NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH MORRIS, ***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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Dated: April 6, 2022

I. QUESTION PRESENTED FOR REVIEW

Whether a provision in a plea agreement which bars a defendant from appealing "any sentence of imprisonment" 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. Morris*, No. 2:20-cr-00167-1, U.S. District Court for the Southern District of West Virginia. Judgment entered September 23, 2021.
- *United States v. Morris*, No. 21-4540, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on January 6, 2022.

V. OPINIONS BELOW

The order granting the Government motion to dismiss Morris' appeal before the United States Court of Appeals for the Fourth Circuit in *United States v. Morris*, No. 21-4540, is unpublished and is attached to this Petition as Appendix A. The district court's determination that the plea agreement, including the appeal waiver provision, was entered into knowingly and voluntarily occurred during the guilty plea hearing. A copy of the transcript is attached to this Petition as Appendix B. The final judgment order of the district court is unreported and is attached to this Petition as Appendix C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 6, 2022. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. 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 August 7, 2020, a complaint was filed in the Southern District of West Virginia charging Keith Morris with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). J.A. 9-11.[1] On September 1, 2020, a grand jury returned an indictment charging Morris with that same offense. J.A. 12-14. On November 17, 2020, a superseding indictment was returned charging Morris with possession with intent to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count One); possession with intent to distribute 40 grams or more of fentanyl, also in violation of 21 U.S.C. § 841(a)(1) (Count Three); possession of a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A) (Count Four); and two counts of being a felon in possession of a firearm (Counts Two and Five). J.A. 52-58. 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 Morris pleaded guilty to Counts Two and Three of the superseding indictment. J.A. 116-118. A Judgment and Commitment Order was entered on September 23, 2021. J.A. 166-173. Morris filed a timely notice of appeal

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

on October 6, 2021. J.A. 174. 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 two incidents in which Morris was in possession of drugs and firearms. Following his conviction, the district court *sua sponte* upward varied to impose a sentence of 120 months in prison. The Fourth Circuit did not review that decision, but instead dismissed the appeal at the Government's request due to a waiver of appellate rights in Morris' plea agreement.

1. The Two Incidents

In January 2020, police officers in Charleston, West Virginia, responded to a traffic accident in which Morris was involved. J.A. 180. While the accident was being investigated, a drug-sniffing dog was run around Morris' car and alerted on the driver's side door. A search of the vehicle uncovered a small amount of marijuana, a digital scale, and, in the trunk, a locked safe. Additional marijuana was found on Morris' person. Officers obtained a warrant to open the safe, in which they found a handgun and small amounts of heroin and Xanax, along with almost 60 grams of methamphetamine. J.A. 181.

In August 2020, officers in Charleston were surveilling a downtown hotel after receiving complaints of drug activity. They observed Morris drive away from the hotel after making eye contact with the officers, then looking away, which the officers felt was "suspicious." J.A. 181. Morris' vehicle was stopped and another

drug-sniffing dog alerted during a sniff of the car. A search uncovered almost 177 grams of fentanyl and a handgun. J.A. 182.

2. Charges and Guilty Plea

Morris was not charged after the January 2020 incident. However, after the August 2020 incident he was charged, first by complaint and then by indictment, with being a felon in possession of a firearm, based on that incident. J.A. 9-14. Following the indictment, Morris filed a motion to suppress the evidence found during the August traffic stop. J.A. 15-17. While that motion was pending, the Government obtained a superseding indictment charging Morris with five offenses covering both incidents: possession with intent to distribute methamphetamine and possession of a firearm by a felon from January (Counts One and Two), along with possession with intent to distribute fentanyl, possession of a firearm by a felon, and possession of a firearm in connection with a drug trafficking offense from August (Counts Three, Four, and Five). J.A. 52-58.

