

No. 20-\_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JOSEPH D. ROUSE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

Does the express language of 21 U.S.C. § 851 requiring prior written notice of the particular conviction the government seeks to use to enhance a mandatory minimum sentence grant the government an implicit right to change the particular conviction post-plea and without the defendant's consent

Is appellate review of the above question precluded by an appeal waiver which exclusively provides "the defendant retains the right to appeal a sentence imposed above the sentencing guideline range determined by the Court or above any mandatory minimum sentence deemed applicable by the Court, whichever is greater"

## **PARTIES TO THE PROCEEDINGS**

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

## **RELATED CASES**

(1) *United States v. Joseph D. Rouse*, No. 3:18-cr-36, District Court for the Eastern District of Tennessee. Judgment entered April 9, 2019. When referring to the record in the District Court, Mr. Rouse will use the following format (Document Name, Document Number)

(2) *United States v. Joseph D. Rouse*, No. 19-5400, U.S. Court of Appeals for the Sixth Circuit. Order entered January 31, 2020. When referring to the record in the Sixth Circuit Court of Appeals, Mr. Rouse will use the following format (19-5400, Document Name, Document Number)

## **DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to Supreme Court Rule 29.6, Joseph Rouse makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

No

2. Is there a publicly owned corporation, not a party to the appeal that has a financial interest in the outcome? No

s/ Wesley D. Stone  
Wesley D. Stone

June 4, 2020  
Date

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**PETITION FOR WRIT OF CERTIORARI**

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Joseph Rouse respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Sixth Circuit dismissing his appeal regarding the government's post-plea and unilateral substitution of the particular conviction it intended to rely upon to increase Mr. Rouse's mandatory minimum sentence from ten (10) years to fifteen (15) years.

**OPINIONS BELOW**

The unpublished order of the United States Court of Appeals for the Sixth Circuit appears at pages 33a to 34a of the Appendix to this petition. The district court's unpublished Order *denying and overruling* Mr. Rouse's objection to the district court's use of a post-plea substituted prior felony conviction pursuant to 21

U.S.C. § 851 appear along with the accompanying order at pages 23a to 24a of the appendix to this petition.

### **JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Sixth Circuit Court of Appeals' order granting the government's motion to dismiss Mr. Rouse's appeal was filed on January 31, 2020. Pet. App. 33a-35a. On March 19, 2020, and in light of the global COVID-19 pandemic, this Court entered an Order extending the deadline to file any petition for certiorari 150 days. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the March 19, 2020 Order.

### **STATUTORY PROVISION INVOLVED**

21 U.S.C. Section 851 provides

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or *before entry of a plea of guilty*, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C.A. § 851(a)(1)(emphasis added).

### **STATEMENT OF THE CASE**

Joseph Rouse is serving an enhanced fifteen-year mandatory minimum controlled substance sentence based upon the government's untimely reliance upon

a post-plea conviction not included in the government's timely 851 Notice. Mr. Rouse's guilty plea and the timely filed 851 Notice referenced a promoting the manufacture of methamphetamine conviction. After changing his plea to guilty based upon the promoting the manufacture of methamphetamine conviction, the government unilaterally substituted an entirely different conviction from the promoting conviction, to-wit, felony possession of a Schedule II controlled substance. Over Mr. Rouse's objection, the District Court applied the post-plea substituted conviction and enhanced Mr. Rouse's mandatory minimum sentence from ten years to fifteen years. Mr. Rouse excepted from the application of the untimely reliance upon the enhancing prior felony conviction.

The questions contained within this petition are extremely important. Their resolution would uphold the rule of law by requiring the government's adherence to 21 U.S.C. § 851's simple notice requirements. The misapplication of the temporal notice provision contained in 21 U.S.C. § 851 should survive an appeal waiver because such deviation cannot be considered within its scope.

