NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

Shane Anthony Roberts - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Whether the Court of Appeals improperly denied Mr. Roberts of the statutory right to appeal his 70-month sentence by summarily granting a government motion to dismiss, where his plea agreement stated that both parties waive the right to appeal if the court "imposes the [87-month] sentence recommended by the parties," but preserve the right to appeal if the court "does not impose the [87-month] sentence recommended by the parties".

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The petitioner, Shane Anthony Roberts, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 19-3600, entered on April 21, 2020. Mr. Roberts' petitions for panel and en banc rehearing were denied on May 26, 2020.

OPINION BELOW

On April 21, 2020, a panel of the Eighth Circuit Court of Appeals summarily granted a government motion to dismiss Mr. Roberts' appeal of his sentence as barred by an appeal waiver. Eighth Cir. Case No. 19-3600, Entry ID: 4904970.

JURISDICTION

The Court of Appeals entered its judgment on April 21, 2020, and denied Mr. Roberts' petition for panel or en banc rehearing on May 26, 2020. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3742. Review of a sentence.

> **(a) Appeal by a defendant.–**A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . .
>
> > **(2)** was imposed as a result of an incorrect application of the sentencing guidelines . . .
>
> **(e) Consideration.–**Upon review of the record, the court of appeals shall determine whether the sentence . .
>
> > (2) was imposed as a result of an incorrect application of the sentencing guidelines . . .
>
> **(f) Decision and disposition**.--If the court of appeals determines that–
>
> > (1) the sentence was . . . imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

28 U.S.C. § 1291 (2020) Final decisions of district courts

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On July 3, 2019, Mr. Roberts pled guilty to a single-count superseding indictment charging him with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2). See DCD 26–29.[1] The United States District Court for the Southern District of Iowa had jurisdiction over the federal criminal case pursuant to 18 U.S.C. § 3231.

In Mr. Roberts' Federal Rule of Criminal Procedure 11(c)(1)(B) plea agreement with the government, the parties agreed to "jointly recommend at the time of sentencing that the Court impose a sentence of 87 months' imprisonment," for Mr. Roberts' § 922(g) offense. DCD 28, p. 6, ¶ 17. Regarding Mr. Roberts' right to appeal his sentence, the plea agreement contained the following waiver:

> If the Court imposes the sentence recommended by the parties, Defendant and the Government also waive any and all rights to appeal Defendant's sentence. If the Court ***does not impose the sentence recommended by the parties***, both Defendant and the United States preserve the right to appeal any sentence imposed by the District Court, to the extent that an appeal is authorized by law.

[1] In this petition, the following abbreviations will be used:
"DCD" - district court clerk's record, followed by docket entry and page number, where noted;
"PSR" - presentence report, followed by the page number of the originating document and paragraph number, where noted;
"Plea Tr." – Plea hearing transcript, followed by page number; and
"Sent. Tr." – Sentencing hearing transcript, followed by page number.

Id. ¶ 25 (emphasis added). When discussing the appellate waiver during the plea colloquy, the Magistrate judge summarized it as follows: "The judge does not have to accept th[e parties' joint] recommendation, but if the judge does accept the recommendation, then you're also giving up your right to appeal the sentence in the case." Plea Tr. p. 10.

At sentencing, the parties disputed whether one of Mr. Roberts' prior state convictions qualified as a "crime of violence" within the meaning of USSG § 4B1.2(a). If the prior offense was not a crime of violence, Mr. Roberts' base offense level under USSG § 2K2.1 was 14, and his advisory guideline sentencing range was 37–46 months. *See* PSR ¶ 114. If the prior state law conviction qualified as a crime of violence, his base offense level was 20 and his guideline sentencing range was 70–87 months. PSR, p. 32. After receiving evidence and hearing competing arguments on the issue, the district court found that the prior state offense qualified as a crime of violence, and adopted the 70–87 month sentencing guideline range. Sent. Tr. pp. 17–18.

The district court did <u>not</u> impose the 87-month sentence jointly recommended by the parties, finding instead that a sentence of 70 months' imprisonment was sufficient but not greater than necessary. Sent. Tr. p. 39. When the government inquired if the court would "impose its sentence of 70 months even if it were not to have found the prior conviction is a crime of violence," the court responded, "No, I would not do that." *Id*. p. 42.

Mr. Roberts filed a timely notice of appeal. DCD 59. On March 9, 2020, the Government filed a Motion to Dismiss the appeal, arguing that it was barred by a valid and enforceable appellate waiver in the plea agreement. 8th Cir. Entry ID: 4889210. Mr. Roberts resisted the motion (*Id*., Entry ID: 4904215), but on April 21, 2020, a panel of the Eighth Circuit Court of Appeals entered a Judgment granting the government's motion to dismiss. The decision contained no analysis, stating simply that the "motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed." *Id*. Entry ID: 4904970. Mr. Roberts' timely-filed requests for panel or en banc rehearing were denied on May 26, 2020. *Id*. Entry ID: 4916327.