The district court denied Morris' motion to suppress. J.A. 58-69. Morris then entered into a plea agreement with the Government to resolve the charges against him.[2] J.A. 103-113. One part of the plea agreement was a provision restricting the appellate rights of both parties. Morris agreed to give up his right "to seek appellate review of . . . any sentence of imprisonment . . . or the manner in which the sentence was determined, on any ground whatsoever . . . so long as" the sentence "is below or

[2] The plea agreement was not a conditional one and, therefore, Morris' Fourth Amendment issue was not preserved for appellate review. *United States v. Fitzgerald*, 802 F.3d 107, 110 (4th Cir. 2016).

within the Sentencing Guideline range corresponding to offense level 28, regardless of criminal history category." J.A. 110-111. Morris pleaded guilty to Counts Two and Three of the superseding indictment, with the Government agreeing to dismiss the other counts. J.A. 104.

3. Sentencing

Following Morris' guilty plea a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. J.A. 176-206. On the firearm charge, the probation officer recommended that Morris' base offense level be 24, with a four-level enhancement for the possession of the firearm during another felony offense. J.A. 184. On the drug charge, the probation officer recommended that Morris be attributed a total of 566.108 kilograms of converted drug weight, producing a base offense level of 26. J.A. 184-185. To that the probation officer recommended a two-level enhancement for possession of a firearm during the offense, for a final offense level of 28. J.A. 185. Considered together, the two calculations produced a final offense level of 28. However, the probation officer recommended that Morris be classified as a career offender, raising his offense level to 34. J.A. 186. With a three-level reduction for acceptance of responsibility, the final recommended offense level was 31 which, when combined with a Criminal History Category VI,[3] produced an advisory Guideline range of 188 to 235 months in prison, with a 120-month maximum on the firearm charge. J.A. 186-187, 189,

[3] Without the career offender enhancement, Morris' recommended Criminal History Category would have been IV. J.A. 189.

195. The Government had no objection to those calculations. J.A. 202. Morris objected, arguing that he was not a career offender. J.A. 203-204.

Morris reiterated his objection in a memorandum filed prior to sentencing. J.A. 119-127. He argued that he was not a career offender and that the applicable advisory Guideline range was 84 to 105 months in prison. J.A. 121. He further argued that the relevant sentencing factors supported a sentence within that range. J.A. 122-125. The Government maintained that Morris should be classified as a career offender and argued for a sentence within that resulting Guideline range. J.A. 128-135.

Sentencing for Morris was held on September 23, 2021. J.A. 136-165. The district court sustained Morris' objection to his designation as a career offender and adopted an advisory Guideline range of 84 to 105 months in prison. J.A. 140-143, 148. The Government argued for a sentence at the top of that range "for the purpose of achieving a deterrent factor," noting Morris' "quite serious and extremely violent criminal history." J.A. 148. In addition, he had multiple prior convictions involving the use of firearms. J.A. 149. The Government argued against "any leniency" because the firearms involved in this offense were not used, as "having those guns does indicate he was prepared to do something, if necessary, and solely for money." J.A. 151.

Morris argued that the firearms at issue in this case were "locked away" when found, in a glove compartment and in the trunk of a car, and he was "not threatening to use them . . . against anyone." J.A. 152. Morris also highlighted his

"significant history of substance abuse issues and mental and physical issues that have kind of permeated throughout his past." J.A. Tr. 18. His substance abuse history began in his teens and he has been shot twice before. *Ibid.* In his allocution, Morris explained that "I got shot when I was a kid, almost killed, left for dead in the middle of the street." J.A. 155. That was "why I carry a gun . . . because I feel like if I don't have something to protect myself my life could be in danger, again." J.A. 155-156. He also noted his lack of education, admitting that "I can barely read," explaining that selling drugs was a way to provide for his family. J.A. 156. He also explained how his arrest, after having had his first child, made him realize that continuing to sell drugs was "the horriblest decision I ever made in my life." *Ibid.* As his attorney argued, none of this was to "excuse what he's done, but it gives some insight into why he's done this," because "he's trying to protect himself, provide for his family." J.A. 154.

