Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ARMAD JAMALL GATLING,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Armad Jamall Gatling, who is incarcerated in a federal correctional facility, asks leave to file the attached Petition for a Writ of Certiorari to The Supreme Court of the United States of America without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 39 of this Court.

The Petitioner was previously granted leave to proceed in forma pauperis in the Court of Appeal for the Fourth Circuit. By order of the Court of Appeals dated April 5, 2022, the undersigned was appointed as counsel for the petitioner pursuant to the Criminal Justice Act, 18 USC § 3006A, which is why no affidavit from the petitioner is attached, pursuant to Supreme Court Rule 39(1).

Dated: October 4, 2022

/s/ Mark Diamond
Attorney for Petitioner

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IN THE

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ARMAD JAMALL GATLING,

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-vs-

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI

October 4, 2022

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in dismissing Mr. Gatling's appeal without reviewing its merits?

2. Did the district court err when determining the amount of restitution and sentence enhancement?

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On August 23, 2022, The United States Court of Appeals for the Fourth Circuit dismissed Mr. Gatling's appeal in *United States v. Armad Jamall Gatling*, USCA 22-4198 (4th Cir. Va.). (Appendix -A-)

JURISDICTION

The final Order of the U.S. Court of Appeals was issued on August 23, 2022. This petition was filed within ninety days thereof. Jurisdiction in the trial court was based on 18 USC § 3231, since the appellant was charged with offenses against the laws of the United States of America. The jurisdiction of this Court is invoked under 28 USC § 1254 and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment, which assures that no one "shall be deprived of life, liberty, or property, without due process of law," as well as his Sixth Amendment right to the effective "assistance of counsel for his defence." It involves Mr. Gatling's right to direct appeal under 18 USC § 3742, as well as to a sentence that is procedurally and substantively reasonable under 18 USC § 3553(a) and Fed.R.App.Proc. 4(b).

STATEMENT OF THE CASE

By dismissing the appeal, the Court of Appeals has sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

BACKGROUND OF THE CASE

On July 22, 2021, judgment was entered in the United States District Court for the Eastern District of Virginia in Norfolk under index number 2:19-cr-00153-RBS-RJK-1. Following his guilty plea, Mr. Gatling was convicted of one count each of felon in possession of a firearm transported interstate [18 USC § 922(g)(1) and 924 (a)(2)]; aggravated identity theft for unauthorized use of another's identification to commit fraud in relation to wire fraud [18 USC § 1028A(a)(1); (c)(5); and 2]; and financial institution fraud, consisting of cashing counterfeit checks for $1410 on September 10, 2019, and $1402 on September 10, 2019, at a credit union [18 USC § 1344 and 2]. He received a total effective sentence of 216 months in prison and five years of supervised release.

Mr. Gatling allocuted that while in Virginia on August 5, 2019, he possessed a rifle in interstate commerce knowing that he had been convicted of a crime punishable by imprisonment lasting more than one year; on September 10, 2019, he knowingly used someone else's identification without consent to conspire to commit wire fraud by means of credit card fraud involving a credit union; and on

September 11, 2019, he knowingly got others to help him defraud that credit union by depositing counterfeit checks in the amounts of $1410 and $1402 into other people's accounts without their permission and then transferring those amounts into the accounts of two conspirators, which they then withdrew.

On March 28, 2022, Mr. Gatling wrote to the district court seeking relief pursuant to 18 USC § 2255, which the court deemed to be a "Notice of Appeal." On May 24, 2022, he filed another letter seeking 2255 relief. On July 18, 2022, he filed a formal "Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody." On July 21, 2022, the district court issued an Order dismissing the motion without prejudice to timely refile upon the resolution of the direct appeal.

The appellant's opening brief was filed on June 24, 2022. On July 15, 2022, the appellee filed a motion to dismiss the appeal, which we opposed. On August 23, 2022, the Court of Appeals dismissed the appeal untimely.