REASONS FOR GRANTING THE WRIT

In his plea agreement with the government, Mr. Roberts waived the right to appeal his sentence "[i]f the Court imposes the sentence recommended by the parties." He "preserve[d] the right to appeal" his sentence "[i]f the Court does not impose the sentence recommended by the parties." Although the district court did not impose the 87-month sentence recommended by the parties, the Court of Appeals nonetheless summarily dismissed Mr. Roberts' appeal, pursuant to a government motion to enforce the appeal waiver.

Certiorari is warranted because Mr. Roberts' appeal of his sentence in this case is not only not barred by the appeal waiver; it is expressly authorized. With respect, the Court of Appeals' decision dismissing the case is so obviously erroneous that it departs from the accepted and usual course of judicial proceedings and requires an exercise of this Court's supervisory power. S.C. Rule 10(a). As well, the decision conflicts with relevant decisions of this Court, most notably *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019), wherein the Court observed that a "valid and enforceable appeal waiver . . . *only* precludes challenges that fall within its scope." S.C. Rule 10(c).

If the Court does not grant certiorari, Mr. Roberts will be improperly deprived of his absolute right to appeal the district court's incorrect and non-harmless application of the United States Sentencing Guidelines. Although this right to appeal is statutory under 18 U.S.C. § 3742(a)(2), the Court should act with the same vigor to protect it in this case as it has on numerous occasions in the past.

See, e.g., *Garza*, 139 S. Ct. 738 (2019) (finding counsel's failure to file an appeal presumptively prejudicial, regardless of whether the appeal had merit or might be subject to dismissal based on an appeal waiver); *Stutson v. United States*, 516 U.S. 193 (1996) (remanding where Court of Appeals may have mistakenly believed appeal was not timely filed); *Church of Scientology of California v. United States*, 506 U.S. 9 (1992) (remanding where appeal improperly dismissed as moot); *Dennett v. Hogan*, 414 U.S. 12 (1973) (remanding where dismissal may have resulted from a factual error by the Court of Appeals); *People v. Wilson*, 318 U.S. 688 (1943) (remanding to reconsider dismissal of appeal in light of a recent potentially controlling state law decision).

A. *The appeal does not fall within the scope of the appeal waiver.*

"That an appeal waiver does not bar claims outside its scope follows from the fact that, '[a]lthough the analogy may not hold in all respects, plea bargains are essentially contracts.'" *Garza*, 139 S. Ct. at 744 (quoting *Puckett v. United States*, 556 U.S. 129, 137 (2009)). As such, they are generally governed by ordinary principles of contract interpretation. *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996). Unless it is ambiguous, the "plain language" of a plea agreement waiver governs. *United States v. Guice*, 925 F.3d 990, 992 (8th Cir. 2019).

Here, the plain language of Mr. Roberts' appeal waiver expressly *authorizes* the instant appeal. It states: "If the Court does not impose the sentence

recommended by the parties, both Defendant and the United States preserve the right to appeal any sentence imposed by the District Court, to the extent that an appeal is authorized by law." DCD 28, p. 8, ¶ 25 (emphasis added). The "sentence recommended by the parties" was 87 months. *Id*., p. 6, ¶ 17. The sentence "imposed" by the district court was 70 months. DCD 53. The district court, therefore, "d[id] not impose the [87 month] sentence recommended by the parties." There is no ambiguity and the analysis is clear. The government did not, and cannot, satisfy its burden to prove that the instant appeal falls within the scope of the appeal waiver. The Court of Appeals' conclusion to the contrary is flatly incorrect and must be corrected in the interests of justice.

Presumably, the government *meant* to permit Mr. Roberts to appeal only if the court imposed a sentence above 87 months, and preserve for itself the option to appeal if the court imposed a sentence below 87 months. The plain language of the waiver, however, is subject to only one reasonable interpretation: that *neither party* could appeal if the court imposed an 87 month sentence, and that *both parties* could appeal if the court imposed a sentence *other than* 87 months. If the government wanted to prohibit Mr. Roberts from appealing if the court imposed a sentence of "87 months *or less*," it should have written the plea agreement to so provide. *See United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc) (holding that appellate waivers are "to be applied narrowly and construed strictly against the Government" (quotation marks and citation omitted)). It did not, and is bound by

the language it drafted. Mr. Roberts must be allowed to exercise his 18 U.S.C. § 3742 right to appeal.

B. *It is irrelevant whether Mr. Roberts will ultimately prevail on appeal.*

The fact that Mr. Roberts actually received a lower sentence than the one he jointly requested with the government is completely irrelevant, even if that fact alone might lead a court of appeals to affirm his sentence after a fully-litigated appeal. The government's motion to dismiss *only* required the Court of Appeals to determine whether the language of the appeal waiver in the plea agreement barred Mr. Roberts from asserting an appeal in the first place. Mr. Roberts bore no burden at all to show that he would ultimately prevail on appeal, or even that his appellate arguments had merit. *See, e.g.*, *Garza*, 139 S. Ct. at 747 (finding that where a defendant was prevented from taking an appeal, prejudice is presumed "with no further showing from the defendant of the merits of his underlying claim").

CONCLUSION

For the foregoing reasons, Mr. Roberts respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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