NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEROME SCOTT KING,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether a provision in a plea agreement that bars a defendant from appealing a sentence of imprisonment violates due process and whether it can be knowingly and voluntarily entered into prior to the imposition of the sentence?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

Judgment, *United States v. King*, No. 21-3363 (8th Cir. Feb. 9, 2022)

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On February 9, 2022, the court of appeals entered its order granting the Government's motion to dismiss Mr. King's appeal before the United States Court of Appeals for the Eighth Circuit based on an appellate waiver contained in the plea agreement. *See* Judgment, *United States v. King*, No. 21-3363 (8th Cir. Feb. 9, 2022). A copy of the Judgment is attached at Appendix ("App.") A 1.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2022. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTE AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The Petitioner refers this Honorable Court to the following statute and Federal Rule of Criminal Procedure:

Relevant Sections of 18 U.S.C. § 3742:

> (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.

18 U.S.C. § 3742(a).

Relevant Section of Federal Rule of Criminal Procedure 11(b)(1):

> 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.

Fed. R. Crim. P. 11(b)(1).

STATEMENT OF THE CASE

1. On January 10, 2020, Jerome Scott King pleaded guilty to aiding and abetting the robbery of controlled substances in violation of 18 U.S.C. §§ 2118(a) and 2, and to conspiracy and possession with intent to deliver controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. The plea agreement contained an appellate waiver, which waived his right to directly appeal his conviction and sentence. In part, it stated:

> Defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence, including any restitution order, as follows:
>
> a. the Defendant waives the right to directly appeal the conviction and sentence pursuant to 28 U.S.C. § 1291 and/or 18 U.S.C. § 3742(a);
>
> b. the Defendant reserves the right to appeal from a sentence which exceeds the statutory maximum;
>
> c. the Defendant expressly acknowledges and agrees that the United States reserves all rights to appeal the Defendant's sentence as set forth in 18 U.S.C. § 3742(b) and [*United States v. Booker*, 543 U.S. 220 (2005)];
>
> d. the Defendant waives the right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims based on ineffective assistance of counsel or prosecutorial misconduct. . . .

2. On October 6, 2021, Mr. King was sentenced to 108 months in prison on each count to run concurrently to each other but consecutively to the Western District of Missouri conviction relating to robbery of a pharmacy. Mr. King had argued that his Missouri conviction was part of a jointly undertaken activity that also involved his robbery of a pharmacy in Arkansas pursuant to U.S.S.G. § 1B1.3. He noted that there was a similar *modus operandi*, common victims, common accomplices, and a

common purpose. The common purpose was to take drugs from pharmacies using the *modus operandi* of multiple young men entering the pharmacy late at night or early in the morning and undertaking different roles in the robbery. Mr. King had argued that because the Missouri crime was relevant conduct, under U.S.S.G. § 5G1.3, the court shall adjust the instant sentence for any term of imprisonment already served, and then run the sentence concurrently with the remaining Missouri sentence. The district court found that his conviction in the Western District of Missouri was not relevant conduct and therefore it would not run the sentence concurrently pursuant to § 5G1.3(b).

3. Mr. King appealed his sentence to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

4. Mr. King argued on appeal that the district court committed procedural error by determining that his federal conviction in Missouri was not relevant conduct to the instant offense when it imposed a consecutive sentence and assigned three criminal history points to the Missouri conviction. He contended that the district court failed to properly apply § 5G1.3 and should have adjusted his sentence downward to account for his prior service on his Missouri sentence per § 5G1.3(b)(1). It also should have imposed the instant sentence concurrently with the undischarged portion of the Missouri sentence. In addition, Mr. King argued that the appellate

waiver was not knowing and voluntary as he could not foresee the errors that the district court would make in applying the United States Sentencing Guidelines. He further argued that the appeal waiver is not supported by proper consideration as he did not receive a real benefit in this bargain. Therefore, the appeal waiver is invalid and a violation of due process.

5. The Eighth Circuit granted the Government's motion to dismiss the case based upon the appellate waiver contained in the plea agreement without considering the merits of Mr. King's case. *See* Judgment, *United States v. King*, No. 21-3363 (8th Cir. Feb. 9, 2022).

