IN THE SUPREME COURT
OF THE UNITED STATES

CASE NO. 21-6987

MARCUS GRUBBS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

By:
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ORIGINAL

QUESTIONS PRESENTED

1. Whether a defendant can "knowingly," "voluntarily," and/or "intelligently," execute an appeal waiver of conduct yet to occur in the proceedings, vis-a-vis sentencing.

2. Whether a "miscarriage of justice" exception exists to a valid appeal waiver for errors committed after execution of that waiver.

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to this petition and is unpublished to the best of Petitioner's knowledge.

The judgment of the United State District Court for the Middle District of Alabama appears at Appendix B to this petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided the case below was September 2, 2021. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII

18 U.S.C. § 3742(a)

STATEMENT OF THE CASE

This matter arises from an "appeal waiver" contained within a validly executed plea agreement. As such, Petitioner will not recount the underlying criminal activity which led to the plea but will, instead, recount the procedural history relevant to the Eleventh Circuit's enforcement of the appeal waiver.

Following his indictment, Petitioner entered into a plea agreement with the Government on September 28, 2020. The plea agreement contained an appeal waiver. The waiver states:

> Understanding that 18 U.S.C. § 3742 provides for appeal by a defendant of the sentence under certain circumstances, the defendant expressly waives any and all rights conferred by 18 U.S.C. § 3742 to appeal the conviction or sentence. The defendant further expressly waives the right to attack the conviction or sentence in any post-conviction proceeding, including proceedings pursuant to 28 U.S.C. § 2255. Exempt from this waiver is the right to appeal or collaterally attack the conviction or sentence on the grounds of ineffective assistance of counsel or prosecutorial misconduct.

[D.E. 27, § 13.] Following execution of the plea agreement, Petitioner proceeded to a change-of-plea hearing, and pled guilty to Counts Two and Four, and the Government requested dismissal of Counts One, Three, and Five. [D.E. 56.] A magistrate judge accepted his guilty plea, and adjudicated him guilty. [Id.]

As is normal in criminal cases, after the finding of guilt, the U.S. Probation Office conducted a Pre-Sentence Investigation and prepared a Pre-Sentencing Report ("PSR"). Within the PSR, the Probation Office made a recommendation that Petitioner was ascribed the position of "ringleader" and his sentenced enhanced accordingly. [PSI, ¶ 23.] Additionally, the Probation Office recommended three further sentencing enhancements based upon the nature of the firearms involved (stolen under U.S.S.G. § 2K2.1(b)(4)(A)), the quantity of firearms involved (25-99 under U.S.S.G. § 2K2.1(b)(1)(C)), and because of his "trafficking in firearms" (exchanging drugs for firearms under U.S.S.G. § 2K2.1(b)(5)). [PSI, ¶¶ 18-20.]

On March 30, 2021, six (6) months after entry into the plea agreement containing the appeal waiver and the change-of-plea hearing, the Court proceeded with sentencing. Petitioner objected to the "leadership role" enhancement under § 3B1.1(c), and the Court sustained that objection. [D.E. 57, pp. 5:17-20, 10:25-11:2.] Defense counsel then withdrew all other objections. [Id., p. 12:1-5.] Counsel did, however, argue the three (3) additional § 2K2.1 enhancements were an improper reflection of actual conduct because they repeatedly counted the same material issues, namely the firearms. [Id., pp. 18:19-20:16.] The Court sentenced Petitioner to a 157-month term of imprisonment. [Id., pp. 27:7-28:11.] For purposes of this Petitioner, it is worth noting the Court's specific language used:

> your sentence will now be stated, but you will have a final chance to make legal objections before the sentenced is imposed.

[Id., p. 27:7-9.]

Petitioner timely appealed his sentence to the Eleventh Circuit Court of Appeals. His brief, filed on July 19, 2021, argued a single ground: whether the sentence imposed was unreasonable in light of the 18 U.S.C. § 3553(a) factors. [See, generally, Defendant's Initial Brief.] The Government responded, therein asserting the appeal should be dismissed under the appeal waiver contained in the plea agreement. [See Response Brief, pp. 7-8.] On September 2, 2021, the Eleventh Circuit dismissed the appeal asserting Petitioner's appeal of his sentence fell within the waiver's ambit. [See Appx. A, hereto.]

Petitioner timely filed the instant petition.

