No. _____

In The

Supreme Court of the United States

MARCUS DWAYNE PEMBERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Michael W. Patrick, N.C. State Bar #7956
Counsel of Record
LAW OFFICE OF MICHAEL W. PATRICK
100 Timberhill Place, Suite 127
Post Office Box 16848
Chapel Hill, North Carolina 27516
(919) 960-5848 – Telephone
(919) 869-1348 – Facsimile
mpatrick@ncproductslaw.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTIONS PRESENTED

I. SHOULD STANDARDS OTHER THAN THE KNOWING AND VOLUNTARY WAIVER STANDARD OF *BRADY V. UNITED STATES* GOVERN THE ENFORCEMENT OF APPEAL WAIVERS IN PLEA AGREEMENTS?

II. SHOULD AN APPELLATE COURT ENFORCE A CRIMINAL DEFENDANT'S APPEAL WAIVER WHERE THE SENTENCING COURT USES AN IMPROPER SENTENCING GUIDELINE THAT SUBSTANIALLY INCREASES THE SENTENCING GUIDELINE?

TABLE OF CONTENTS

Page:

APPENDIX:

TABLE OF AUTHORITIES

Page(s):

Cases:

Constitutional Provision:

Statutes:

Rule:

Sentencing Guidelines:

Other:

OPINION BELOW

The order of the Fourth Circuit dismissing the appeal, issued on April 18, 2022. The order is reprinted as Appendix A to this Petition. (Appendix A, infra).

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on April 18, 2022.

STATUTORY PROVISIONS INVOLVED

Rule 11 of the Federal Rules of Criminal Procedures provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

> (1) Advising and Questioning the Defendant.
> 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.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Sentencing Guidelines (hereinafter, U.S.S.G.) § 4B1.1 provides:

(a) A defendant is a career offender if

(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
(2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
(3) the defendant has at least two prior felony convictions of either a crime violence or a controlled substance offense.

STATEMENT OF THE CASE

Defendant Marcus Pemberton was indicted on September 2, 2020 for one count of possession with intent to distribute heroin, one count of possession of a firearm in further of a drug trafficking offense, and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §922. J.A. p. 8. Pursuant to a plea agreement, Defendant Pemberton entered a plea of guilty to count three of the indictment which charged possession of a firearm on August 16, 2010 in Stanly County, North Carolina. J.A. p. 27. Hon. Catherine Eagles imposed a sentence of 69 months for the gun possession and dismissed the remaining counts pursuant to the plea agreement. J.A. p. 93. This appeal followed.

After the entry of Mr. Pemberton's plea of guilty, the probation office prepared a draft presentence report which described the circumstances surrounding the August 16 possession as arising out of an investigation of drug trafficking at a residence in Albermarle, N.C. J.A. p. 106. On August 16, local police executed a search warrant for a residence on Richardson Street in Albemarle, N.C. Police arrested Mr. Pemberton after finding a quantity of heroin in the living room of the residence, and a handgun and a small amount of marijuana in the bedroom of the residence where Mr. Pemberton had been sleeping. J.A. p. 107. The draft PSR proposed a four level offense enhancement under U.S.S.G. § 2K2.1(b)(6)(B) on the

grounds that the firearm had been possessed in connection with commission of another felony, drug trafficking. J.A. p. 108. The Defendant objected to this enhancement arguing that the firearm had been possessed because the residence had been recently shot up by someone engaged in an ongoing dispute with Mr. Pemberton over his relationship with a woman. J.A. p 139, 142.

The government filed a sentencing memorandum to support this enhancement. J.A. p. 219. The government argued that the proximity of the gun to the living room drugs was sufficient to establish that the gun was possessed in connection with drug distribution, a felony. J.A. p. 227. At the sentencing hearing on August 16, 2021, the government relied on the information in the final presentence report. J.A. p 56.

