13, 2019. Subsequent judgment entered on motion for rehearing November 4, 2019.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

PAGE

CASES

## STATUTES AND GUIDELINES

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Rashaun Carter, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINION BELOW

On November 4, 2019 the United States Court of Appeals for the Fourth Circuit denied Rashaun Carter's Petition for Rehearing and Petition *En Banc* effectively adopting the Federal District Court Order. That decision can be found in the Appendix B. The per curiam opinion decided on September 13, 2019, did not consider the stark reality in this case regarding the actual amount of drugs distributed by Rashaun Carter and improperly adopted the District Court's finding with respect to the Defendant's appellate waiver and ineffective assistance of counsel claim. That decision can be found in the Appendix A.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2011) as this Petition for Writ of Certiorari is filed within ninety (90) days of the November 4, 2019 judgment that denied the Petition for Rehearing and Petition for Rehearing *En Banc.*

## STATEMENT OF THE CASE

On August 22, 2017, a federal grand jury in Charleston, West Virginia, returned an eleven-count superseding indictment in Criminal Case No. 5:17-cr-

00113 with a forfeiture provision. *JA:* 28[1]. Count One charges the Appellant along with seventeen (17) others with knowingly and intentionally conspiring to manufacture, distribute, and possess with intent to distribute 280 grams of more of Cocaine base; 5 kilograms or more of Cocaine; and, 1 kilogram or more of Heroin from August 2016 through June 28, 2017, in violation of 21 U.S.C. § 846. *JA:* 28-29.

Appellant appeared for his preliminary hearing on September 6, 2017 and, the Appellant was remanded to the custody of the U.S. Marshal. *JA:* 158. On March 14, 2018, the Appellant signed a plea agreement pleading guilty to a Single-Count Information charging him with knowingly conspiring with others to Commit Offenses in violation of 21 U.S.C. § 841(a)(1). *JA:* 63. All other counts of the superseding indictment were dismissed on September 4, 2018 as a part of the plea agreement. *JA:* 9.

On March 26, 2018, Appellant entered his plea with the court and the District Court deferred acceptance of the plea agreement until the District Judge had an opportunity to review a presentence report. *JA:* 99; 105. After deferring acceptance of the plea agreement, the District Court conducted a Rule 11 hearing. *JA:* 68.

On July 26, 2018, the United States District Court sentenced the Appellant to a term of imprisonment of one hundred twenty-one (121) months, a term of supervised release of five (5) years, and a special assessment of $100. *JA:* 127-128; 132.

[1] The citation "*JA:* ___" refers to Joint Appendix.

## REASONS FOR GRANTING THE PETITION

### A. The Decision Below Incorrectly Adopted the Government's Position that the Appellant's Claims Were All Precluded by Waiver

The Fourth Circuit Court of Appeals in this case erroneously determined that even when unfairly induced, a Defendant's plea agreement can be held against him even when his appeal does not challenge the actual plea agreement, but instead involves a faulty presentence investigation report (PSI) which utilized archaic, biased, and prejudicial marijuana equivalency conversions which increased the Appellant's base offense level.

The first basis for the Appellant's appeal is the Government's unfair and prejudicial use of the "crack" conversion equivalencies for purposes of sentencing. Based upon the United States Probation Office's use of these outdated, biased ratios, the Appellant's offense level was stated as thirty-two (32). *JA:* 177. However, had the powder cocaine marijuana equivalencies been employed, the Appellant's offense level would (assuredly) have been stated as thirty (30). The difference between those two offense levels is 121-151 months for the former (under which the Appellant was sentenced), and 97-121 months for the latter (under which the Appellant *should have been* sentenced).

The next basis for the Appellant's appeals is the Government's attribution of cocaine base attributed to him based upon monitored calls, which the Probation Office could, at best, roughly estimate but which was listed as thirty-nine *ounces* (1,105.63 grams). This amount could not be proven, but impermissibly was

assigned to Mr. Carter, despite not being accounted for in his plea agreement. *See JA:* 10, 175-176.