#### **A. Legal background**

A defendant charged with a controlled substance offense under 21 U.S.C. § 841(a) faces a mandatory minimum sentence of incarceration of ten (10) years. 21 U.S.C. § 841(b). In the event the defendant has one or more prior serious drug felony convictions, the defendant is subject to an enhanced mandatory minimum sentence of fifteen (15) years. 21 U.S.C. § 841(b). However, a District Court may only enhance the mandatory minimum sentence to fifteen (15) years if the government's adherence

to 21 U.S.C. § 851 is strictly complied with. *United States v. LaBonte*, 520 U.S. 751 (1997). 21 U.S.C. 851 requires the government, before trial or change of plea, to give the defendant written notice of the particular conviction(s) it intends to rely upon to invoke the increased mandatory minimum sentence. 21 U.S.C. § 851(a). This requirement is mandatory and must occur before the trial or before a guilty plea is entered. Section 851 does not permit the substitution of conviction(s) post-trial or post-change of plea.

This Court has not addressed the propriety of a District Court's reliance upon an untimely and unilaterally substituted conviction in support of the government's desire to enhance a defendant's mandatory minimum sentence. In addition, this Court has not addressed the effect such reliance has on an appeal waiver.

## **B. Proceedings below**

Prior to the First Step Act and on October 2, 2018 the parties filed a Plea Agreement. Pet. App. 3a-11a. The Plea Agreement provided, in part, “[t]he defendant further admits that he was convicted of the felony offense of promotion of meth manufacture in the Criminal/Circuit Court of Claiborne County, Tennessee, in Case No. 13,397 on January 22, 2008.” Id. Mr. Rouse pled guilty to conspiring to distribute 500 grams but less than 1.5 kilograms of actual methamphetamine. (PSR, R. 504). Therefore, absent an enhancement under 21 U.S.C. § 851, Mr. Rouse's mandatory minimum sentence would be ten (10) years. 18 U.S.C. § 841(b). The presentence investigation report disclosed that Mr. Rouse's advisory guidelines range was 151 months to 188 months. (PSR, R. 504). The plea agreement provided that he

was subject to a mandatory minimum sentence of twenty years up to life. Pet. App. 3a-11a. The Presentence Investigation Report provided that Mr. Rouse was subject to a mandatory minimum sentence of fifteen (15) years.<sup>1</sup> (PSR, R. 504).

Prior to the First Step Act and on October 2, 2018, the Government filed an Information Filed by United States Attorney To Establish Prior (hereinafter referred to as "Information"). 1a-2a. In this Information the Government relied upon the prior conviction referenced in Mr. Rouse's Plea Agreement, to-wit, "on January 22, 2008 in the Criminal/Circuit of Claiborne County, Tennessee, in Case No. 13,397, the defendant, Joseph Douglas Rouse, was convicted of the felony offense of promotion of meth manufacture, in violation of T.C.A. §39-17-433." Id. The government also filed the plea agreement referencing the same conviction. Pet. App. 3a-11a.

On November 27, 2018, Mr. Rouse appeared for his change of plea and pled guilty. (Minute Entry, R. 269). The matter was scheduled for sentencing on April 4, 2019 at 10:00 a.m. (Minute Entry, R. 269).

After Congress passed the First Step Act and on January 15, 2019, the Government filed an Amended Information Filed by United States Attorney to Establish Prior Conviction after Mr. Rouse entered his guilty plea and before sentencing (hereinafter referred to as "Amended Information"). Pet. App. 12a-13a. In the Amended Information, the Government alleged as follows:

On October 2, 2018, the United States filed an Information To Establish a Prior Conviction pursuant to Title 21 U.S.C. §851(a)(1). (R. 215). In that document, the United States cited to the defendant's 2008 conviction Case No. 13397. The United States hereby *substitutes* the

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<sup>1</sup> The PSR was filed after Congress passed the First Step Act.

following conviction in support of the Information: On April 21, 2006, in the Criminal/Circuit Court of Claiborne County, Tennessee, in Case No. 12-886, the defendant, Joseph D. Rouse, was convicted of the felony offense of possession of Schedule II (Meth), in violation of T.C.A. §39-17-417. *Id.* (emphasis added).