Prior to the sentencing hearing, Defendant Pemberton filed two sworn statements by Melaine Nelson and Louise Hooker showing that in the month prior to the August search the Richardson Street house had been shot up twice in a dispute unrelated to drug dealing. In July and August 2019, Defendant Pemberton was staying with Melaine Nelson at Richardson Street. J.A. p. 146. Ms. Nelson's statement also provided photographs of bullet holes in the exterior of the house from these shootings. J.A. p. 148. The statement also provided text messages from Melaine Nelson to Louise Hooker in July 2019 about the first shooting. One of the text messages included a photo of the bedroom dresser showing damage from a bullet passing through the dresser. J.A. p. 147. The second statement, from Louise Hooker, further verified these text messages. J.A. p. 152. It is notable that the

police photographs from the August 16, 2019 search of the house also show the bullet hole in this dresser, the dresser where the firearm was found. J.A. p. 154. Ms. Hooker statement's also explains that these shootings occurred because of disagreement over a woman between Defendant Pemberton and the shooter Jaquavis Parker. This disagreement culminated a year later in July 2020 in two shootings. In the first, the Richardson Street house was again shot up in the early morning hours with Ms. Nelson and Mr. Pemberton present. See police report, J.A. p. 157. In a second shooting a few days later, Parker succeeded in shooting defendant Pemberton approximately six times. J.A. p. 166. Parker was subsequently arrested and charged with attempted murder for this shooting. J.A. p. 179.

The record also established that Defendant Pemberton had previously been shot several times prior to August 2019.The PSR notes Defendant was first shot at a Myrtle Beach night club when he was 17. PSR ¶17, J.A. p. 205. Mr. Pemberton was also shot in the right thigh in 2007, left knee, calf and buttock in 2009, right hip in 2013 and left side of his back in 2015. PSR ¶79.

After hearing argument on the sentencing enhancement, the district court overruled the objection and applied the four level enhancement to set offense level at 26, criminal history category IV and a sentencing guideline of 92 to 115 months. J.A. p. 65. The court then sentenced defendant Pemberton to a term of imprisonment of 69 months which was a downward departure from the guidelines in light of a U.S.S.G. § 5K1.1 motion filed by the government. J.A. p. 84.

After Defendant Pemberton's appeal brief was filed, the government moved to dismiss the appeal based on the appeal waiver in the plea agreement. April 18, 2022, the Court of Appeals for the Fourth Circuit dismissed the appeal based upon the waiver in the plea agreement.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT SHOULD REVIEW THIS CASE TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS ON WHETHER APPEAL WAIVERS THAT BAR REVIEW OF SENTENCING GUIDELINE APPLICATIONS ARE ENFORCEABLE.

Each circuit upholds appeal waivers in plea agreements.[1] As will be demonstrated below, most circuits, but not all, enforce appeal waivers in a way that prevents appellate review of incorrectly applied sentencing guidelines.

The standards that govern the enforcement of appeal waivers are of enormous consequence since appeal waivers are used in thousands of federal cases each year. A study of appeal waivers published in the Duke Law Journal found that more than 65 percent of the 971 federal cases studied utilized some form of appeal waiver.[2] The U.S. Sentencing Commission reported that in 2021 that 57,324 federal defendants were convicted with plea agreements.[3] If 65% of these defendants

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[1] *See, e.g.*, *United States v. Khattack*, 273 F.3d 557, 560–561 (3d Cir. 2001) (citing *United States v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001); *See also, United States v. Fisher*, 232 F.3d 301, 303 (2d Cir. 2000); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Branam*, 231 F.3d 931, 932 (5th Cir. 2000); *United States v. Fleming*, 239 F.3d 761, 763–64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916–18 (7th Cir. 2000); *United States v. Estrada – Bahena*, 201 F.3d 1070, 1071 (8th Cir. 2000); *United States v. Nguyen*, 235 F.3d 1179, 1184 (9th Cir. 2000); *United States v. Rubio*, 231 F.3d 709, 711 (10th Cir. 2000); *United States v. Howle*, 166 F.3d 1166, 1168– 69 (11th Cir. 1999).

[2] Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy,* 55 Duke L.J. 209, 231 (2005).

[3] UNITED STATES SENTENCING COMMISSION, 2021 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table11.pdf.

pleaded guilty with appeal waiver, appeal waivers were used in more that 37,000 federal cases in 2021.

The circuits diverge markedly on the standards used to decide whether appeal waivers are enforceable in cases where the sentencing court has applied the wrong sentencing guideline. This petition presents an opportunity to resolve a split in the circuits over whether appeal waivers are enforceable that restrict the review of erroneous application of guideline determinations.

Appellate courts have frequently addressed appeal waivers in plea agreements and generally have held them to be enforceable.[4] The general policy enunciated in the decisions upholding appeal waivers is that waivers serve the public interest in finality, efficiency, and the preservation of resources in the criminal justice system. When addressing the constitutionality of express waivers of appellate rights in plea bargains, federal and state courts start with the proposition that these agreements are valid so long as they are knowing and voluntary.[5] As this Court found in *Brady v. United States*, 397 U.S. 742, 752-53 (1970), waivers of constitutional rights in guilty pleas must be "voluntary[,] . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."