Finally, the Appellant argues that his trial counsel's failure to object to the Government's archaic conversion methods was, both facially and impactfully, ineffective assistance. The record clearly reflects this failure to object, and, therefore, the Fourth Circuit Court of Appeals erred in stating otherwise. *See JA:* 17.

The lower court in this case sweepingly decided that "Mr. Carter's claims fall squarely within the scope of his valid appeal waiver, foreclosing review," and also that a claim for ineffective assistance of counsel based upon the failure of Mr. Carter's trial counsel to object to the prejudicial weight conversions – the very basis for his appeal – is not established by the record. *JA:* 29.

The Fourth Circuit Court of Appeals noted in its opinion that Mr. Carter has not challenged his plea agreement. *Id.* That is true. Mr. Carter's appeal is not based upon his plea agreement,[2] but on the Government's – through the Probation Office – conduct following the trial court's acceptance of said plea agreement in its use of outmoded equivalency calculations which unfairly prescribes a much higher conversion ratio to cocaine-base ("crack") than it does ordinary, powder cocaine.[3]

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[2] Which, notably, is entirely devoid of any language suggesting calculations of drug weight equivalencies. *See JA:* 10.

[3] It needs noted that cocaine and "crack" cocaine-base are molecularly identical, *See United States v. Davis*, 864 F. Supp. 1303 (N.D. Ga. 1994), and "have the same physiological and psychotropic effects." *See Kimbrough v. United States*, 552 U.S. 85, 85, 128 S. Ct. 558, 560, 169 L. Ed. 2d 481 (2007).

It is for this reason that the lower court's dismissal of the Appellant's appeal should be reviewed by this Court. The lower court's contention that a valid appellate waiver exists simply reveals the commonplace and overly routine nature of appellate waivers. The repeat use of these waivers does not obviate the need to examine the fairness and legality of impacting provisions on a case-by-case basis. To the contrary, the volume and typicality of boilerplate appellate waiver provisions designed to prohibit criminal defendants of any chance for appellate review should only serve to direct close scrutiny to a waiver's individual effect.

The right to appeal a federal sentence is found in statutory authority that provides "…an otherwise final sentence" is subject to appeal if it was imposed in violation of law, or "…as a result of an incorrect application of the sentencing guidelines," or "…was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." 18 U.S.C. § 3742. Notably, the Fourth Circuit Court of Appeals, which held that all of the Appellant's claims were within the scope of the appellate waiver, has interpreted the statutory protection to be enforceable, even in the face of explicit waiver of the right to direct and collateral appeal in written plea agreements. *United States v. Lemaster*, 403 F.3d 216 (4th Cir. 2005); *United States v. Broughton-Jones*, 71 F.3d 1143 (4th Cir. 1995) (emphasis added).

Mr. Carter should have his appeal heard on its merits. Repeated and indiscriminate acceptance of appellate waivers, especially when the Appellant's appeal is based not upon the actual plea agreement, but the subsequent report of

the Probation Office, improperly deprives appellate courts of the opportunity to maintain constitutional validity, reasonableness, and consistency in the plea agreement process. Even worse, the repeated use of appellate waivers virtually guarantees the inevitable insulation of unconstitutional sentencing and potentially unfair plea agreements.

The right of appeal from federal sentencing, although not specified in the United States Constitution, is protected by Constitutional safeguards. The lower court, which held that all of the Appellant's issues on appeal – including those which implicated racially prejudicial treatment – has held that agreeing to waive appellate review of a sentence is implicitly conditioned on the presumption that proceedings will be conducted in accordance with Constitutional limitations. *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992). Indeed, this must be regarded with the utmost scrutiny in regard to potentially racially prejudicial factors.