On February 11, 2019, Mr. Rouse filed a “Motion to Strike Amended Information filed by United States Attorney to Establish Prior Conviction. Pet. App. 14a-19a. The Government filed a Response to Mr. Rouse’s Motion on February 25, 2019. Pet. App. 20a-22a.

On April 9, 2019, the District Court entered a Judgment as to Mr. Rouse and sentenced him to 178 months and five (5) days imprisonment followed by ten (10) years supervised release.<sup>2</sup> Pet. App. 25a-31a. The District Court relied upon the untimely and substituted conviction contained in the Amended Information to increase Mr. Rouse’s mandatory minimum sentence from ten years to fifteen years. *Id.*

Mr. Rouse appealed this decision to the Sixth Circuit Court of Appeals. Pet. App. 32a. The Sixth Circuit concluded that Mr. Rouse’s appeal waiver precluded its consideration of his case and granted the government’s motion to dismiss. Pet. App. 33a-34a.

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<sup>2</sup> The District Court imposed a sentence of fifteen (15) years – the mandatory minimum sentence but adjusted it for the 55 days Mr. Rouse had already served.

## **REASONS FOR GRANTING THE PETITION**

- I. **This Court should resolve the important question of law of whether 21 U.S.C. § 851 provides the government an implied right to change the particular conviction upon which it will rely after a defendant enters a guilty plea**

21 U.S.C. § 851 does not contain express statutory authority that allows the government to change the particular conviction it will rely upon to seek an increased mandatory minimum sentence after a defendant enters a guilty plea. To the contrary, Section 851's language provides that the government must provide written notice of the prior felony conviction it intends to rely upon and that notice must occur before entry of a guilty plea. In addition, the government does not have an implicit right to unilaterally, and without the consent of the defendant, to change the particular conviction it will rely upon after a defendant enters a guilty plea. This Court has held that other provisions of 21 U.S.C. § 851 should be interpreted according its express language.

In *Custis v. United States*, this Court considered whether a defendant could collaterally attack a prior state court conviction the government intended to use to enhance a sentence under the Armed Career Criminal Act. *Custis v. United States*, 511 U.S. 485 (1994). In *Custis*, Mr. Custis attempted to collaterally attack the constitutionality of his state court convictions in order to avoid application of 18 U.S.C. § 924(e) to enhance his federal sentence. *Id.* This Court concluded that Congress had not included any express language in the statute that would allow a defendant to collaterally attack his sentence. *Id.* at 490-491. In determining whether an implicit right to collaterally challenge state court convictions in 18 U.S.C. § 924(e)

proceedings, this Court concluded that no such implied right existed. *Id.* at 491. In addressing *Custis*'s implied-right assertion and noting § 924(e)'s absence of "specific statutory authorization", this Court reviewed other sentencing enhancement statutes containing the express right to collaterally attack prior convictions; 21 U.S.C. § 851. *Id.* at 491-492.

In *Custis*, this Court noted the specific statutory authorization to collaterally attack prior convictions contained within 21 U.S.C. § 851(c) and concluded that "Congress' passage of other related statutes [] expressly permit repeat offenders to challenge prior convictions..." and that "the language of 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, *it knew how to do so.*" *Id.* 492. (emphasis added). Finding Congress omitted similar language from 924(e), it likewise did not intend to give defendants in Section 924 matters the implicit ability to collaterally attack their prior convictions. *Id.*

21 U.S.C. § 851(a) likewise does not have an express provision allowing what has occurred in this case; post-plea reliance upon a substituted conviction not contained in either the plea agreement or the timely filed 851 Notice. As in *Custis*, if Congress intended for the government to have this express right, "it knew how to do so." Therefore, the right to rely upon an untimely and substituted conviction can only be implicitly found and applied.