This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

The writ should be granted to determine whether a provision in a plea agreement that bars a defendant from appealing a sentence of imprisonment violates due process and whether it can be knowingly and voluntarily entered into prior to the imposition of the sentence.

This Court should not enforce the appellate waiver contained in Mr. King's plea agreement as it was not entered into knowingly and voluntarily and because it violates due process. Mr. King pleaded guilty to robbery involving a controlled substance and possession with intent to distribute controlled substances pursuant to a written plea agreement that contained an appellate waiver. Although "a defendant's right to appeal his sentence may be waived in a plea agreement," those waivers are not "enforceable on a basis that is unlimited and unexamined." *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). "It is well-established that the interpretation of plea agreements is rooted in contract law, and that 'each party should receive the benefit of its bargain.'" *United States v. Peglera*, 33 F.3d 412, 413 (4th Cir. 1994) (quoting *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993)). Indeed, plea agreements are given even "greater scrutiny than we would apply to a commercial contract" "[b]ecause a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement." *United States v. Warner*, 820 F.3d 678, 683 (4th Cir. 2016) (internal quotation marks and citations omitted). The 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 the imposition of the sentence, is an important question of federal law this Court should resolve. *See* Rules of the Supreme Court 10(c).

This Court recognized the importance of plea bargains and approved their role in the modern criminal justice system. *See 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 Padilla v. Kentucky*, 559 U.S. 356, 372-373 (2010) (guilty pleas account for 95% of all criminal convictions). 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." *Id.* 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.

Mr. King submits that allowing a defendant to prospectively waive appellate review of sentencing issues he cannot foresee violates due process. Because a guilty plea necessarily constitutes a waiver of the defendant's constitutional rights, a longstanding requirement in all plea agreements is that they be entered by the defendant knowingly and voluntarily. *See United States v. Mezzanatto*, 513 U.S. 196, 200-01 (1995); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also* Fed. R. Crim. P. 11. If a guilty plea is entered

without "an understanding of the law in relation to the facts" on the part of the defendant, "it cannot be truly voluntary." *Johnson* 304 U.S. at 466. If not voluntary, any waiver of rights is invalid under the Due Process Clause. *Id.* at 464. Additionally, to comport with due process, any waiver of rights under Rule 11 of the Federal Rules of Criminal Procedure at the time of a defendant's guilty plea must be "an intentional relinquishment or abandonment of a known right or privilege." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). As this case demonstrates, at the time of a plea agreement, which necessarily occurs many months, or even years, prior to sentencing, defendants cannot foresee the facts underlying and forming the appellate rights they are waiving.

This principle was thoroughly explored by then-District Judge Robert M. Parker, sitting by designation on the Fifth Circuit, in a special concurrence to the per curiam opinion in *United States v. Melancon*, in which he lambasted a rule mandating the acceptance of appeal waivers if they are informed and voluntary. 972 F.2d 566 (5th Cir. 1992). Judge Parker characterized the rule as "illogical and mischievous" at best, and "clearly unacceptable" at worst. *Id.* at 570 (Parker, J. concurring). In *Melancon*, the court upheld an appeal waiver based on another unpublished, per curiam opinion holding that appeal waivers are valid if informed and voluntary, referring to this as "the *Sierra* rule." *Id.* at 570 (citing *United States v. Sierra*, 951 F.2d 345 (5th Cir. 1991)). Although Judge Parker specially concurred because he was bound to uphold the appeal waiver, he felt compelled to "urge the full Court to examine the '*Sierra* rule,' and to reject it." *Id.* (Parker, J., concurring). Judge

Parker called the *Sierra* rule "clearly unacceptable, even unconstitutional," because it "manipulates the concept of knowing, intelligent, and voluntary waiver so as to insulate from appellate review the decision-making by lower courts . . . thwarting congressional limitations on the courts' sentencing power and cramping the constitutional rights of those who succumb." *Id.* at 571. He explained:

> In typical waiver cases, the act of waiving occurs at the moment the waiver is executed . . . . The situation is completely different when one waives the right to appeal a Guidelines-circumscribed sentence before the sentence has been imposed. What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence. *This right cannot come into existence until after the judge pronounces sentence*; it is only then that the defendant knows what errors the district court has made – *i.e.*, what errors exist to be appealed, or waived.

Id. at 572 (emphasis in original). In other words, it is simply impossible for a defendant to waive something he does not know.

Appeal waivers differ from the waiver of other constitutional rights at the time of plea, such as the right to a jury trial, because that right is a "known quantity." *Id.* There is a critical distinction between an identifiable, fixed fact versus a fact that *may* or *may not* occur in the future. For instance, defendants know they will not see a jury when they waive the right to trial, but they cannot know that a judge will or will not make a mistake at sentencing. Even if it were somehow possible to knowingly and intelligently waive the right to appeal a future sentence, the "systemic benefits" appeal waivers may offer are not outweighed by their "extremely deleterious effects upon judicial and congressional integrity, and individual constitutional rights." *Id.* Individual defendants are not the only parties with an interest in preserving

appellate review of district courts' application of both constitutional rights and congressionally-created policy-based statutes – including the Guidelines. If appellate review of most sentencing decisions is precluded by waivers, the "public interest in proper applications of the Guidelines cannot be protected." *Id.* at 574. Such systemic benefits as a reduction in sentencing appeals, and thus a more manageable workload for appellate courts, do not compel insulating the entire sentencing process from review, undermining both due process and the checking and balancing of courts' powers. *Id.* at 575.

Appeal waivers not only open a risky avenue to overt prosecutorial or sentencing misconduct, they also prematurely punish the defendant during plea negotiations. When the Government demands the execution of an appeal waiver in exchange for a favorable deal, "the prosecution acts only to punish the defendant's exercise of his or her right to appeal – *i.e.*, by threatening to increase the measure of jeopardy faced by a defendant who refuses to execute a waiver. Such prosecutorial overreaching impedes the defendant's due process rights and impinges the voluntariness of the defendant's guilty plea." *Id.* at 578 (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). Punishment imposed by prosecutors in the plea negotiation context is improper. As Judge Parker notes, "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Id.* (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 32-33 (1973)). Appeal waivers, especially when forced upon defendants by prosecutors who insist on their routine inclusion in any plea agreement offer, tread

on due process by depriving a defendant of the opportunity to correct errors in the adjudication of the most important constitutionally protected right: liberty.

This case reveals the inherently unknowing nature of appeal waivers. Facts which significantly affected Mr. King's sentence were adjudicated at his sentencing hearing. He could not have known when he executed the plea agreement and appeal waiver that the district court would refuse to run relevant conduct concurrently in direct opposition to the Guidelines. He could not validly and knowingly waive his right to appeal based on those unknown facts and rulings. Indeed, a waiver is an intentional and knowing "relinquishment of a ***known*** right or privilege." *Zerbst*, 304 U.S. at 464 (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 months or years in the future.

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. After reviewing the plea agreement with Mr. King, the district court informed him that while counsel may have discussed the application of the sentencing guidelines, it was an "educated guess." (APP. B 7). The district court then made clear that the Guidelines are advisory and it was not required to impose a guideline

sentence. App. B 6-7). 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." *Id.* 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. *United States. v. Quiroga,* 554 F.3d 1150, 1155 (8th Cir. 2009). *See also United States v. Spears,* 235 F.3d 1150, 1152 (8th Cir. 2001) (holding that a defendant's guilty plea was "knowing and voluntary," despite "any confusion about how he would fare under the Sentencing Guidelines"); *United States v. Granados,* 168 F.3d 343, 345 (8th Cir. 1999) ("a defendant's reliance on an attorney's mistaken impression about the length of sentence is insufficient to render a plea involuntary as long as the court informed the defendant of his maximum possible sentence.")

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); *Booker*, 543 U.S. at 260-262. But a waiver of appellate rights as part of a plea agreement occurs long before those errors may occur, and thus a waiver executed in such situations cannot truly be knowing. 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, 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 on this issue.

CONCLUSION

For the foregoing reasons, Petitioner Jerome Scott King respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 6th day of May, 2022.

Respectfully submitted,

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