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[4] *See*, *e.g.*, *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1977); *United States v. Melancon*, 972 F2d. 566, 567-568 (5th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52-53 (4th Cir. 1990).

[5] *Brady v. United States*, 397 U.S. 742, 752-53 (1970); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992). *See also*, *United States v. Fleming*, 239 F.3d 761, 763–764 (6th Cir. 2001) (citing *Town of Newton v. Rumery*, 489 U.S. 386, 393 (1987)), *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995).

The various federal circuits differ in the extent they test the enforcement of appeal waivers against additional standards and how they apply *Brady*. One of the major differences is whether appeal waivers are enforced to prevent review of sentences even though the district court has applied an incorrect sentencing guideline.

A. The Simplified Application of *Brady's* Knowing and Voluntary Standard.

The analysis followed in the Fourth and Ninth Circuits focuses almost exclusively on whether the appeal waiver passes a simplified version of *Brady's* knowing and voluntary standard. For example, the Fourth Circuit routinely enforces appeal waivers, so long as there is any indication that the defendant understood that a waiver was included in his or her plea agreement.[6] The primary rationale expressed in the Fourth Circuit's decisions is the idea that any plea bargain struck by a defendant provides him or her with the benefit of having some control over their sentence. This benefit prevents a bargain from being "inequitable," according to the Fourth Circuit. *Brown*, 232 F.3d at 406. Beyond this requirement, however, there are few limits placed on the enforcement of such waivers in the Fourth Circuit.

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[6] *See, e.g., United States v. General,* 278 F.3d 389, 399–401 (4th Cir. 2002); *United States v. Brown,* 232 F.3d 399, 402–06 (4th Cir. 2000); *United States v. Brock,* 211 F.3d 88, 92 n. 6 (4th Cir. 2000); *United States v. Lambey,* 974 F.2d 1389, 1393 (4th Cir. 1992) (en banc); *United States v. Marin,* 961 F.2d 493, 495–96 (4th Cir. 1992); *see also United States v. Davis,* 954 F.2d 182, 185–86 (4th Cir. 1992) (enforcing a waiver that precluded the defendant from appealing certain convictions); *cf. United States v. Williams,* 29 F.3d 172, 174–75 (4th Cir. 1994) (holding that a defendant who stipulated his drug amounts prior to sentencing waived his right to appeal on the issue of the drug amounts).

Similarly, in allowing the broad enforcement of appeal waivers, the Ninth Circuit has noted that knowingly requirement does not necessarily mean that the defendant "foresees the specific issue that he now seeks to appeal." *United States v. Johnson*, 67 F.3d 200, 203-203 (9th Cir. 1995) (holding " [the defendant] knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be").

Brady's knowing and voluntary test included the requirement that waivers be "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." 397 U.S. at 752-53. The Fourth and Ninth Circuit read this to mean that the defendant need to understand only that there is an appeal waiver in the plea agreement. This simplified approach to the "voluntary and knowing" test permits appeal waivers to be enforced in a wide set of circumstances. Use of this simplified approach insulates from review many types of mistakes by the sentencing courts including whether a particular guideline is even applicable to a defendant.

B. The Second Circuit's Approach to Enforcing Appeal Waivers Permits Appellate Review of Whether the Sentencing Court Applied the Correct Guideline.

The Second Circuit has the most developed case law addressing when a defendant can challenge a mistaken determination of sentencing guideline ranges despite an appeal waiver. In its cases, the Second Circuit has fleshed out *Brady's* language that a defendant's waiver be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." The end result is that the Second Circuit typically upholds only those waivers that "waive the right to

appeal a sentence within (or below) an agreed guideline range." *United States v. Chen,* 127 F.3d 286, 288 (2d Cir. 1997).[7]

The Second Circuit balks at enforcing broader waivers that purport to waive the right to appeal "a sentence within (or below) whatever guideline range the sentencing judge determines is applicable." *United States v. Goodman,* 165 F.3d 169, 174 (2d Cir. 1999). The Second Circuit invalidated such an agreement in *United States v. Martinez-Rios,* 143 F.3d 662, 668-69 (2d Cir. 1998). The Second Circuit's hesitancy in upholding these waivers stems from the view that this "form of waiver leaves a defendant free to appeal an upward departure but denies him the opportunity to challenge the correctness of the sentencing judge's determination as to the applicable guideline range." *Goodman*, 165 F.3d at 174. Furthermore, while the Second Circuit routinely upholds appeal waivers that prevent a defendant from appealing a sentence that falls within a range "explicitly stipulated within the agreement itself,"[8] the defendant "retains the right of appeal if the ultimate sentence exceeds the prediction."

