NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

RANDALL ALLEN EPLION, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

Whether a provision in a plea agreement which bars the defendant from appealing "the right to seek appellate review of . . . any sentence of imprisonment . . . on any ground whatsoever" can be knowingly entered into well before the sentence has been imposed and the right to appeal has accrued.

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- *United States v. Eplion*, No. 3:19-cr-00117-1, U.S. District Court for the Southern District of West Virginia. Judgment entered January 7, 2020.
- *United States v. Eplion*, No. 20-4060, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on June 16, 2020.

V. OPINIONS BELOW

The order of the United States Court of Appeals for the Fourth Circuit granting the Government's motion to dismiss Eplion's appeal is an unpublished order and is attached to this Petition as Appendix A. The district court addressed issue Eplion sought to raise in his appeal at sentencing. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The judgement order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on June 16, 2020. No petition for rehearing was filed. This Petition is filed within 150 days of the date the court's judgment, pursuant to this Court's order of March 19, 2020. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of 18 U.S.C. § 3742, which says, in pertinent part:

> **(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 –

> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
>
> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
>
> (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

This case also requires interpretation and application of Rule 11(b)(1) of the Federal Rules of Criminal Procedure, which provides, in pertinent part:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> * * *
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On April 23, 2019, an indictment was returned in the Southern District of West Virginia charging Randall Allen Eplion, Jr. ("Eplion") with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count One); possession of a stolen firearm, in violation of 18 U.S.C. §§ 922(j) and 924(a)(2) (Count Two); possession of an unregistered machinegun, in violation of 26 U.S.C. §§ 5861(d) and 5871 (Count Three); and possession of an unregistered short-barreled shotgun, also in violation of 26 U.S.C. §§ 5861(d) and 5871 (Count Four). J.A. 7-12.[1] Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Eplion pleaded guilty to Count One of the indictment. J.A. 57-59. A Judgment and Commitment Order was entered on January 7, 2020. J.A. 79-85. Eplion filed a timely notice of appeal on January 17, 2020. J.A. 86. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from the theft of a firearm from a police officer and the eventual sale of that firearm to Eplion. After being convicted for being a felon in possession of a firearm, Eplion was sentenced to 114 months in prison. His appeal

[1] "J.A." refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

was dismissed by the Fourth Circuit, at the Government's request, due to a provision in his plea agreement waiving almost all of his appellate rights. Whether such waivers are valid is the issue presented in this Petition.

1. A firearm is stolen and eventually sold to Eplion, who is a convicted felon.

In March 2019, a Huntington (West Virginia) police officer allowed his weapon, an automatic M4 Colt Commando rifle, to be stolen. Investigation eventually led to Eplion, who had purchased the rifle from another man (who had, in turn, purchased it from the man who had stolen it in the first place) for $200 and a small amount of methamphetamine. J.A. 90. As a result, investigators executed a search warrant at Eplion's home, where they recovered the rifle along with 20 other firearms and an "[i]mprovised explosive device." J.A 91-94.

Eplion was charged with four counts related to the possession of firearms, including being a felon in possession of a firearm, based on a prior West Virginia conviction for robbery. J.A. 7-12. He entered into a plea agreement with the Government in which he agreed to plead guilty to that charge, while the other charges in the indictment would be dismissed. J.A. 47-48. The plea agreement also contained a provision in which the parties waived particular appellate rights. As relevant to this Petition, Eplion agreed to waive "the right to seek appellate review of . . . any sentence of imprisonment . . . on any ground whatsoever." J.A. 51.

Following Eplion's guilty plea, a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 87-110. The probation

officer recommended that Eplion's base offense level be 22, based on his prior conviction and the fact that the stolen rifle could accept a large capacity magazine. J.A. 95. The probation officer recommended enhancements for the number of firearms possessed (four levels), because the Colt rifle was stolen (two levels), because another firearm had an obliterated serial number (one level), and because Eplion committed another felony offense while in possession of the firearms (four levels). J.A. 95-96. After a recommended three-level reduction for acceptance of responsibility, Eplion's final recommended offense level was 30. J.A. 96. Combined with a Criminal History Category II, his recommended advisory Guideline range was 108 to 120 months in prison. J.A. 99, 107. Neither party had any objections to those calculations. J.A. 110.

