NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCO ANTONIO SERRANO,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

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

PETITIONER FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Can a plea agreement that includes an appellate waiver lawfully deprive a defendant of his right to appeal a sentence that was based on the district court's erroneous mandatory application of a sentencing enhancement under the United States Sentencing Guidelines?

LIST OF PARTIES

Per Supreme Court Rule 14(b)(i), the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case.

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PROCEEDINGS BELOW

Petitioner Marco Antonio Serrano waived indictment and, by way of a plea agreement, pleaded guilty to an information that charged him with one count of possession with intent to distribute a controlled substance in violation of 21 U.S.C. §841(a)(1). (*United States v. Marco Antonio Serrano*, U.S. Dist. N.D. Ohio Case No. 1:19-CR-365, Sep. 13, 2019, Plea Agreement, DOC 26, Appendix A). On December 3, 2019, the District Court sentenced Petitioner to 151 months imprisonment. (*United States v. Marco Antonio Serrano*, U.S. Dist. N.D. Ohio Case No. 1:19-CR-365, Dec. 3, 2019, Sentencing Transcript, DOC. 44, Appendix B).

Petitioner filed an appeal to the United States Court of Appeals for the Sixth Circuit on December 13, 2019. On August 7, 2020, after Petitioner's merit brief was filed, the government moved to dismiss the appeal. (*United States v. Marco Antonio Serrano*, 6th Cir. Case No. 19-4218, Aug. 7, 2020, Motion to Dismiss). On November 5, 2020, the Sixth Circuit granted the United States of America's motion to dismiss. (*United States v. Marco Antonio Serrano*, 6th Cir. Case No. 19-4218, Nov. 5, 2020 Order, Appendix C).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Sixth Circuit Court of Appeals' November 5, 2020 Order granting the government's motion to dismiss the appeal. This Court has jurisdiction under 28 U.S.C.§1254. *See also* March 19, 2020 United States Supreme Court Order 589 U.S. (extending deadline to file petitions for a writ of certiorari to 150 days from the date of the order).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless

> on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

STATEMENT OF THE CASE

This case is an example of what can happen when the practice of plea bargaining is elevated over principles of fundamental fairness and due process.

By way of a Fed. R. Crim. P. 11(c)(1)(B) plea agreement, Petitioner pleaded guilty to one count of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. §841(a)(1). That offense carries a maximum term of imprisonment of 20 years.

The plea agreement included a stipulated guideline computation. That computation provided that there were *two* possible offense levels that could be assessed against Petitioner. Due to the amount of drugs involved, base offense level 16 applied pursuant to U.S.S.G. §2D1.1(c)(12). However, if Petitioner were classified as a career offender the adjusted base offense level would be level 32 pursuant to U.S.S.G. §4B1.1(b). *See* Plea Agreement, Doc. 26 at PageID#92. The plea agreement did not compute Petitioner's criminal history category. *Id.*

The plea agreement also contained a provision whereby Petitioner agreed to waive some of his appellate rights. More specifically, paragraph 18 of the plea agreement provided:

> Defendant acknowledges having been advised by counsel of Defendant's rights, in limited circumstances, to appeal the conviction or sentence in this case, including the appeal right conferred by 18 U.S.C. § 3742, and to challenge the conviction or sentence collaterally through a post-conviction proceeding, including a proceeding under 28 U.S.C. § 2255. Defendant expressly and voluntarily waives those rights, except as specifically reserved below. Defendant reserves the right to appeal: (a) any

> punishment in excess of the statutory maximum; or (b) any sentence to the extent that it exceeds the maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing stipulations and computations in this agreement, using the Criminal History Category found applicable by the Court. Nothing in this paragraph shall act as a bar to Defendant perfecting any legal remedies Defendant may otherwise have on appeal or collateral attack with respect to claims of ineffective assistance of counsel or prosecutorial misconduct.

Id. at PageID#92-93.

The district court found that Petitioner qualified as a career offender. As a result, it applied the adjusted base offense level of 32 and also increased Appellant's criminal history category from IV to category VI, pursuant to U.S.S.G. 4B1.1(b). After applying a three level reduction for acceptance of responsibility, Appellant's guideline range became 151-188 months imprisonment. The district court then imposed a 151 month sentence. (*United States v. Marco Antonio Serrano*, U.S. Dist. N.D. Ohio Case No. 1:19-cr-365, Dec. 3, 2019 Sentencing Transcript, DOC. 44, Appendix B).