The Second Circuit also scrutinizes plea agreements that waive a defendant's rights to appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range *as determined by the Court.*" *Id.* at 99 (emphasis added). In the view of the Second Circuit, this type of waiver effectively "provides no protection to the defendant" because the guideline range is up to the discretion of the court and could "bear little to no resemblance to the predicted

[7] See e.g., *United States v. Maher*, 108 F.3d 1513 (2d Cir. 1997); *United States v. Ready,* 82 F.3d 551, 555 (2d Cir. 1996); *United States v. Yemitan,* 70 F.3d 746, 747 (2d Cir. 1995).

range." *Id.* Such a waiver, in the view of the Second Circuit, leaves the defendant "to the mercy of the sentencing court" because the defendant "assumes a virtually unbounded risk of error or abuse by the sentencing court." *Id.*

Normally, the standard plea agreement allows a defendant to weigh the predicted range and determine if he or she is willing to take the risk that they will receive a sentence in the upper part of the range and then be unable to appeal. *Id.* The predicted range provides some form of protection for the defendant because, if that sentence exceeds the range, he or she would still have the right to appeal. These broader waivers take that protection away because the guideline is left to the discretion of the sentencing court. Under such a waiver, a sentencing court could theoretically "sentence to a life term a defendant who had signed a plea which anticipated only a few months of imprisonment, and that defendant, under the terms of [these] agreement[s], would have no right to appeal even if the sentence were made erroneously." *Id.* at 100.

In addition, the Second Circuit has voiced concern that broad waivers are ambiguous and confusing to a defendant, thereby implicating the "knowing and voluntary" inquiry "to an even greater extent than a standard plea." *Id.* The Court noted that, to have an understanding of precisely what he is waiving, the defendant must grasp the distinction between 1) the court's upward departure from a sentence range which the court has already determined to be the proper application of the guidelines, a result which *is* appealable; and 2) the court's application of the guidelines to establish a sentence above the predicted range, a result which *is not*

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[8] *See, e.g., United States v. Rosa,* 123 F.3d 94, 97-102 (2d Cir. 1997).

appealable. In the Court's view the distinction between upward departures and relevant conduct enhancements –which remove one from a predicted range – are difficult even for attorneys and judges to grasp. Finally the Court noted a defendant could easily misunderstand the plea to mean that he would retain the right of appeal if the court were to sentence him more harshly than the predicted sentence range. *Id.* at 100-101.

Because of these concerns, the Second Circuit has held that appeals under broader appeal waivers should not be summarily dismissed. Instead, the Court will examine "carefully the facts of the case and to look at the manner in which the agreement and the sentence were entered into and applied to determine whether it" should be upheld. *Id.* at 101. The Second Circuit formulated what it has called a "closer look" standard that it now applies to these broad waivers. *Goodman*, 165 F.3d at 174-75. The Court looks for specific factors, such as "the extent to which the defendant actually understood both the scope of the waiver provision and the factors at work which encompass his risk of a sentence exceeding the predicted range, and the extent of actual discrepancy between the predicted range and the ultimate sentence," but in practice the Court subjects the appeal waiver and containing plea agreement to a fairness analysis. *Rosa*, 123 F.3d at 101. This fairness analysis has been applied on several occasions.

In *United States v. Rosa*, *supra,* the appeal waiver provided "[t]he defendant agrees not to file an appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guidelines range as determined by the Court." *Id.*

at 99. In examining the agreement's fairness, the Court noted that, in exchange for his waiver of appeal, Rosa was permitted to plead guilty to a lower offense that carried no minimum sentence. This agreement allowed him to escape a ten-year mandatory minimum connected with the other charge in the indictment. The Court viewed this as a substantial benefit and stated that "[w]hile receipt of the expected benefits of a plea is, of course, not in and of itself a reason to hold a defendant to a plea agreement which is otherwise invalid, we mention it as it goes to the overall fairness, and thereby the validity, of that agreement." *Id.* at 101-02. The Court also noted that the sentence imposed on Rosa, 27 months, was only six months higher than the upper limit set in the plea agreement. While higher discrepancies between predicted sentence and actual sentence may be cause for remand, *Rosa* was not such a case. *Id.* at 102.