2. Eplion is sentenced to 114 months in prison.

Prior to sentencing, Eplion filed a memorandum arguing for a sentence below the advisory Guideline range. J.A. 111-119. He argued that his history and characteristics supported a variance. In particular, Eplion argued that a 2016 assault had left him with a traumatic brain injury, leaving him fearful of sustaining any further head trauma which, doctors had told him, could be fatal. That fear and anxiety led him to possess firearms for his protection. J.A. 114-115. The memorandum concluded that while the Guideline range accounted for Eplion's offense and his criminal history, it did "not adequately account for [his] difficult upbringing" or "the effect of his traumatic brain injury on his psyche" and a sentence of sixty months was appropriate. J.A. 116-117.

At sentencing the district court adopted the Guideline calculations from the PSR without objection. J.A. 64. Eplion then reiterated his argument for a variance from the advisory Guideline range, adding that while his criminal history included "some violence," it did not involve firearms and it was not "until his traumatic brain injury back in 2016 that he became infatuated with firearms." J.A. 65. Eplion became a "collector of firearms," such that when the search warrant was executed all but one of the firearms were locked in a safe, while the other was close to where Eplion was working on his car. J.A. 66.

The Government argued for a sentence within the advisory Guideline range, noting that "this is a pretty serious offense," calling the number of firearms Eplion possessed "an arsenal." J.A. 67. It also stressed that, in addition to the number of firearms, "there were a couple of explosive devices," one of the firearms "had a filed off serial number," and Eplion was "involved in distributing methamphetamine." J.A. 68. While conceding that Eplion had "a lot of arrests, not a lot of convictions," the Government argued that he "had some issues on parole," which had been revoked, and that when "he got out of prison, this is the kind of conduct that he found himself engaging in." *Ibid.* The Government further argued that the district court should "not really give much weight" to Eplion's brain injury and its impact on his firearm possession, because "the number and types of firearms and his conduct in acquiring the firearms here go well beyond somebody that would simply say, hey, I want to keep a gun around because of this head injury." J.A. 69.

The district court imposed a sentence of 114 months in prison, to be followed by a three-year term of supervised release. J.A. 73-74. The court explained that while it was "undisputed that you suffered a very serious, traumatic brain injury" it did not "see any way that it in any way provides any justification for possessing the number and types of firearms and other gun paraphernalia that you had here." J.A. 72. The court further stated that Eplion "possessed a lot more guns and ammunition than necessary to defend yourself." *Ibid.* While, "I guess to your credit," the district court noted that "most of these guns . . . were locked away" but were "not stationed around the house where some paranoid person might be able to quickly get to a gun to protect himself." *Ibid.* The district court concluded that "I honestly don't believe that you were collecting guns just to protect yourself." J.A. 72-73. The district court also noted that in spite of "having served a very significant prison sentence and . . . just off being on parole for a few years, you started this collection of guns." J.A. 72. Ultimately, the district court concluded that the advisory Guideline range "is consistent with your actual conduct" and was "a fair measure of appropriate punishment, so I'm not going to vary downward." J.A. 73.

3. The Fourth Circuit dismisses Eplion's appeal without reaching the merits of his claim.

Eplion challenged his sentence on appeal. Specifically, he argued that his sentence was substantively unreasonable, in that the 114-month sentence imposed by the district court did not adequately reflect the nature and circumstances of his

background and how it shaped his conduct. Dkt. No. 16 at 6-10.[2] In response to Eplion's brief, the Government filed a motion to dismiss the appeal, citing the appeal waiver provision in Eplion's plea agreement. Dkt. No. 21. The Fourth Circuit granted the motion, concluding that "Eplion knowingly and voluntarily waived his right to appeal and that the issue he seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights." Appendix A at 1.

IX. REASON FOR GRANTING THE WRIT

The Petition should be granted so the Court can determine whether a provision in a plea agreement which bars the defendant from appealing "the right to seek appellate review of . . . any sentence of imprisonment . . . on any ground whatsoever" can be knowingly entered into well before the sentence has been imposed and the right to appeal has accrued.