Petitioner brought an appeal of his sentence to the United States Court of Appeals for the Sixth Circuit, as a matter of right, pursuant to 18 U.S.C. §3742(a)(1)-(2). In his merit brief, Petitioner argued that the district court erroneously treated the career offender guideline as mandatory. However, before considering Petitioner's merit brief, the Sixth Circuit granted the government's motion to dismiss the appeal on the grounds that the appeal was barred by the appeal waiver provision of Petitioner's plea agreement. (*United States v. Marco Antonio Serrano*, 6th Cir. Case No. 19-4218, Nov. 5, 2020 Order, Appendix C).

Thus, according to the court below, Petitioner could lawfully bargain away his right to appeal his sentence, even if it was based on the district court's fundamental misunderstanding of the

guidelines, despite the fact that Petitioner had no way of knowing at the time he entered into his plea agreement that the district court would not follow the law in imposing the sentence.

REASONS FOR GRANTING REVIEW

I. A plea agreement that includes an appellate waiver cannot lawfully deprive a defendant of his right to appeal a sentence that was based on the district court's erroneous mandatory application of a sentencing enhancement under the United States Sentencing Guidelines.

A. Lack of Uniform Standard in Considering Appellate Waivers.

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

"Plea agreements are unique contracts and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause." *United States v. Ingram*, 979 F.2d 1179, 1184 (7th Cir.1992), *cert. denied*, 507 U.S. 997, 113 S.Ct. 1616, 123 L.Ed.2d 176 (1993); *See also United States v. Bowman*, 634 F.3d 357, 360 (6th Cir. 2011) ("plea agreements' constitutional and supervisory implications raise concerns over and above those present in the traditional contract context").

The Fourth Circuit has recognized, in interpreting plea agreements:

> courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts. But the courts have recognized that those rules have to be applied to plea agreements with two things in mind which may require their tempering in particular cases. First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. Second, with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights—to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.

United States v. Harvey, 791 F.2d 294, 300 (4th Cir.1986) (citations and internal quotation marks omitted).

Thus, while a defendant's right to appeal his sentence may be waived in a plea agreement, the basis for such waivers are not unlimited and are to be strictly construed against the Government. *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996), *superseded on other grounds* as stated in *United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013).

Indeed, this Court has endorsed Judge Posner's zoological example to demonstrate that courts do not sanction all waivers that were negotiated by the parties:

> No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.

United States v. Mezznatto, 513 U.S. 196, 204 (1995) *quoting United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985).

The problem with waivers is particularly acute in the context of plea agreements because such waivers are made before any manifestation of sentencing error emerges. *See United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001) ("When all is said and done, such [appellate] waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries (however harsh, unfair, or unforeseeable)."); *see also United States v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, J. concurring) (it is only after the judge pronounces sentence "that the defendant knows what errors the district court had made i.e., what errors exist to be appealed or waived).

However, courts are largely bereft of guidance on how to differentiate between invalid and

valid appellate waivers in plea agreements. Some courts have noted, for example, that an otherwise valid waiver of appellate rights may be invalidated if it results in "a miscarriage of justice." *See e.g., United States v. Guillen*, 561 F.3d 527, 529-31 (D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1318, 1324-28 (10th Cir. 2004) (en banc) (per curiam);*United States v. Andis,* 333 F.3d 886, 890 (8th Cir. 2003) *(en banc); United States v. Khattak*, 273 F.3d 557, 562 (3d. Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001). But those same courts have also recognized that such a standard is ill-defined:

> ...we conclude that plea-agreement waivers of the right to appeal from imposed sentences are presumptively valid (if knowing and voluntary), but are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs. In charting this course, we recognize that the term "miscarriage of justice" is more a concept than a constant. Nevertheless, some of the considerations come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result. Other considerations doubtless will suggest themselves in specific cases.

Teeter, 257 F.3d at 25-26.

This illusive "concept" has been met with criticism by the bench and scholars alike. *See Andis* 333 F.3d at 895-96 (Arnold, J. concurring) (discussing the difficulty of applying the vague miscarriage of justice exception for its vagueness and inconsistent administration); *Hahn*, 359 F.3d at 1344 n. 9 (Murphy, J. dissenting) (criticizing the miscarriage of justice exception because it fails to provide guidance to courts, defendants and the prosecution); *see also* Kevin Bennardo, Post-Sentencing Appellate Waivers, 48 U.Mich. J.L. Reform 347 (2015); Kristine Malmgren Yeater, Note, This Circuit Appellate Waivers: The Mysterious Miscarriage Of Justice Standard, 1 DUQ. CRIM. L.J. 94, 1003) (2010).