In the District Court, the government averred it had an implicit right to substitute, post-plea, a different conviction than relied upon in its otherwise timely

851 Notice. Pet. App. 20a-22a. In its Response, the government averred that to hold it strictly to the letter of 21 U.S.C. § 851(a) would elevate form over substance. Id. The authorities relied upon by the government seeking this implicit right are inapposite to Mr. Rouse's facts. (19-5400, Rouse Brief, Doc. 14, pp. 17-27).

All of the cases relied upon by the government involved the use of the same conviction and not a substituted conviction. Id. All of the cases relied upon by the government involved supplementing the original notice with additional or corrected information. (*United States v. Layne*, 192 F.3d 556 (6th Cir. 1999))(supplementing the original convictions with corrected information is sufficient for the "particular conviction" requirement of § 851); *United States v. Kevin King*, 127 F.3d 483 (6th Cir. 1997)(untimely correcting the date of conviction regarding the original conviction relied upon is a clerical mistake contemplated by § 851); *United States v. Kelsor*, 665 F.3d 684 (6th Cir. 2011)(incorrect date of prior felony conviction is a clerical mistake contemplated by § 851(a)(1) particularly in light of the defendant acknowledging the conviction during the change of plea); *U.S. v. Boudreau*, 564 F.3d 431 (6th Cir. 2009)(quantum of proof needed to establish actual notice of prior felony conviction that was ultimately used to enhance sentence can be established by circumstantial evidence); *U.S. v. Pritchett*, 496 F.3d 537 (6th Cir. 2007)(having the same prior felony conviction used to enhance the sentence is sufficient when the defendant agrees to its application during a change of plea despite its related Notice being filed one and one-half hours later).

21 U.S.C. § 851 does not contain an express provision allowing the government

to change the particular conviction it will rely upon once a defendant enters a guilty plea. In addition, 21 U.S.C. § 851 does not provide the government with an implied right to change the particular conviction it intends to rely upon once a defendant enters a guilty plea. As a result, this Court should grant Mr. Rouse's petition for a writ of certiorari.

**II. Unilateral post-plea substitutions of enhancing convictions was not contemplated in the plea agreement and is not contemplated within the scope of the appeal waiver**

The government's untimely reliance upon the substituted prior felony conviction after Mr. Rouse entered his guilty plea, and the District Court's application of the substituted prior felony conviction, are outside the scope of the appeal waiver.

“[N]o appeal waiver serves as an absolute bar to all appellate claims.” *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019). “[A] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope. *Id.* (quoting, *United States v. Hardman*, 778 F.3d 896, 899 11th Cir. 2014). “...Plea bargains are essentially contracts.” *Garza v. Idaho*, 138 S.Ct. 738, 744 (2019). “[T]he language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived.” *Id.* The term ‘appeal waivers’ “can misleadingly suggest a monolithic end to all appellate rights.” *Id.* “A defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court.” *United States v. Freeman*, 640 F.3d 180, 193–94 (6th Cir. 2011) (*citing United States v. Caruthers*, 458 F.3d 459, 471–72 (6th Cir.2006)).

Mr. Rouse recognizes that a subsequent change in the law, even a beneficial one, does not render the appeal waiver unknowing and involuntary. However, the issue asserted in his Brief (Document 14) is not limited to a change in the law. While it is true that the First Step Act of 2018 was enacted after Mr. Rouse changed his plea, the government's action of substituting a post-plea conviction not contained in Mr. Rouse's guilty plea must also be examined to determine the voluntariness and knowing components of his guilty plea.