This Court has recognized that "[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *see also Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)(guilty pleas account for 95% of all criminal convictions). A large percentage of those convictions come about as a result of plea agreements between the prosecution and defense, and "many-if not most-of those plea agreements contain waivers of the defendant's right to appeal." Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 Vt. L. Rev. 149, 150-151 (2003). Although this Court has never addressed the issue

[2] "Dkt. No." refers to the document filed in the appeal before the Fourth Circuit,

directly, the Circuit Courts have agreed that defendants in criminal cases may waive their right to appeal their sentences, if such a waiver is made knowingly and intelligently. *See, e.g.*, *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990); *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir.1993), *cert. denied*, 509 U.S. 931 (1993)("[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement."); *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009)(collecting cases). However, that waiver of a right guaranteed by statute, see 18 U.S.C. § 3742, is given at the guilty plea stage of proceedings, well before any potential sentencing error occurs. Whether a defendant may waive his right to appeal his sentence, well in advance of when that sentence is imposed or even contemplated, is an important question of federal law this Court should resolve. See Rules of the Supreme Court 10(c).

A. Given the importance of guilty pleas, plea agreements, and appeal waivers in modern federal criminal practice, this Court should address the validity of such waivers.

This Court recognized the importance of plea bargains and approved their role in the modern criminal justice system in *Santobello v. New York*, 404 U.S. 257 (1971). If plea bargaining were not appropriate and "every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to

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multiply by many times the number of judges and court facilities." *Id*. at 260; *see also Frye*, 566 U.S. at 144 (to "note the prevalence of plea bargaining is not to criticize it"). Among other benefits, plea bargains lead "to prompt and largely final disposition of most criminal cases." *Santobello*, 404 U.S. at 261. The usefulness of plea bargaining, however, "presuppose[s] fairness in securing agreement between an accused and a prosecutor." *Ibid*. Therefore, the plea must be "be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Id*. at 261-262.

The Fourth Circuit first approved of appellate waivers as part of a plea bargain in *Wiggins*. Wiggins pleaded guilty to obstruction of justice as part of a plea agreement in which he agreed to waive "the right to appeal his sentence on any ground." *Wiggins*, 905 F.3d at 52. Nonetheless, he filed an appeal challenging the district court's decision to deny him credit for acceptance of responsibility at sentencing.[3] The court concluded that he had waived his right to such review. The court first noted that it was "well settled that a defendant may waive his right to go to trial, to confront the witnesses against him, and to claim his Fifth Amendment privilege against self-incrimination" by pleading guilty. *Ibid*. In comparison to those rights based in the Constitution, the "right of direct appeal after judgment on a plea is very limited." *Ibid*. Without any real analysis, the court concluded that it was

[3] As this Court recently held, it is defense counsel's obligation to file an appeal for a defendant if the defendant so request, even if there is an appeal waiver in place. *Garza v. Idaho*, 139 S. Ct. 738 (2019).

"clear that a defendant may waive in a valid plea agreement the right of appeal under 18 U.S.C. § 3742," because as the "court has recognized, '[i]f defendants can waive fundamental constitutional rights . . . surely they are not precluded from waiving procedural rights granted by statute.'" *Id.* at 53, quoting *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989). That logic controls the resolution of appeal waiver cases in the Fourth Circuit. *See United States v. Blick*, 408 F.3d 162 (4th Cir. 2005); Appendix A at 1. It is also the logic adopted by most other Courts of Appeals. *See United States v. Melancon*, 972 F.2d 566, 566-567 (5th Cir. 1992); *United States v. Khattak*, 273 F.3d 557, 560 (3d Cir. 2001); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003)(*en banc*); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

It is axiomatic that a waiver of rights can only be enforceable "if the defendant knowingly and intelligently agreed to it." *United States v. Manigan*, 592 F.3d 621, 627 (4th Cir. 2010). However, the analogy drawn by the Fourth Circuit and other courts between constitutional rights related to trial waived as part of a guilty plea and the preemptive waiver of the right to appeal a sentence is deeply flawed by not recognizing that it is impossible for a defendant to knowingly agree to waive something which does not accrue until some future date. A waiver is an intentional and knowing "relinquishment of a ***known*** right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(emphasis added). As one judge explained, "one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge. In these cases,

the defendant knows what he or she is about to say, or knows the nature of the crime to which he or she pleads guilty." *Melancon*, 972 F.2d at 571 (Parker, J., concurring). The same cannot be said for a person during a guilty plea hearing waiving his right to appeal a sentencing decision to be made weeks, if not months, in the future.