REASONS FOR GRANTING THE PETITION

There are two reasons this Court should issue the writ of certiorari to review the determination of the Eleventh Circuit Court of Appeals. First, the appeal waiver entered into by Petitioner six (6) months before sentencing cannot be said to have been knowing, voluntary, and/or intelligent as to the Court's future conduct at sentencing; and, even if the appeal waiver is valid, a "miscarriage of justice" exception to the waiver should be recognized by all courts, as has been done by a majority of circuits to date.

I. Appeal Waiver as to Sentencing was Neither Knowing, Voluntary, or Intelligently Entered Into

The Eleventh Circuit has stated, quite unequivocally that "a valid appeal waiver prevents a defendant from appealing issues that fall within the waiver's scope." U.S. v. Rogers, 839 Fed. Appx. 436, 438 (11th Cir. 2021)(citing U.S. v. Hardman, 778 F 3d 896 899 (11th Cir 2014)). It further explained that "[a] waiver of appeal even includes a waiver of the right to appeal 'blatant error.'" U.S. v. Bascomb, 451 F.3d 1292, 1295 (11th Cir. 2006). See also U.S. v. Grinard-Henry, 399 F.3d 1294 (11th Cir. 2005). It has, however, acknowledged that such a waiver must be made knowingly and voluntarily. U.S. v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008). This Court, too, has elaborated that a plea must be "voluntary" and "related waivers" must be made "knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences." U.S. v. Ruiz, 536 U.S. 622, 629 (2002).

The issue herein is whether a defendant, knowingly and voluntarily executing an appeal waiver at a change-of-plea hearing, can knowingly and voluntarily waive appellate rights for conduct at a future sentencing, conduct of which he has no knowledge or understanding.

There can be no dispute that appeal waivers, in general, are valid. See, e.g., U.S. v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990); U.S. v. Wiggins, 905 F.2d 51 (4th Cir. 1990). In general, at the time of a change-of-plea hearing a defendant is fully aware of the rights he is giving up at that time: the right to a trial by jury, a right to call and confront witnesses, a right to testify on his own behalf and preserve the privilege against self-incrimination. All of these are rights forfeited by the very act of changing a plea to that of guilty. Consequently, a defendant knows precisely what he is giving up in exchange for the guilty plea.

In contrast, sentencing does not occur contemporaneously with the plea and waiver. It is a future event, and the mistakes from which one might have reason to appeal have not yet occurred at the time a defendant waives the right to appeal or collaterally attack the sentencing proceedings. It is axiomatic that a defendant cannot know what he has relinquished by waiving the right to appeal until after the judge and counsel have reviewed a yet to-be-prepared presentence investigation report, after the judge has considered other information not yet known to the defendant at the time of the plea, and after the judge has actually imposed sentence. By then, however, it is too late. No matter how disproportionate the sentence or how egregious the procedural or substantive errors committed by the sentencing judge or counsel may have been, the defendant has already waived his right to challenge. It is hard to see how a defendant at a change-of-plea hearing can ever "knowingly and intelligently" waive the right to appeal or collaterally attack a sentence that has yet to be imposed. This Court has stated though, that a plea that requires such a waiver of unknown rights cannot comport with Rule 11 or the Constitution. McCarthy v U.S. 394 U.S 459, 466 (1969).

Courts nationwide "throw around" the terms "knowingly," "voluntarily," and "intelligently" with respect to appeal waivers but never defined those terms The closest Petitioner has discovered is

> with "a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon it"

Moran v Burbine, 475 U.S. 412, 422 (1986). Without such "full awareness," is inherently uninformed and unintelligent. U.S. v Melancon, 972 F.2d 566, 571 (5th Cir. 1992)(Parker, J., concurring).

In the instant case, Petitioner entered into a plea agreement and appeal waiver. He acknowledges that, as of the time the plea was entered and the agreement accepted, he did so knowingly and intelligently as to the proceedings' conduct up to that point in time. He knew he was forfeiting the right to a jury trial, call and confront witness, and avoid self-incrimination. He could not imagine or fathom the extent of error the trial court might commit six months later at sentencing. Given the logic imposed by the Eleventh Circuit in enforcing the appeal waiver, had the district court sentenced Petitioner to 50 years in prison, the appeal waiver would have prevented any review. Petitioner raised a similar argument based upon his "unreasonable" sentence, an unreasonable determination that was unforeseeable and, thus, unknowable.