Courts employing this standard have also used competing formulas in calculating when a miscarriage of justice occurs. For instance, the D.C. Circuit Court has held that a waiver should not be enforced "if the sentencing court's failure in some material way to follow a prescribed sentencing procedure results in a miscarriage of justice. If, for example, the district court utterly fails to advert to the factors in 18 U.S.C. § 3553(a), then this court may disregard the waiver and consider the defendant's argument that the district court imposed an unlawful sentence." *Guillen*, 561 F.3d at 531.

In contrast, the Tenth Circuit has limited the miscarriage of justice exception to specific instances (1) where the district court relied on an impermissible factor such as race, (2) where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, (3) where the sentence exceeds the statutory maximum, or (4) where the waiver is otherwise unlawful such that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *See Hahn*, 359 F.3d at 1327.

Other courts, for instance, the Sixth Circuit Court of Appeals, have not even expressly recognized the miscarriage of justice standard in evaluating appellate waivers in plea agreements. *See United States v. Mathews*, 534 Fed.Appx. 418, 425 (6th Cir. 2013) (per curiam) (noting that the Sixth Circuit has never expressly recognized such an exception in a published decision, but has implicitly recognized it in unpublished decisions). Rather, the Sixth Circuit has only held that "[i]f a defendant validly waives his right to appeal pursuant to a plea agreement, this court is bound by the agreement, and will review a sentence only in limited circumstances, such as where the sentence imposed is based on racial discrimination or is in excess of the statutory maximum." *United States v. Ferguson*, 669 F.3d 756, 764 (6th Cir.2012).

Thus, there is no uniform standard used by the courts of appeals in determining under what

circumstances an appellate waiver in a federal plea agreement is enforceable.

B. The Sixth Circuit Court of Appeals Enforced Petitioner's Appeal Waiver Notwithstanding His Argument that his Sentence was Based on the District Court Erroneously Treating the Career Offender Guideline as Mandatory.

In *United States v. Booker*, 543 U.S. 220, 245 (2005), this Court held that the "provision of the federal sentencing statute that ma[de] the Guidelines mandatory" was unconstitutional and severed it from the statute. Since then, this Court has considered it a "significant procedural error" to treat the guidelines as mandatory. *Gall v. United States*, 553 U.S. 38, 51 (2007).

Petitioner pleaded guilty to the Information pursuant to a Plea Agreement under Fed. R. Crim. P. 11(c)(1)(B). (Appendix A, Plea Agreement). The agreement stipulated a joint recommendation that the Court use the advisory sentencing guideline computations, but that sentencing recommendations were not binding on the court. *Id.* at PageID#91.

The plea agreement further stated that, due to the amount of drugs involved, the base offense level was 16 pursuant to U.S.S.G. §2D1.1(c)(12). *Id.* However, it was also acknowledged that Petitioner *might* be classified as a career offender based upon his prior criminal record. In that event, the adjusted base offense level would be 32 pursuant to U.S.S.G. §4B1.1(b). *Id.* at 92.

The Pretrial Services Department prepared a Presentence Investigation Report. In computing Petitioner's offense level, the Probation Officer recognized that, although the adjusted offense level would normally be 16, Petitioner qualified as a career offender. Thus, an enhancement pursuant to U.S.S.G. §4B1.1(b)(3) applied which doubled Petitioner's offense level from 16 to 32. PSR, Sealed RE 28 at PageID#126. In addition, his criminal history category was adjusted from category IV to category VI as a result of the enhancement. *Id.*

Had it not been for the career offender classification, Petitioner's base offense level would

have been 16 and, with a three level reduction for acceptance of responsibility, his adjusted offense level would have been 13. With a criminal history category IV, his guideline range would have been 24-30 months imprisonment.

However, with the application of the career offender guideline, and after applying a three level reduction for acceptance of responsibility, Petitioner's guideline range became 151-188 months imprisonment.

At sentencing, the district court recognized that, due to the amount of drugs involved, the applicable base offense level was 16. But the court then found that because Petitioner qualified as a career offender, the "offense level becomes a 32." (Appendix B, Sentencing Tr., RE. 44 at PageID#225).