His guilty plea and original information filed on the same date was limited to his promoting the manufacture of methamphetamine conviction on January 22, 2008 in the Claiborne County Criminal Court, Docket Number 13,397. When he changed his plea on November 27, 2018, Mr. Rouse acknowledged that conviction. No other conviction was referenced during his change of plea. The effect of the enactment of the First Step Act was to nullify the conviction contained in both the timey filed 851 Notice and contained within Mr. Rouse's plea agreement. In the Sixth Circuit, the government acknowledged this in its Motion<sup>3</sup> when it asserted "[s]pecifically, Congress changed the types of prior convictions that would trigger an enhancement . . ." and "[t]he United States then filed an amended notice of its intent to enhance defendant's sentence, listing a different prior felony conviction to satisfy the *new* requirements interposed by Congress." (19-5400, Document 22, Motion to Dismiss Appeal, P. 2). While Mr. Rouse understands that the law is dynamic and subject to change, the die was cast when he entered his guilty plea based upon the conviction

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<sup>3</sup> Government's Motion to Dismiss Appeal, R. 22.

referenced in his guilty plea and originally filed 851 Information. Asserting that he knew or should have known that the government would substitute a different conviction after its time to do so had expired under 21 U.S.C. § 851 is the antithesis of a knowing and voluntary waiver of his right to appeal such action.<sup>4</sup> As a result, Mr. Rouse asserts that he did not knowingly and voluntarily waive his right to appeal the government's post-plea amendment of its original and timely filed 851 Information by substituting a different conviction after the new law took effect.

In summation, the appeal waiver in this case does not include within its scope an implied right in the government to substitute a particular conviction in an untimely 851 Notice after the defendant has entered his plea.

**III. This case presents an excellent opportunity for this Court to enforce the express requirements contained within 21 U.S.C. § 851(a) and thereby avoid future miscarriages of justice occurring upon successful enforcement of appeal waivers in such circumstances**

In *Garza v. Idaho*, 139 S.Ct. 738 (2019) this Court quoted with approval the Eleventh Circuit's opinion in *United States v. Hardman*, 778 F.3d 896 (11th Cir. 2014). *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019). In *Hardman*, the circuit court addressed whether a defendant's appeal waiver regarding his sentence included within its scope a district court's decision regarding a post-sentence Rule 35(b) motion. *United States v. Hardman*, 778 F.3d 896 (11th Cir. 2014). Concluding that to apply the appeal waiver to Rule 35 motion for a reduction of sentence, the Eleventh

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<sup>4</sup> In denying Mr. Rouse's Motion to Strike the amended information filed after he entered his guilty plea, the District Court commented that "[a]lthough defendant's reading of [21 U.S.C. § 851] appears to be correct \* \* \*" substance over form controls. (R. 525, Order, PageID# 4754).

Circuit opined that it would have to “eschew . . . a rigidly literal approach in the construction of the language”; particularly the term ‘sentence.’ Id. at 900 & 901.

In *Hardman*, the Eleventh Circuit first looked to whether the appeal waiver included any reference to a Rule 35 modification. Id. at 901. Finding no express language including a Rule 35 modification motion in the appeal waiver relating to the term ‘sentence’, the Eleventh Circuit reviewed Rule 35 and concluded that post-plea modifications pursuant to Rule 35 were not included in the appeal waiver relating to the term ‘sentence’. Id. Therefore, the Eleventh Circuit denied the government’s motion to dismiss Mr. Hardman’s appeal regarding his Rule 35 motion. Id. at 903.

In the instant case, Mr. Rouse’s appeal waiver does reference the term ‘sentence’. However, it does not expressly include the government’s right to substitute an entirely different conviction as an enhancing conviction under Section 851 after Mr. Rouse entered his guilty plea. Although Mr. Rouse and the government could have bound themselves to an appeal waiver that would include such post-plea substitutions, they did not. See, *United States v. Hardman*, 778 F.3d 896, 903 (11th Cir. 2014)(suggesting that “nothing prevents parties from binding themselves to appeal waivers that would cover Rule 35 modifications”). Like *Hardman*, holding that Mr. Rouse’s appeal waiver included a post-plea substitution of the particular conviction the government and the district court ultimately relied upon would “eschew . . . a rigidly literal approach in the construction of the language.” Id. at 901.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.



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