The Second Circuit also applied this fairness standard in *United States v. Goodman, supra.* The appeal waiver in that case provided that the defendant "knowingly and voluntarily waive[d her] right to appeal any sentence ... imposed by the Court and the manner in which the sentence is determined so long as [the] sentence is within the statutory maximum specified above." *Goodman*, 165 F.3d at 172. The Court first noted that, because she pleaded guilty to the only charge brought against her, "Goodman received very little benefit in exchange for her plea of guilty." *Id.* at 174. The Court also concluded that the sentencing court did not adequately insure Goodman understood the appeal waiver because the statements made to the defendant were inconsistent with those in the appeal waiver. *Id.*

Finally, the Court noted "the discrepancy between the sentence imposed – thirty months in prison – and the predicted sentencing range-ten to sixteen months-is substantial." *Id.* As a result of the above issues, the Court determined the appeal waiver to be unfair and refused to enforce the waiver against Goodman. *Id.* at 175.

C. The Miscarriage of Justice Standard.

The First[9], Third[10], Eighth[11], and Tenth[12] Circuits judge the enforcement of appeal waivers using a miscarriage of justice standard.[13] A "miscarriage of justice"

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[9] The First Circuit holds that the relevant factors of a defendant's unenforceable waiver claim are "the clarity of the alleged error, its character and gravity, its impact on the defendant, any possible prejudice to the government, and the extent to which the defendant acquiesced in the result." *United States v. Gonzales-Colon*, 582 F.3d 124, 128 (1st Cir. 2009)(citing *United States v. Gil-Quezada*, 445 F.3d 33, 37 (1st Cir. 2006). In *Ortiz-Garcia*, the First Circuit found that the waiver of appeal was a miscarriage of justice because the sentencing court failed to disclose in taking the waiver that the maximum penalty for the crime was life imprisonment. 665 F.3d 279 (1st Cir 2011). In this case, the lower court stated only that the minimum penalty was "imprisonment of not less than ten (10) years." *Id.* Because the defendant was not fully informed of the rights he was waiving, the Court held that enforcing the appeal waiver would be a miscarriage of justice. The rationale behind this decision was a defendant did not know what right he waived until his sentence was imposed. Therefore, under this logic, a defendant's waiver does not pass the "knowing and voluntary" requirement if the court taking the waiver has stated an incorrect sentence range.

[10] Instead of identifying a list of specific circumstances that fall into the miscarriage of justice exception, the Third Circuit holds that the "underlying facts [of the case] determine whether a miscarriage of justice would be worked by enforcing the waiver." *United States v. Mabry*, 536 F.3d 231, 242 – 243 (3d Cir. 2008). In *United States v. Khattak*, 273 F.3d 557 (3d Cir 2001), the Third Circuit held that the defendant received a sentence "well within the terms of his plea agreement," and, additionally, the defendant's counsel presented no additional argument proving a miscarriage of justice. *Id.* at 563. Therefore, the waiver of his right to appeal was upheld. *Id.*

[11] The Eighth Circuit also upheld this approach in *United States v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002). The defendant in this case pled guilty to first-degree murder and later sought to withdraw this plea, claiming his attorney coerced him into taking the deal. *Id.* at 728. The district court denied his motion and imposed the agreed upon sentence of thirty-five years. *Id.* The appellate court reversed and remanded this decision stating, "There can be no plea bargain to an illegal sentence." *Id.* (citing *Baker v. Barbo*, 177 F.3d 149, 155 (3d Cir.), cert. denied, 528 U.S. 911, 145 L. Ed. 2d 219, 120 S. Ct. 261 (1999); *Correale v. United States*, 479 F.2d 944, 947 (1st Cir. 1973)). The Court described an illegal sentence as a decision "not authorized by the judgment or conviction or when it is greater or less than the permissible statutory penalty for the crime." *Id.* The Court further held that "even when a defendant, prosecutor, and court agree on a sentence, the Court cannot give the sentence effect if it is not authorized by law. Thus, when a defendant has entered a plea bargain contemplating an illegal sentence, the defendant is generally entitled to withdraw the guilty plea." *Id* at 730. To hold otherwise would be considered a miscarriage of justice; therefore, the appeal waiver was considered invalid.

