No. _____

In The

Supreme Court of the United States

TIMOTHY ROBERT GALLION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY DISMISSING MR. GALLION'S MERITORIOUS ARGUMENT THAT THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISREGARDING THE GUIDELINE RANGE OF 51-63 MONTHS AND IMPOSING A SENTENCE OF 120 MONTHS AND REFUSING TO ADDRESS THE SENTENCE CREDIT GUIDANCE OF U.S.S.G. § 5G1.3.

B. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S JUDGMENT IMPOSING CONDITIONS OF SUPERVISED RELEASE WHEN THE DISTRICT COURT REFERENCED BUT DID NOT ORALLY PRONOUNCE SUCH CONDITIONS DURING THE SENTENCING HEARING.

LIST OF PARTIES

TIMOTHY ROBERT GALLION, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Robert Gallion respectfully prays for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The decision of the Fourth Circuit Court of Appeals affirming the judgment entered against Mr. Gallion is reported at *United States v. Timothy Robert Gallion*, 2022 WL 4463132, No. 22-4015 (4th Cir., 26 September 2022). (App A). Pursuant to Federal Rules of Appellate Procedure 32.1, the decision is unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued an unpublished decision on September 26, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 3553 – Imposition of a Sentence

> (a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—
(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—
(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;
(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—
(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;
(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or
(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the

court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

This case began on March 22, 2017 when deputies in Buncombe County, North Carolina executed a traffic stop on Mr. Gallion's vehicle to serve him with an outstanding arrest warrant. Mr. Gallion was inebriated and refused to comply. Upon arrest, deputies found three firearms and multiple rounds of ammunition. Grand Juries in the Western District of North Carolina issued an Indictment on April 4, 2017 and a Superseding Indictment on February 19, 2021. Both indictments included the same provision charging Mr. Gallion with possession of a Mossburg model 500A 12-gauge shotgun and a forfeiture provision for both the Mossburg and for 19 shotgun shells.

Mr. Gallion appeared before Magistrate Judge Carleton Metcalf on February 26, 2021 at which both the initial appearance and plea hearings were conducted. Mr. Gallion entered into a written plea agreement with the government filed on February 19, 2021. As part of the plea agreement the parties agreed upon a recommended base offense level of 14 with a two-level addition for having 3 firearms per U.S.S.G. § 2K2.1(b)(1)(A) and four-level enhancement for one of the firearms having been used in another felony offense per U.S.S.G. § 2K2.1(b)(1)(A). The parties also agreed to "request that the sentence in this case be imposed to run concurrently with the sentence the defendant is currently serving for first degree murder and weapons offenses."

The case returned to court for a sentencing hearing on December 16, 2021 before Judge Martin Reidinger who made findings that the total offense level was 17 with a criminal history category VI resulting in a guideline range of 51 to 63 months. Judge Reidinger considered the defendant's sentencing memorandum seeking both that the sentencing run concurrently but also that the court provide sentencing credit for the time he had served on an undischarged related state conviction as provided for in U.S.S.G. § 5G1.3(b).

Judge Reidinger entered judgment sentencing Mr. Gallion to 120 months and that upon release he also would be subjected to 3 years of supervised release "and shall comply with the mandatory and discretionary conditions of supervised release as those have been adopted by the court in the Western District of North Carolina." Mr. Gallion entered notice of appeal on January 3, 2022. The Fourth Circuit issued

an unpublished decision on September 26, 2022 dismissing Mr. Gallion's argument that Judge Reidinger had erred by upwardly varying from the guidelines. The circuit court affirmed the portion of the judgment containing the conditions of supervised release. (App A).

REASONS FOR GRANTING THE WRIT

Petitioner asserts that the Writ should be issued because the circuit court erred both by dismissing Mr. Gallion's argument regarding the length of his sentence and by affirming the portion of the judgment containing conditions of supervised release.

In 2017, Mr. Gallion was charged in North Carolina state court with felony possession of a firearm by a felon and felony first degree murder. On February 11, 2020 he was found guilty and sentenced to life imprisonment and given sentencing credit of 1,014 days. The government initiated federal charges for possession of a firearm by a felon "not to add additional time" but "to, in fact, have some type of certainty and finality of conviction for this particular offense." In that context, Mr. Gallion reached an agreement that he would enter a guilty plea and the parties would jointly agree to a specific offense level and that the sentence imposed would be concurrent with his sentence in the murder case.

Mr. Gallion argued that the agreed upon sentencing guideline was appropriate under 18 U.S.C. § 3553(a) but also that an application of U.S.S.G. § 5G1.3(b) authorized the court to adjust his sentence to provide a sentence credit for time already served on the undischarged related state conviction. U.S.S.G. § 5G1.3(b)

states, in part, that when a sentence is imposed which is associated with related conduct:

> (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
>
> (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

U.S.S.G. § 5G1.3(b).

The federal case involved the same firearm as the one in his state firearm possession case, although not the one used in the murder. The state court gave him credit against his state life sentence of 1,014 days. Because he already received that credit on his state sentence, the Bureau of Prisons would not extend the same credit to his federal sentence. The guideline provision, therefore, requires the district court to "adjust" his sentence in addition to making it concurrent. As defense counsel explained to the court the defense concern was that "if way down the road somehow [the state conviction] was vacated, I think we would have to do a lot of arguing with the BOP to explain all of this."