REASONS FOR GRANTING THE WRIT
FOR GRANTING THE WRIT

(1) The Fourth Circuit has decided the important federal question of jurisdiction in a way that conflicts with this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007) calling for an exercise of this Court's supervisory power. (Fed.R.App.Proc. 4(b).

(2) The Fourth Circuit's refusal to consider the merits of Mr. Gatling's appeal sanctioned such a departure by the district court as to call for an exercise of this Court's supervisory power. (U.S. Const. 5th, 6th Amends.; 18 USC §§ 3553[a]; 3664).

<u>Argument 1</u>: Mr. Gatling's Late Appeal Did Not Deprive The Appellate Court Of Jurisdiction.

Fed.R.App.Proc. 4(b)(A)(i) states, "In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after … the entry of either the judgment or the order being appealed." A defendant's failure to comply with this rule does not deprive the Court of Appeals of jurisdiction to consider the merits of a criminal appeal, though. That is because Rule 4(b) is a rule and not a legislatively derived statute.

This varies from the time restriction in a civil judgment, which is contained in Fed.R.App.Proc. 4(b)(1)(A) and is legislatively mandated under 28 USC § 2107(a). Rule 4(b) concerning criminal appeals, unlike Rule 4(a) for civil appeals, is not grounded in a federal statute. (*Bowles v. Russell*, 551 U.S. 205, 210 (2007); see also, *United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v. Sadler*, 480 F.3d 932, 934 (9th Cir. 2007); *United States v. Garduño*, 506 F.3d 1287, 1288 (10th Cir. 2007)

Rule 4(b) is a mandatory claim-processing rule. (*Manrique v. United States*, 137 S.Ct. 1266, 1271 (2017); *United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009) A mandatory claim-processing rule can be forfeited "if the party asserting the rule waits too long to raise the point." (*Eberhart v. United States*, 546 U.S. 12, 15 (2005)

In *Eberhart v. United States* (ibid at 18) the Court held, "… failure to object to untimely submissions entails forfeiture of the objection ...." In (*United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) citing *Eberhart*, 546 U.S. at 17-18) the Fourth Circuit held, "When the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b) is mandatory and inflexible.... And where, as here, the government forfeits an objection to the untimeliness of a defendant's appeal by failing to raise it, we act within our jurisdiction when we decide to consider the appeal as though it were timely filed."

In Mr. Gatling's case, the government waited too long to object to his appeal. Gatling filed his notice of appeal on March 19, 2022. The government did not move to dismiss the appeal until July 15, four months later. This was after counsel was assigned to represent Mr. Gatling on appeal, after the Court had issued a scheduling order, and after Mr. Gatling's appellate brief had already been served and filed. This delay constituted a waiver of the government's right to object to the appeal.

Argument 2: The Court of Appeals Incorrectly Declined to Consider The Merits of Mr. Gatling's Meritorious Appeal.

Restitution

The error in refusing to consider the merits of Mr. Gatling's appeal is not harmless, for our raised two meritorious claims. In Argument 1 of his appellate

brief, Mr. Gatling noted that the amount of restitution contained in the Judgment varied substantially from the restitution amount contained in the Restitution Order. Additionally, the district court failed to identify the basis for the restitution amounts, either on the record during the court proceedings or in its Restitution Order.

Contrary to the requirements of 18 USC § 3664, the Mr. Gatling's Presentence Investigation Report failed to provide any information identifying whether a loss was actually suffered and how much that loss might be. Under the category "Restitution", the presentence report states only the following:

> To be determined
>
> Count 1: Not applicable
>
> Count 2: Not applicable
>
> Count 3: To be determined

Nor did the parties' Plea Agreement specify the amount or nature of restitution. In short, there was no clear and accurate basis for the amount of restitution that Mr. Gatling was ordered to pay, in violation of 18 USC § 3664, which requires that the Presentence Investigation Report make that initial determination. The Fourth Circuit itself has repeatedly held that in order to ensure effective appellate review of restitution orders, sentencing courts must make

explicit findings of fact on each of the factors set forth in 18 USC § 3664(a). (*United States v. Molen*, 9 F.3d 1084, 1086 (4th Cir. 1993)