Without any notice to the parties, the district court then imposed a 120-month sentence, a *sua sponte* variance from the advisory Guideline range it calculated. J.A. 157-158. The term of imprisonment will be followed by a four-year term of supervised release. J.A. 158. The district court explained that Morris' "adult life has been one of crime and violence," including "a history of extreme violence, including a prior conviction for attempted murder with a firearm." J.A. 160. And while the prior conviction at issue in the career offender context, wanton endangerment, was not categorically a crime of violence for Guideline purposes, the district court nonetheless recognized "the extremely dangerous nature" of that

offense, in which Morris, after having been kicked out of a bar "fired numerous shots toward the bar and inside through the front door." J.A. 160-161. "What really concerns me," the district court explained, "is that Mr. Morris seems to have a habit of firing his weapons at others when he becomes angry." J.A. 161. "[E]verything" in Morris' history "says you're a danger to others and that the public needs to be protected from you." *Ibid*. The district court did conclude that "I like what you had to say here today" and that "maybe the birth of your child or maybe this last arrest or something else has shifted a gear in your head," but noted that his offense "requires severe punishment." J.A. 161-162.

4. The Fourth Circuit dismisses Morris' appeal at the Government's request.

Morris appealed his sentence to the Fourth Circuit Court of Appeals. *United States v. Morris*, Appeal No. 21-4520. In his opening brief, Morris raised one issue: whether his 120-month sentence is "unreasonable because it is greater than necessary to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2)." *Id*. at Dkt. No. 11 at 13. Rather than file a responsive brief, the Government filed a motion to dismiss the appeal, invoking the waiver provision in the plea agreement. *Id*. at Dkt. No. 16. Specifically, the Government argued that the waiver provision applied because the sentence imposed was within the Guideline range produced by an offense level 28 and his assigned Criminal History Category. *Id*. at 8. Morris objected, arguing that because there is no "range corresponding to offense level 28" without a Criminal History Category and any

ambiguity in the waiver language had to be construed against the Government. *Id*. at Dkt. No. 19 at 4-7.

The Fourth Circuit granted the Government's motion to dismiss in a one-paragraph order which stated, in its entirety:

> Keith Morris seeks to appeal his 120-month prison sentence. The Government has moved to dismiss the appeal as barred by Morris' waiver of the right to appeal included in the plea agreement. Upon review of the record, we conclude that Morris knowingly and voluntarily waived his right to appeal and that the issue Morris seeks to raise on appeal falls squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's motion to dismiss.

Appendix A at 1.

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether a provision in a plea agreement which bars a defendant from appealing "any sentence of imprisonment" 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, 372-373 (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 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. Plea bargains, and the assorted waivers that can be part of them, must be knowingly and voluntarily entered into.

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 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. 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 "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 today. *See United States v. Blick*, 408 F.3d 162 (4th Cir. 2005), Appendix A at 1. It is also the logic adapted 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.

B. A defendant cannot knowingly waive his right to appeal a decision that has not yet been made and for which the preconditions do not exist at the time of the waiver.

The problems inherent in forcing defendants to waive a right to appeal prior to sentencing are evident from the routine plea hearing conducted by the district court in this case. J.A. 70-102. After reviewing the plea agreement with Morris, the district court explained that "I want to make sure . . . that you understand the nature of the charges against you and the consequences of pleading guilty to those charges" as well as making "sure you understand the constitutional and other legal rights you're giving up by pleading guilty." J.A. 80-81. As part of that discussion, the district court asked whether Morris had discussed with counsel "the application of the United States sentencing guidelines to your case?" J.A. 91. The district court then made clear that "the fact that you and the government have agreed as to what you think [the Guideline range] is is not binding on me in any way[,]" and that "the sentencing guidelines I just talked about are advisory and that I have the authority to impose a sentence which is . . . more than that called for by the guidelines[.]?" J.A. 92. Yet, 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(c)(6) 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, the most recent data shows that over 97% of cases that end in conviction do so as the result of guilty pleas. *Frye*, 566 U.S. at 143-144. 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.

X. CONCLUSION

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

Respectfully submitted,

KEITH MORRIS

By Counsel

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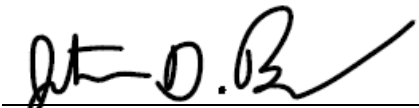

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