This Court has already held that lower courts are empowered to deviate from the federal sentencing guidelines which impose draconian terms of months to those convicted of offenses involving cocaine-base versus those convicted of offenses involving cocaine powder. *See Kimbrough v. United States*, 552 U.S. 85, 85, 128; *see also Spears v. United States*, 555 U.S. 261, 268, 129 S. Ct. 840, 845, 172 L. Ed. 2d 596 (2009). The time is ripe for this Court take the next logical step, and review the question as to whether the disparity in sentencing between the two identical controlled substances is *per se* violative of a Defendant's rights. To do so, this Court must first analyze the question of whether an appeal based upon the Probation

Office's report between such times as the trial court accepts a defendant's guilty plea and sentencing is precluded by an appellate review waiver agreed to in the defendant's plea agreement, despite the fact that the Probation Office's report cannot be anticipated at such time that the Defendant is contemplating accepting a plea offer.

The lower court also erred in its finding of a valid appellate waiver under which all of the Appellant's claims fell because the Government, through the United States Probation Office, ascribed to the Appellant factors which could not be evidenced. In *Blakely v. Washington*, 542 U.S. 296, 312, 124 S.Ct. 2531, 2542 (2004). This Court was concerned with the issue that a defendant's sentence would be grounded "… not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong…." Appellant was never proven to be associated with the quantities the government alleged, yet the trial settled upon this quantity. *JA:* 176.

Just as prejudicial was the Government's assignment of the Appellant as serving in a managerial or supervisory role of the drug trafficking organization. Appellant's role in the organization was mischaracterized by the Appellee primarily based on circumstantial evidence. The combination of these factors resulted in Mr. Carter's offense level being calculated at a higher value. Enforcing the Plea Agreement's appellate waiver under these circumstances would result in exactly the

type of injustice that *United States v. Johnson* intended to avoid. *United States v. Johnson*, 410 F.3d 410 F.3d 137, 151 (4th Cir. 2005).

Thus, Mr. Carter should not be deprived of the opportunity for an appellate court to review his appeal on its merits to ensure validity, reasonableness, and fairness in his Plea Agreement process.

Regarding the Appellant's ineffective assistance of counsel claim, which the lower court explicitly stated was not subject to the appellate waiver, *JA:* 29, the Appellant was denied effective assistance of competent counsel in accord with the standards in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Appellant maintains that his retained trial counsel provided him with ineffective assistance of counsel during the most crucial points of his case. Specifically, the Appellant's trial counsel made no specific objection to the Government's use of prejudicial, antiquated, biased drug weight attributions regarding the difference between cocaine base and powder cocaine. This Court has long recognized a constitutional right to effective assistance of counsel at trial. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). An appellate court may hear a claim for ineffective assistance of counsel "if and only if it conclusively appears from the record that his counsel did not provide effective assistance." *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998).

To establish a Sixth Amendment claim for ineffective assistance of counsel, a defendant must show (1) objectively unreasonable performance and (2) prejudice stemming from that performance. *See Strickland v. Washington*, 466 U.S. 668, 687–688 (1984). The first prong of the Strickland test relates to professional competence and the defendant must be shown that the counsel's representation fell below "an objective standard of reasonableness." *Id.* at 687-691. To satisfy the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

It is objectively unreasonable for a zealous advocate to not object to the Government's attribution of drug weights based upon prejudicial guidelines which resulted in the Appellant's sentence being years higher than it otherwise should have been. Likewise, it is reasonably probable that, had his counsel duly objected to the District Court, the Appellant's sentence would not have been as high as it was.

Therefore, the District Court erred in accepting the Government's prejudicial drug weight conversion, and the Fourth Circuit Court of Appeals erred in affirming that decision, and because his retained counsel acted objectively unreasonable, absent these failures, the result would have been different. *Strickland v. Washington*, 466 U.S. 668.

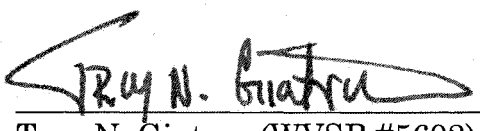
## CONCLUSION

The Petitioner respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

Rashaun Carter, Petitioner

By Counsel of Record:



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January 31, 2020