Despite "the clear mandate from this court, the district court failed to articulate on the record specific findings with respect to" Mr. Gatling's earning ability or financial needs. It failed to make a factual determination that Gatling could make the necessary restitution payments without undue hardship to himself or that the amount of restitution was necessary and correct. And it failed to adopt a presentence report containing adequate findings of fact, since the presentence report never made any findings of fact concerning restitution. (*United States v. Blake*, 81 F.3d 498, 505 (4th Cir. 1996)

Mr. Gatling retained his right to appeal this issue. The Plea Agreement states that Mr. Gatling waived his right to appeal his sentence "in exchange for the concessions made by the United States in this plea agreement" The agreement goes on to state under "Restitution" the following: "The defendant agrees to the entry of a restitution order for the full amount of the victim's losses." Mr. Gatling's waiver is premised on the concession by the prosecutor that it will seek "the full of amount of the victim's losses" but not more Mr. Gatling entered into the plea agreement with the promise to pay "the full amount of the victim's losses" but not more.

Instead, the Government sought, and the district court ordered, Gatling to pay an amount far in excess of the full amount of losses incurred by the victims.

At sentencing, Mr. Gatling preserved his right to appeal the Order of Restitution that was not supported by the facts of the case and that exceeded the full amount of the victims' losses.

Additionally, restitution is statutorily authorized. (18 USC § 3664) Since a restitution order that exceeds the authority of the applicable statute is no less illegal than a sentence of imprisonment that exceeds the statutory maximum, appeals challenging the legality of restitution orders are outside the scope of an otherwise valid appeal waiver. Waiver of appeal does not prevent appellate review of an illegally imposed amount of restitution amount since the sentencing court did not comply with the applicable restitution statute. (*United States v. Cohen*, 459 F.3d 490, 497 (4th Cir. 2006)

The district court stated at sentencing that a Restitution Order had still not been provided by the Government. (Transcript of 7/21 pp. 16, 48) For this reason, Gatling had no opportunity to object to the amount of restitution before he was sentenced. It cannot be said that he forfeited his right to object to an Order of Restitution that did not exist at the time of sentencing.

Since the district court failed in its duty to make an independent determination of the appropriate amount of restitution, the Presentence Investigation Report failed to provide an analysis or determination of the appropriate amount of restitution, and the Government failed to provide any reason for the amount of restitution it sought, that portion of the judgment concerning the

amount of restitution should have been considered by the Fourth Circuit on its merits, the Judgment vacated, and the case should have been remanded to the district court for a lawful determination of the proper amount of restitution.

Sentence Enhancement

Mr. Gatling had a second appellate argument that deserved consideration on its merits. The Superseding Indictment alleged that Mr. Gatling possessed a single rifle, which was found in the trunk of his car when he was arrested. The Statement of Facts and the Presentence Investigation Report both allege the same thing: A single firearm that was not used in relation to the crimes charged was found in the trunk of Gatling's car. Despite this, the district court added two levels to Gatling's offense level under USSG 2K2.1(b)(1)(A) for "multiple firearms."

The district court provided no reason or basis for this determination. During the proceedings, the number of firearms imputed to Mr. Gatling was never discussed. No mention of number of firearms is made in the Statement of Facts or the Plea Agreement. The district court improperly enhanced Mr. Gatling's offense level under USSG 2K2.1 since (1) the firearm was never used, or alleged to have been used, in the commission of the crimes charged, and (2) there was nothing in the record to support the court's attributing multiple firearms to Mr. Gatling for sentencing purposes.

In addition, the district court enhanced Mr. Gatling's offense level by another two points under USSG § 2B1.1(b)(16)(B) for use of a baton during the crimes charged. The court made the same error. The baton was found in the trunk of Gatling's car when he was arrested. There was no claim in the Indictment, Presentence Investigation Report, Statement of Facts, Plea Agreement, or on the record that he used or possessed the baton during the crimes charged.