The problems inherent in such an approach are evident from the routine plea hearing conducted by the district court in this case. The Government summarized the plea agreement, including the paragraph with the appellate waiver. J.A. 21. The district court's explanation of the waiver was muddy, at best. After noting that Eplion agreed to waive his right to appeal his "conviction . . . sentence or the manner in which the sentence is determined on any ground whatsoever," the court went on to state that this "type of waiver is usually enforceable," but that Eplion could challenge it on appeal. J.A. 36. While Eplion said he understood that, the district court did not provide any example of what may or may not fall within the waiver if challenged on appeal. Similarly, the district court explained the need to calculate the Guidelines – and that those calculations could not yet be done – and that it was also not bound by those calculations. J.A. 34. At the time of the plea hearing "there has not been a presentence investigation or Presentence Report. Therefore, the trial court cannot be fully apprised of the relevant guideline computations." *United States v. DeFusco*, 949 F.2d 114, 118 (4th Cir. 1991). As a result, "the court is not in the position to inform the defendant of the sentencing range under the Guidelines at the time the plea is entered." *Ibid*. Thus, a defendant

has no right to be advised of the proper Guideline range before entering a guilty plea, nor does he have the right to withdraw the plea later if his lawyer's advice as to the advisory Guideline range was incorrect. *DeFusco*, 949 F.2d at 119; *United States v. Lambey*, 974 F.2d 1389, 1394-1396 (4th Cir. 1992)(*en banc*).

The defendant faces a Catch-22. The right to appeal a sentence arises only when certain specified errors occur when that sentence is imposed. *See* 18 U.S.C. § 3742(a); *United States v. Booker*, 543 U.S. 220, 260-262 (2005). But a waiver of appellate rights as part of a plea agreement occurs long before those errors may occur. That is doubly so in cases like this one where the argument on appeal was the reasonableness of the sentence under *Booker*, an issue which cannot be fathomed until the sentence is actually imposed. A waiver executed in such situations cannot truly be knowing.

In 1999, the Federal Rules of Criminal Procedure were amended to require the district court during a guilty plea hearing to advise the defendant of any provisions of a plea agreement that include a waiver of appellate rights. Fed. R. Crim. P. 11(b)(1)(N). Although some courts have pointed to the adoption of the Rule as support for the propriety of appeal waivers, *see, e.g.*, *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001), the rule makers did not intend to provide such support. In explaining the need for the provision, the Advisory Committee stated that "[a]lthough a number of federal courts have approved the ability of a defendant to enter into such waiver agreement, the Committee takes no position on the

underlying validity of such waivers." Fed. R. Crim. P. 11(b)(1)(N) advisory committee's note to 1999 amendment.

Guilty pleas, and the plea bargains that usually accompany them, are not only a feature of the modern criminal justice system, they have become the defining one. In federal courts, data shows that over 97% of cases that end in conviction do so as the result of guilty pleas. *Frye*, 566 U.S. at 143. Given the prevalence of plea bargaining in modern criminal law, it is essential that defendants know precisely what they are waiving. Therefore, this Court should grant the Petition and provide guidance to the Circuit Courts of Appeals, the Government, and criminal defendants on this issue.

B. This case is an appropriate one to resolve the issue, as Eplion had a legitimate sentencing issue that he was prevented from having the court of appeals resolve on the merits.

In a post-*Booker* advisory system, Circuit Courts review the district court's sentence to determine if it is "unreasonable." *Booker*, 543 U.S. at 261. The reasonableness of a sentence "is not measured simply by whether the sentence falls within the statutory range, but by whether the sentence was guided by the Sentencing Guidelines and by the provisions of § 3553(a)." *United States v. Green*, 436 F.3d 449, 456 (4th Cir. 2006). A sentence is not "unreasonable" simply because the appellate court reviewing it would have imposed a different sentence in that case. *Gall v. United States*, 552 U.S. 38, 51 (2007). With regards to a sentence imposed within the advisory Guideline range, the Fourth Circuit has held that "a

sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" *Green*, 436 F.3d at 456, quoting *United States v. Newsom*, 428 F.3d 685, 687 (7th Cir. 2005); *Rita v. United States*, 551 U.S. 338 (2007)(upholding, but not mandating, the use of the presumption of reasonableness). "At bottom," review for reasonableness requires a determination of "whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law." *Id.* at 457.