[12] Finally, the Tenth Circuit found persuasive the Eighth Circuit's treatment of these principles and created a three-prong analysis. In reviewing appeals brought after a defendant has entered into an

has been found where the sentence exceeds the statutory maximum, where an impermissible factor such as race has been used or where there has been ineffective assistance of counsel. A miscarriage of justice has also been found in these circuits where a sentence was entered that was not authorized by statute, or when the defendant was not informed of the statutory maximum he faced. These courts have not found that erroneous application of a sentencing factor is a miscarriage of justice. This type of mistake is unreviewable in these circuits if there is an appeal waiver.

D. The Ad Hoc Approach Used in Other Circuits.

Without enunciating a broad general standard, the Seventh and Eleventh Circuits each use their own *ad hoc* approaches to judge the validity of a defendant's waiver of the right to appeal. These circuits hold there are specific instances in which the defendant's waiver is unenforceable. For example, the Seventh Circuit has enforced appeal waivers to reject challenges made to guideline determinations and to reject claims of ineffective assistance of counsel but has also ruled that an

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appeal waiver, the Tenth Circuit's analysis calls for the court of appeals to determine: (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would not result in a miscarriage of justice. *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (citing *United States v. Andis,* 333 F.3d 886, 890 – 892 (8th cir. 2003)).

In *Hahn*, the Tenth Circuit defined four situations that would qualify as a miscarriage of justice and would result in the invalidation of the waiver: "[1] where the district court relied on an impermissible factor such as a race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver render the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Id.* at 1328. The Court held that Hahn's request for an appeal based on the lower court's sentencing error was within scope of the waiver of his right to appeal, and, therefore, the waiver was upheld. *Id.*

[13] *United States v. Ortiz-Garcia*, 665 F.3d 279 (1st Cir. 2011); *See also, United States v. Khattak,* 273 F.3d 557, 563; *United States v. Jennings*, 662 F.3d 988, 990 (8th Cir. 2011); *United States v. Lonjose*, 663 F.3d 1292 (10th Cir. 2011) (citing *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004).

appeal waiver does not preclude review of a sentence that exceeds the statutory maximum. See *United States v. Joiner*, 183 F.3d 635 (7th Cir. 1999).[14] The Eleventh Circuit instead focuses on procedural protections in connection with appeal waivers. If a defendant has been questioned about the appeal waiver and has understood its full significance, the Eleventh Circuit will uphold appeal waivers even in the face of "blatant errors" committed by the sentencing court.[15]

E. The Differing Approaches Used by the Circuits in Enforcing Appeal Waivers Lead to Markedly Different Results When Applied to Sentencing Appeals That Challenge the Use of the Incorrect Guideline; Except in the Second Circuit The Approaches Insulate the Use of Incorrect Guidelines from Appellate Review.

All circuits, except the Second Circuit, enforce waivers in a way that precludes challenges to the correctness of guideline determinations. The Second Circuit does not enforce some appeal waivers if the plea agreement does not otherwise benefit the defendant.

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[14] In Joiner, the Seventh Circuit held that a waiver of the right to appeal "does not completely foreclose review, because the right to appeal survives where the agreement to waive is involuntary or where the sentence exceeds the statutory maximum." *Id.* at 644 – 645 (citing *United States v. Jones,* 167 F.3d 1142 (7th Cir. 1998)). In this case, the defendant's claims of ineffective assistance of counsel did not fall into one of the narrowly defined categories of the exception to make the appeal invalid. *Id.* Therefore, the waiver of appeal was upheld.

The Seventh Circuit also rejected the claim in *Jones*, 167 F.3d 1142, that the court's sentence exceeded the statutory maximum because the plea agreement proposed a range rather than an exact number. *Id.* at 1145. The Seventh Circuit only recognizes that a "right to appeal survives where the agreement is involuntary, or the trial court relied on a constitutionally impermissible factor (such as race)." Jones, 167 F.3d at 1144.

[15] In *United States v. Grinard-Henry,* 399 F.3d 1294, 1296 (11th Cir. 2005), the court enforced waiver of appeal of the application of the sentencing guidelines that within the scope of the waiver after noting that the trial court had specifically explained the scope of the waiver and determined the defendant understood its full significance. The Court noted an appeal waiver includes the waiver of the right to appeal difficult or debatable legal issues or even blatant error, citing *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999).