Petitioner does not contend his plea agreement or appeal waiver was not entered into knowingly and voluntarily, in general. He contends that the appeal waiver was not knowing, intelligent and/or voluntary as to the actions taken at the later sentencing. Since he could not knowingly waive appeal of erroneous conduct that had not yet occurred, the appeal waiver should not be enforceable in an appeal of such a sentencing error, blatant or otherwise.

Petitioner requests a writ of certiorari issue to review the dismissal of his appeal by the Eleventh Circuit by application of the unknowing and unintelligent appeal waiver.

II. A "Miscarrige of Justice" Exception Should Apply

Whether this Court determines that the appeal waiver was knowing and voluntarily entered into with respect to the not-yet-occurring sentencing, Petitioner's appeal should have fallen within a "miscarriage of justice" exception to the waiver provision thus allowing the appellate court to review whether the sentencing proceedings were tainted.

The Eleventh Circuit has "declined" a request to determine a "miscarrige of justice" excepts an appeal from a valid appeal waiver. U.S. v. Piper 803 Fed. Appx. 285 (11th Cir. 2020). As a result, no such exception exists in the Eleventh Circuit and Petitioner would have been unable to avail himself of such an exception in this case.

Other circuit courts have adopted such an exception for the type of situation giving rise to Petitioner's appeal. Leading such application of this exception was the Tenth Circuit Court of Appeals which stated, "we will enforce an appellate waiver if ... enforcing the waiver would not 'result in a miscarriage of justice.'" U.S. v. Harper, 837 Fed. Appx. 650 (10th Cir. 2021)(quoting U.S. v. Hahn, 359 F.3d 1315, 1325 (10th Cir. 2004)(en banc)(per curium)). Other circuits have adopted similar exceptions. See e.g. Braswell v. Smith, 952 F.3d 441 (4th Cir. 2020)("The appellate court will not enforce an otherwise valid appeal waiver if to do so would result in a miscarriage of justice ...."); U.S, v. Harris, 628 F.3d 1203 (9th Cir. 2011); U.S. v. Scott, 627 F.3d 702 (8th Cir. 2010); U.S. v. Guillen, 561 F.3d 527 (D.C. Cir. 2009); U.S. v. Jackson, 523 F.3d 234 (3d Cir. 2008). The Sixth Circuit has not expressly recognized a miscarriage-of-justice exception, although it has done so implicitly in several unpublished cases. U.S. v. Mehtsentu, 2020 U.S. App. LEXIS 17885, No. 19-5830, *2 (6th Cir. June 5, 2020)(citing, e.g., U.S. v. Matthews, 534 Fed. Appx. 418, 425 (6th Cir. 2013)(per curium)).

This Court has already held that "[e]ven the broadest appeal waiver doe snot deprive a defendant of all appellate claims " U.S. v. Garza, 139 S.Ct. 738 (2018). However, in Garza, it went on to further note it made "no statement today on what potential exceptions may be required." Id., at 86 n.6. Petitioner now urges this Court to do so.

Most circuit courts have adopted a "miscarrige of justice" exception to an appeal waiver; to date, the Eleventh Circuit has declined to do so. This Court has not yet spoken on the matter. Had such an exception existed at the time of Petitioner's appeal, the appeal waiver could be held valid but would still have allowed for review of a sentencing court's error which resulted in a miscarriage of justice, such as by the imposition of an improper sentence. Without such an exception, no matter what error the sentencing court may have committed, it would never be reviewable within the Eleventh Circuit. If this Court were to agree with the several circuit courts adhering to the proposed exception, Petitioner's appeal could be remanded for adjudication on the merits while leaving in tact the appeal waiver generally. Given that most circuit courts to address the issue have adopted such an exception it would behoove this Court to address the issue from Garza upon which it made "no statement," and allow for a uniform exception nationwide.

CONCLUSION

Ballentine's Law Dictionary defines "knowingly," in part, as having knowledge of those facts which are essential. An appeal waiver abrogating one's right has to be knowing, intelligent, and voluntary. Do enter into one without knowledge of what errors might yet be committed can never be said to fill that requirement. Some circuits have protected a defendant's right to appeal such errors by carving out a "miscarriage of justice" exception. Unfortunately for Petitioner, to date, the Eleventh Circuit has declined to do so.

It is, thus, incumbent upon this Court to issue a writ of certiorari to review whether Petitioner's appeal should have been considered by the Eleventh Circuit on its merits.

Respectfully Submitted,

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