Judge Reidinger responded that the argument was "irrelevant, because regardless of how you calculate what credit should be provided, for the reasons that I have stated, the statutory maximum sentence, I believe, is called for here, and therefore, that deduction is not made." The sentence of 120 months imposed by Judge Reidinger was not appropriate under the sentencing factors of section 3553(a). Judge Reidinger should have imposed a sentence within the guideline range; his failure to

follow the language of § 5G1.3 was also an abuse of discretion. The reduction would have been 56 months and 23 days. While it might have little effect in the context of Mr. Gallion serving a life sentence should that state sentence be modified in any of several ways it could affect his continued incarceration. Furthermore, Mr. Gallion has an interest in ensuring that the judgment entered is correct.

The failure to apply the sentence credit language of 5G1.3(b) was relevant due to the court's failure to follow the parties' sentencing recommendation of a guideline range of 51-63 months. Judge Reidinger stated that he found the joint recommendation to be "internally inconsistent." His reasoning was that Mr. Gallion had possessed 3 firearms and that one was used in the homicide so that looking at all of the offense conduct "it takes me to the statutory maximum…because there was no charge here under 924(c)." He further stated that "what is admitted as part of this offense requires a very lengthy and, in fact, statutorily maximum sentence in order to reflect the seriousness of the offense; in order to provide adequate deterrence; in order to provide just punishment for the offense; in order to take into account the nature and circumstances of the offense…".

Judge Reidinger stated that he considered the sentencing factors in 18 U.S.C. § 3553(a). The court abused its discretion by disregarding the joint sentencing recommendation in the context of Mr. Gallion serving a life sentence in North Carolina for related conduct. Also, it is readily apparent that Judge Reidinger was heavily influenced by the murder conviction and his perceived need to reflect the

seriousness of "that offense." The analysis should have been regarding this offense – the federal offense – and not the state conviction.

The Circuit Court dismissed Mr. Gallion's appeal as covered by the scope of the appellate waiver in the plea agreement. That waiver included an appeal of the conviction and sentence except in cases of ineffective assistance of counsel or prosecutorial misconduct. The Fourth Circuit has previously stated that it generally "will enforce [a] waiver to preclude a defendant from appealing a specific issue if the record establishes that the waiver is valid and that the issue being appealed is within the scope of the waiver." *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 1994). "An appellate waiver is valid if the defendant's agreement to the waiver was knowing and intelligent." *United States v. Thornsbury*, 670 F.3d 532 (4th Cir. 2012), *citing*, *Blick*, *supra*. *See also, United States v. Beck*, 957 F.3d 440, 445 (4th Cir. 2020). However, "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court." *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). "We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice." *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016), *citing*, *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005).

The government argued that the question of abuse of discretion was squarely within the scope of the appeal waiver and that enforcing the parties' agreement would guarantee the government the benefit of its bargain. The issue on appeal, however, was not just whether the district court abused its discretion as it fashioned the

sentence but whether the court followed the guidelines and the directives of this Court. Those questions could only be determined by a review of the merits of the appeal.

Judge Reidinger ordered a period of supervised release saying that Mr. Gallion "shall comply with the mandatory and discretionary conditions of supervised release as those have been adopted by the court in the Western District of North Carolina." The Circuit Court in *United States v. Rogers*, 961 F.3d 291 (4th Cir. 2020) held that "all non-mandatory conditions of supervised release must be announced at a defendant's sentencing hearing." *Id.* 961 F.3d at 296, *citing*, *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019) and *United States v. Diggles*, 957 F.3d 551, 559 (5th Cir. 2020) (*en banc*). The *Rogers* Court distinguished between mandatory and discretionary conditions. Judge Reidinger referenced the discretionary conditions but did not announce them during the sentencing hearing, yet they were included in the final written judgment. The Circuit Court has previously stated that the remedy for this error is to vacate the sentence and remand for a resentencing hearing. *United States v. Singletary*, 984 F.3d 341 (4th Cir. 2021).

The Circuit Court affirmed the provision of the judgment including the supervised release conditions saying that "the district court adequately pronounced the conditions of supervised release contained in the written judgment." It followed the ruling in *United States v. Cisson*, 33 F.4th 184 (4th Cir. 2022) which held that "a court may satisfy its requirement to announce discretionary conditions 'by incorporating…all Guidelines 'standard' conditions when it pronounces a supervised-

release sentence.'" *Id.*, at 194, *quoting*, *Rogers*, *supra*, 961 F.3d at 299. The Circuit Court's reasoning was confused. Neither Mr. Gallion nor any similarly situated defendant having heard the district court's ruling would be adequately apprised of the condition to which he was subjected on a term of supervised release. The Circuit Court disregarding its own precedent and Mr. Gallion's right to a judgment reflecting what was announced in court.

Notably, this is also an issue on which the Circuits have split. In *United States v. Montoya*, 48 F.4th 1028 (4th Cir. 2022) the Ninth Circuit specifically rejected a request to follow the holdings from *Anstice*, *Diggles*, and *Rogers*, *supra*. The *Montoya* Court held that "[w]hile it is better practice for the district court to orally advise defendants of standard conditions of supervised release, the district court did not have to do so under our precedent." *Id.*, 48 F.4th at 1036.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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