The circuits that broadly enforce appeal waivers insulate great numbers of sentences from appellate review and thereby allow greater disparity in sentencing results. One of Congress' three primary purposes in enacting the Sentencing Reform Act of 1984 was to promote reasonable uniformity in sentencing decisions among similarly situated defendants.[16] Thus the policy of broadly enforcing appeal waivers undermines the congressional policy of promoting sentencing uniformity.

Petitioner Pemberton' case illustrates how the circuits' different approaches to enforcing appeal waivers brings markedly different results in similar cases. The facts of Petitioner Pemberton' case parallel those found in the Second Circuit *Goodman* case. Pemberton' appeal waiver is the broad type carefully scrutinized in the Second Circuit because it effectively subjects Petitioner to a "virtually unbounded risk of error or abuse by the sentencing court." The sentencing court has unfettered authority to sentence Petitioner however it wishes, because the waiver prevents him from contesting any mistake the court makes in establishing the guideline range.

If Mr. Pemberton' case were in the Second Circuit, the appeals court would apply its "close look" standard to the facts of this case. In doing so, it would observe that Petitioner received no benefit for his bargain. Although he pled to specific charges against his, the sentence was based on his entire course of conduct. Also, the Court would observe that due to the broad nature of the plea agreement, Petitioner possibly did not fully understand the terms of the agreement, and, therefore, did not knowingly and voluntarily waive his right to appeal. The lack of

[16] *United States Sentencing Guidelines Manual,* Ch. 1, Pt. A, 1 (3)(2016).

sophistication of Petitioner raises a serious question to his understanding of the appeal waiver, an issue that was also present in *Goodman*.

In this case, the Fourth Circuit summarily upheld the Petitioner Pemberton's waiver. The court based its determination solely on whether Petitioner Pemberton understood his plea agreement contained an appeal waiver. The Court paid no attention to the relative fairness approach of *Goodman,* and did not examine whether the district court adequately determined whether Mr. Pemberton understood what rights he was waiving.

As a consequence, the Fourth Circuit approach prevented review of a mistake of law that caused Mr. Pemberton to be sentenced to a higher offense level due to the erroneous determination that a four level sentencing enhancement applied. This increased his guideline range by 29 to 37 monthsIf the correct offense level category had been used and Petitioner sentenced using the appropriate guideline range, Petitioner probably would have been sentenced to at least two years less time than he received.[17]

In the *Goodman* case, the sentence imposed was 14 months higher than the predicted sentence. The Second Circuit viewed that discrepancy as substantial and refused to enforce the appeal waiver because of it. In this case, the difference is much larger. Because of a mistake made by the sentencing court, Mr. Pemberton

[17] Without the four level enhancement, Mr. Pemberton would have had a guideline of Offense Level 22, Criminal History Category 4, instead of a Offense Level 26, Criminal History category 4. The correct guideline range was 63 to 78 months; the incorrect guideline range was 92 to 115 months. Even with the downward departure Mr. Pemberton was sentenced to 63 months. With a downward departure from the correct guideline range, he would have received at least two years less time in prision.

will spend at least two more years in prison than he otherwise would have. This case illustrates the significant effects that flow from the different approaches used by most circuits that prevent appellate review of erroneous determinations of guideline ranges. The insulation of such mistakes from appellate review promotes severe disparities in sentencing contrary to the congressional policy of promoting uniformity in sentencing.

Granting review of this case would provide the Supreme Court with an opportunity to establish greater uniformity in how appeal waivers are applied on sentencing appeals and take a step that would promote a more uniform application of the sentencing guidelines across the country. Given the ten of thousands of federal cases in which appeal waivers are used each year, the Court's review the use of appeal waivers and the standards for their enforcement has great importance to federal criminal jurisprudence.

CONCLUSION

Petitioner Pemberton respectfully requests that the Supreme Court review this case in order to resolve this circuit split as well as to provide further guidance to how and whether appeal waivers should be enforced.

This the 12th day of July, 2022.

LAW OFFICE OF MICHAEL W. PATRICK

/s/ Michael W. Patrick
Michael W. Patrick (N.C. State Bar #7956)
Attorney for Marcus Dwayne Pemberton
100 Timberhill Place, Suite 127
Post Office Box 16848
Chapel Hill, North Carolina 27516
(919) 960-5848 (919) 869-1348 - fax
E-mail: mpatrick@ncproductslaw.com