After the court adjusted Serrano's guideline level for acceptance of responsibility, it stated:

> Because Mr. Serrano is classified as a career offender, his criminal history becomes a VI, notwithstanding what it would be outside of that consideration. And so the advisory guideline range of imprisonment for an offense level of 29 and a criminal history category of VI is 151 to 188 months.

Id. at 226.

It went on to state:

> Due to the nature of some of his prior offenses, he is a career offender. And as the assistant United States attorney noted, that does in fact affect his sentence in this case.

Id. at 244.

> ***
>
> So given all the factors that the Court is required to consider in this case, the Court finds that a low-end guideline sentence is appropriate, and therefore, pursuant to the Sentencing Reform Act of 1984, Title 18, United States Code, Section 3553(a), it is the judgment of the Court that the defendant, Marco Serrano, is hereby committed

to the custody of the Bureau of Prisons for a term of 151 months.

Id. at 246.

Thus, the district court imposed the lowest guideline sentence available after the application of the career offender enhancement.

Petitioner appealed his sentence to the Sixth Circuit Court of Appeals. The issue presented for review was "[w]hether the district court erred in treating the application of a career offender enhancement as mandatory under the United States Sentencing Guidelines."

The United States did not file a response brief. Instead, it moved to dismiss the appeal on the ground that it was barred by the appellate waiver provision in Petitioner's plea agreement. Petitioner filed a response urging the court to deny the motion to dismiss, arguing, among other things, that enforcing the waiver would result in a miscarriage of justice.

On November 5, 2020 the Sixth Circuit issued an order granting the motion to dismiss the appeal. (Appendix C, Nov. 5, 2020 Order). It determined that the appellate waiver was enforceable and did not violate public policy.[1] The court noted that there was a dramatic difference between the lowest potential within-guidelines sentence and the highest possible within-guidelines sentences based on the career offender enhancement but determined that Petitioner "was not left at the whim of the district court–he reserved the right to appeal sentences above the guidelines range or greater than the statutory maximum." *Id.* at Page 3.

But that conclusion ignores the heart of the problem. When a criminal defendant enters into a plea agreement and faces two potential sentencing ranges based on the application of various

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[1] In that Order, the Sixth Circuit found that Petitioner's argument that the district court erroneously treated the guideline as mandatory was not supported by the record. However, that conclusion is a determination on the merits and was not before the court on the motion to dismiss.

enhancements, he is entitled to presume that the district court would correctly follow the law in applying those enhancements. *See United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996) ("we presume that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement.").

And where such a defendant has a good faith basis to argue on appeal that the sentencing court erroneously treated the guidelines as mandatory, resulting in a more severe guideline sentencing range, it is error, and a violation of the defendant's constitutional right to due process of law, for the appellate court to enforce a broad appellate waiver that eliminates any review of the alleged error.

It is not difficult to imagine the problems that the Sixth Circuit's order may lead to. Enforcing an appellate waiver based on a sentence that was allegedly imposed in contravention of *Booker* insulates a district court from misapprehending and even outright disregarding this Court's precedent.

Moreover, recall that in the D.C. Circuit, a waiver may be unenforceable if the sentencing court, in some material way, fails to follow a prescribed sentencing procedure. *Guillen*, 561 F.3d at 531; *see also United States v. Lee*, 888 F.3d 503, n. 1 (D.C. Cir. 2018) Were that standard applied by the Sixth Circuit, Petitioner's claim that the district court failed to follow the sentencing procedure prescribed by this Court in *United States v. Booker*, may have caused the court to decline to enforce the waiver and proceed to the merits of the argument.

This Court has not yet provided specific guidance for the lower courts in determining whether to enforce appellate waivers in plea agreements. As a result, different standards and analysis are used

throughout the various federal circuit courts and Petitioner was denied his right to appeal. Guidance from this Court is necessary to achieve a more uniform standard in determining when a presentence appellate waiver in a plea agreement is enforceable.

Therefore, the Writ should issue.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for the reasons stated herein, this Honorable Court should grant the Petition for Writ of Certiorari to the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Mark R. DeVan, a member of the Bar of this Court, hereby certify that on this 1st day of April 2021, I served copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI, in compliance with Supreme Court Rule 29.3, on United States Attorney Justin E. Herman, 801 West Superior Ave., Suite 400, Cleveland, OH 44113 and Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W. Washington, DC 20530-001, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. All parties required to be served have been served.

Respectfully submitted,

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