The 114-month sentence of imprisonment imposed by the district court in this case is unreasonable because it is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a). Specifically, it is greater than needed "to provide just punishment for the offense." § 3553(a)(2)(A). That is because the advisory Guideline range in this case did not accurately reflect the "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

In this case, the advisory Guideline range adequately represented the sentencing factors the Guideline are designed to quantify – the nature of Eplion's offense and his prior criminal history. However, the Guidelines, by design, do not (and arguably could not) accurately reflect parts of a defendant's history and characteristics beyond those metrics. In particular, nothing in the Guideline calculus is designed to take the motivation for a defendant's conduct into the calculation. In Eplion's case, that leaves the advisory Guideline range much higher

than necessary to produce a sentence that is sufficient, but not greater than necessary, to achieve the purposes of sentencing.

Eplion was not a career criminal returning to a life of crime even after he served lengthy prison terms. He was not a drug dealer returning to the trade and the firearms that so often are tools of it in spite of being punished previously. Instead, he was a frightened man, scarred from a trauma that had nothing to do with his prior convictions. Three years before his arrest in this case, Eplion was the victim of a brutal attack, in which he was beaten "with a table leg" while walking down the street. J.A. 105. As a result of that attack, he was "placed in a medically induced coma and suffered from profound neurological deficits." *Ibid*. He underwent a craniotomy – the "surgical removal of part of the bone from the skull to expose the brain" – in order to deal with the swelling of his brain. *Ibid*. As a result, Eplion now suffers from "memory issues and gran mal seizures" and his "overall brain functions within low average parameters." *Ibid*. The attack, and the resulting trauma, has left Eplion with "fears and anxiety related to potential for any future head trauma" because of "physician warnings that any further head trauma could result in death." *Ibid*.

None of this is to excuse Eplion's conduct or serve as any kind of defense to it. To the extent a person can argue self-defense in cases of a felon in possession of a firearm, the collection of weapons over time does not fit within those parameters. *See United States v. Mooney*, 497 F.3d 397 (4th Cir. 2007). However, it does mitigate Eplion's conduct. Having been attacked on a city street and told that a similar

attack could kill him, Eplion developed a fascination with firearms. While the district court held that such a collection was not necessary for Eplion's protection, it also took note of the fact that most of the guns were locked away. J.A. 72-73. Indeed, the only firearm not in the safe when the search warrant was executed was a pistol that was found on a workbench where Eplion had been when the warrant was executed. J.A. 112. In other words, it was precisely where someone in fear of attack would keep a firearm to hand to defend himself, while leaving the other firearms safely locked away.

At 114 months, Eplion's sentence is only six months shy of the statutory maximum for his offense of conviction. It is only slightly less severe than the sentence he would have most likely received if he had taken a firearm and tried to seek revenge on the person who attacked him years ago. Such a sentence does not accurately reflect the man who committed this offense. A lesser sentence, one below the advisory Guideline range, would better reflect what turned Eplion into a collector of firearms, while still providing adequate deterrence and protecting the public, as required by § 3553(a).

The fundamental command to a sentencing court is that it impose a sentence that is "sufficient, but not greater than necessary to comply" with the purposes of sentencing. 18 U.S.C. § 3553(a); *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765-767 (2020). To that end, sentencing courts are required to conduct an "individualized assessment" of each case when imposing sentence. *Gall*, 552 U.S. at 50. An individualized assessment of Eplion's history and characteristics in this case

show that a Guideline sentence – the product of a one-size-fits-all approach to sentencing – is greater than necessary to comply with the purposes of sentencing. Therefore, the district court abused its discretion when it imposed a 114-month sentence and that sentence is substantively unreasonable.

X. CONCLUSION

For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

RANDALL EPLION

By Counsel

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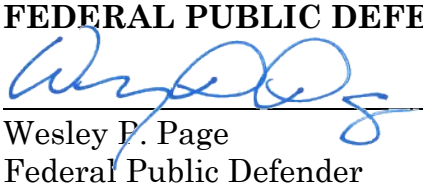

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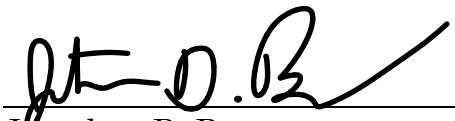

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