Mr. Gatling's waiver of appeal did not preclude the Court of Appeals from considering these arguments, since enforcing a waiver would result in a miscarriage of justice. (*United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005) His attorney's failure to object to the enhancements can only be credited to ineffective assistance of counsel. (U.S. Const. 5th, 6th Amends.; *Strickland v. Washington*, 466 U.S. 668 (1984) Any reasonably competent criminal trial attorney would have objected to the four-level enhancement. There was no legitimate reason not to. Had counsel objected, the district court would not have imposed the four levels for the reasons cited.

The two sentencing errors constituted both procedural and substantive error under 18 USC § 3553(a). (*United States v. Rivera-Santana*, 668 F.3d 95, 106 (4th Cir. 2012) It led to a final offense level of 36 when it should have been 32, and a sentence range of 262 to 327 months in prison instead of 168 to 210 months. Like the court's improper award of restitution amount, the two sentencing errors warranted the Court of Appeals' consideration of Mr. Gatling's appeal.

CONCLUSION

FOR THESE REASONS, the petitioner respectfully asks the Supreme Court to issue a writ of certiorari to review the Court of Appeals' dismissal of his appeal, and for such further relief as the Court deems proper.

Respectfully submitted,

/s/ Mark Diamond
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IN THE SUPREME COURT OF THE UNITED STATES

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PROOF OF SERVICE

Mark Diamond swears that on October 4, 2022, pursuant to Supreme Court Rules 29.3 and 29.4, I served the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on every person or his counsel who is required to be served by first-class mail through the U.S. Postal Service. The following were served:

(1) Mr. Armad Jamall Gatling, 19170-509, USP Canaan, Box 300, Waymart, PA 18472

(2) Mr. William B. Jackson, Office of U.S. Attorney, 101 West Main, Street, Suite 8000, Norfolk, VA 23510

(3) Hon. Elizabeth Barchas Prelogar, U.S. Department of Justice, 950 Pennsylvania Ave. N.W., Washington, DC 20530

/s/ Mark Diamond
Attorney for Petitioner

FILED: August 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4198
(2:19-cr-00153-RBS-RJK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ARMAD JAMALL GATLING, a/k/a Peso Chapo

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: August 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4198
(2:19-cr-00153-RBS-RJK-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARMAD JAMALL GATLING, a/k/a Peso Chapo,

Defendant - Appellant.

ORDER

Armad Jamall Gatling seeks to appeal his 216-month sentence and restitution order imposed following his guilty plea to possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1); aggravated identity theft, in violation of 18 U.S.C. §§ 1028(a), 1028A; and credit union fraud, in violation of 18 U.S.C. § 1344. The Government has moved to dismiss the appeal as untimely.

In criminal cases, the defendant must file the notice of appeal within 14 days after the entry of judgment. Fed. R. App. P. 4(b)(1)(A). With or without a motion, upon a showing of excusable neglect or good cause, the district court may grant an extension of up to 30 days to file a notice of appeal. Fed. R. App. P. 4(b)(4). Although the appeal

period in a criminal case is not a jurisdictional provision, but rather a claim-processing rule, *United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009), "[w]hen the Government promptly invokes the rule in response to a late-filed criminal appeal, we must dismiss," *United States v. Oliver*, 878 F.3d 120, 123 (4th Cir. 2017).

The district court entered judgment on July 22, 2021. Gatling filed the notice of appeal at the earliest on March 19, 2022. Because Gatling failed to file a timely notice of appeal or to obtain an extension of the appeal period and the Government has promptly invoked the appeal's untimeliness, *see* 4th Cir. R. 27(f)(2), we grant the Government's motion to dismiss the appeal.

Entered at the direction of the panel: Chief Judge Gregory, Judge Heytens, and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk