Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

MICHAEL J. MOLLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Should certiorari be granted to address the enforceability of an appellate waiver where the District Court's entire inquiry consisted of a single question, even though that does not establish it was knowing, intelligent and voluntary?

2. Should certiorari be granted to address whether filling out a Paycheck Protection Program loan application (PPP) warranted a sophisticated means enhancement-- where even the Government agreed with Petitioner it did not?

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OPINION BELOW

There was one decision below, which is attached to this petition. *See United States v. Michael J. Moller* (1st Cir. November 15, 2022).

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 2022, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), United States Sentencing Guidelines Manual § 2B1.1(b)(10)(C)(sophisticated means enhancement) and Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

On October 27, 2020, Petitioner pleaded guilty to one count of bank fraud, under 18 U.S.C § 1344(2), as well as violating the terms of his supervised release, in United States District Court for the District of Rhode Island (Hon. Mary S. McElroy). He was thereafter sentenced to a 70-month sentence for bank fraud and a consecutive sentence of 12 months and a day for violating the terms of his supervised release. He subsequently appealed to the First Circuit Court of Appeals. On November 15, 2022, that Court found the appeal waiver was enforceable and dismissed the appeal.

STATEMENT OF FACTS

On October 27, 2020, Petitioner pleaded guilty to one count of bank fraud as well as violating the terms of his supervised release. The District Court told him " ... if I sentence you to a sentence within the guideline range, whatever that is, you have given up by this plea agreement your right to appeal that sentence. Do you understand that?" He said he did. The First Circuit Court of Appeals ruled that this single question, and another sentence in the plea agreement, were " ... sufficient to inform defendant adequately of the appeal waiver provision ...."

At sentence, on October 12, 2021, defense counsel objected to the two-point upward adjustment, under United States Sentencing Guideline 2B1.1(b)(10). He argued that this sophisticated means enhancement did not apply where " ... there were no sophisticated means here because the process of applying for PPP loans is relatively simple ...."

The Government agreed with Petitioner. The Assistant United States Attorney argued " ... this enhancement should not apply to this case." He reasoned that, for the enhancement to apply, the " ... crime has to be significantly more sophisticated than a typical fraud case of its kind

...." Because it was not, he conceded that " ... the Government is not [seeking] this enhancement."

District Court Judge Mary S. McElroy disagreed with both the Petitioner and the Government, finding that " ... the sophisticated means enhancement applied to a basic PPP loan application." She reasoned that it was sophisticated because he had " ... to create fraudulent tax returns, to create fraudulent companies and payrolls ...." Yet she conceded this enhancement was a "close[] call."

The Court then sentenced Petitioner to 70-months' imprisonment for bank fraud, under 18 U.S.C § 1344(2), and a consecutive sentence of 12 months and a day imprisonment, for violating the terms of his supervised release.

SUMMARY OF ARGUMENT

Certiorari should be granted to address whether Petitioner's waiver is unenforceable and whether his sophisticated means enhancement is inapplicable.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER A ONE-SENTENCE INQUIRY ON AN APPELLATE WAIVER IS SUFFICIENT TO ENSURE THAT IT IS KNOWING, INTELLIGENT AND VOLUNTARY.

The First Circuit Court of Appeals ruled that the appellate waiver in this case is enforceable. Yet because the District Court only asked a single question about the waiver, that does not begin to establish it was knowing, intelligent and voluntary. The Eleventh Circuit Court of Appeals agrees with this position. *See United States v. Jackson*, No. 19-14883-CC, 2020 U.S. App. LEXIS 17839, at *1 (11th Cir. June 5, 2020). Due to this conflict amongst the Circuits, as well as the enormous and detrimental impact of incorrectly enforced appellate waivers on the criminal justice system, in both federal and state courts throughout the United States, the Supreme Court should grant a petition for writ of certiorari to find, in this case of first impression, that one-sentence inquiries, at change of plea hearings, do not establish a knowing, intelligent and voluntary waiver.

The Supreme Court has never set forth the standards for an enforceable waiver in federal or state court. Now, finally, it should. The First Circuit, and countless other federal and state courts in the United States, deny appeals, on the merits, every day in American courts, and thereby permit legal errors to stand.

This case is typical: by incorrectly finding an enforceable appellate waiver, the First Circuit declined to address a sentencing error that the *Government itself* conceded was improper. This led to Petitioner receiving a longer sentence than the law allows, which violates all notions of fair play and substantial justice.

In finding an appellate waiver, the First Circuit failed to follow its own precedents. In *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001), it ruled that a District Court must "inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." The " ... court's interrogation [must] suffice[] to ensure that the defendant freely and intelligently agreed to waive [his] right to appeal [his] forthcoming sentence." *Id.* at 24-25. Here, however, the District Court did not follow *Teeter*, and did nothing to determine

that Petitioner understood the appellate waiver, or that he waived his appellate rights knowingly, intelligently or voluntarily. While it asked Petitioner one question about the waiver, that was insufficient to meet either *Teeter* criteria.

Although the First Circuit found that the District Court's inquiry was "sufficient," it was not, as a matter of law. The District Court never specifically questioned Petitioner about his understanding of the waiver provision or adequately informed him of its ramifications. *See United States v. Chambers*, 710 F.3d 23, 30 (1st Cir. 2013)("the district court must question the defendant specifically about his understanding of the waiver provision ....")(citation, quotation and grammatical marks omitted).

More important, the one-question inquiry about an appellate waiver violates Rule 11(b)(1)(N) of the Federal Rules of Criminal Procedure, which requires a District Court to ascertain that a defendant understands and accepts the waiver. *See United States v. Rodriguez-Monserrate*, 22 F.4th 35, 42 (1st Cir. 2021)("Rule 11(b)(1)(N) requires a district court to ascertain that a defendant understands and freely accepts his plea waiver.").

A single question about the appellate waiver is too non-specific to be sufficient. *See Teeter*, 257 F.3d at 24 (" ... we hold that the district court must inquire specifically at the change-of-the-plea hearing into any waiver of appellate rights. Neglecting this duty will constitute error and may serve to invalidate the waiver ....").

In merely telling Petitioner that, if his sentence were within the guideline range, he would be giving up his right to appeal, the District Court never explained, in plain language, what a waiver meant, namely, that Petitioner would be barred from asking a higher court to find that the lower court was wrong. *Compare United States v. Sura*, 511 F.3d 654, 659 (7th Cir. 2007)("Most criminal defendants are not legal experts, which is why Rule 11(b)(1)(N) puts a check in the system in the form of a requirement that the district court explain in plain language what consequences will flow from the guilty plea, including (where applicable) the loss of appellate rights")(emphasis added).

Nor did the District Court explain that its decision on the length of the sentence would be firm and final. *Compare United States v. Lara-Joglar*, 400 F. Appx. 565, 569 (1st Cir. 2010)("[I]f I sentence you

Mr. Lara to 156 months * * * [this] means this sentence will be firm and final.").

The District Court also never asked Petitioner if he had any questions about the waiver. Hence, it cannot be divined if he knew what he was doing.

The court also failed to ask Petitioner if anyone had forced or coerced him to waive his right to appeal. Hence, it is unknown if the waiver was voluntary.

Nor did the District Court advise Petitioner that, if he elected to proceed to trial, rather than plead guilty, he would be statutorily entitled to free counsel, under the Criminal Justice Act, both at trial, and on appeal, at no charge to him. Hence, Petitioner may have signed the appellate waiver because he could not afford appellate counsel--rather than because he was, in fact, guilty.

The District Court even failed to confirm Petitioner understood the terms of the appellate waiver in the plea agreement. Instead, it merely asked him if he had " ... gone over [the plea agreement] with [defense counsel]. Yet cursorily "going over" such a vital right in a plea

agreement, and its terms, including the appellate waiver, is not the same as understanding them.

The First Circuit's ruling creates a conflict amongst the Circuits. In *United States v. Jackson*, No. 19-14883-CC, 2020 U.S. App. LEXIS 17839, at *1 (11th Cir. June 5, 2020), the Eleventh Circuit ruled that one-sentence appeal waiver colloquy's are expressly prohibited. Indeed, when faced with the one-sentence appellate waiver, the Court held:

> The Government's motion to dismiss this appeal pursuant to the appeal waiver in Appellant's plea agreement is DENIED. First, the District Court's one-sentence reference to the appeal waiver, without any explanation, was insufficient. Second, the District Court never asked Appellant whether he understood the appeal waiver or was entering into it freely and voluntarily. On this record we cannot say that it is 'manifestly clear' that Appellant understood the full significance of the appeal waiver.

Under the standards enunciated by the Eleventh Circuit, the appeal waiver in the First Circuit would have been found unenforceable. Here, the District Court's one-sentence reference to the appeal waiver, without any explanation, was insufficient because it failed to establish that it was entered into knowing, intelligent and voluntary. It was, in fact, manifestly clear that Petitioner did not understand the significance of the appellate waiver.

Worse, the District Court never asked Petitioner whether he understood the appeal waiver, or was entering into it freely and voluntarily. As a result, it is not manifestly clear Petitioner understood the full significance of the appeal waiver.

The First Circuit's ruling is also directly in conflict with those of other courts in which a one-sentence inquiry on an appeal waiver are deemed *ipso facto* insufficient. In New York, as just one example, the District Court's one-sentence inquiry would be immediately rejected. In *People v. Brown*, 122 A.D.3d 133 (2d Dept. 2014), the Supreme Court, Appellate Division, Second Department, ruled:

> [g]enerally, such a thorough explanation [of an appellate waiver] should include an advisement that, while a defendant ordinarily retains the right to appeal even after he or she pleads guilty, the defendant is being asked, as a condition of the plea agreement, to waive that right. Ideally, a defendant should then receive an explanation of the nature of the right to appeal, which essentially advises that this right entails the opportunity to argue, before a higher court, any issues pertaining to the defendant's conviction and sentence and to have that higher court decide whether the conviction or sentence should be set aside based upon any of those issues. The defendant should also be told that appellate counsel will be appointed in the event that he or she were indigent.

In the past eight years, *Brown* has been cited, with approval, 378 separate times. Because the District Court failed to do any of this, there is no

record evidence that Petitioner understood the appellate waiver and, therefore, it cannot be deemed enforceable.

Because only a few issues may survive a valid appeal waiver,[1] it is vital that trial courts ensure that defendants understand what they are surrendering when they waive the right to appeal. Giving up the right to appeal is not a perfunctory step. It is, on the contrary, one of the single important rights in the criminal process, in which otherwise meritorious legal claims are procedurally forfeited in countless state and federal courts every day.

Indeed, trial courts--in New York alone--have failed to conduct sufficient appeal waiver inquiries in hundreds of cases in a five-year period of time. In *People v. Batista*, 167 A.D.3d 69, 78 (2d Dept. 2018), the Court said:

> ... our research has shown that this Court has held an appeal waiver to be invalid in well over 200 appeals during the past five years. Our further research demonstrates that the three other Departments of the Appellate Division have had similar experiences. Specifically, during the past five years, the Appellate Division, Third Department, has held an appeal waiver to be invalid in at least 75 appeals. The

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1. The District Court also failed to advise Appellant that, even after waiving the right to appeal, appellate review still remained available for a minimum of four discrete issues, including the voluntariness of the plea, the voluntariness of the appellate waiver, the legality of the sentence and the jurisdiction of the court.

> Appellate Division, Fourth Department, has held an appeal waiver to be invalid on no less than 90 occasions during this same five-year period. And the Appellate Division, First Department, has held an appeal waiver to be invalid in at least 15 appeals over the past five years. Collectively, this reflects a conservative estimate of at least 380 published instances in which the Appellate Division has held an appeal waiver to be invalid during the past five years (Scheinkman, P.J., concurring).

The different tests for an enforceable waiver make this number conservative. As just one example, the waiver of appeal here, predicated on a single question, would never have withstood scrutiny in either the Eleventh Circuit Court or in New York state. This, therefore, results in an Equal Protection Clause violation, because in those Courts, a defendant will have his appeal heard on the merits, while those in the First Circuit will not. Yet whether a defendant's unfair conviction stands, or his unreasonable sentence is upheld, should turn on the merits of the appeal, not the jurisdiction of the waiver.

Certiorari should be granted to address the sufficiency and enforceability of appellate waivers in federal and state court. It should find that, because the District Court failed to conduct a sufficiently detailed inquiry, there is no record evidence that the appellate waiver is

knowing, intelligent and voluntary, and, therefore, is not legally unenforceable.

POINT II

CERTIORARI SHOULD BE GRANTED WHERE THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A TWO-LEVEL SOPHISTICATED MEANS ENHANCEMENT--EVEN THOUGH THE GOVERNMENT ITSELF CONCEDED IT DID NOT APPLY.

Over objection, the District Court abused its discretion when it imposed a two-level sophisticated means sentencing enhancement, even though the Government itself conceded Petitioner did not use any sophisticated means in applying for loans under the Paycheck Protection Program. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). Certiorari should be granted to address this novel question of law, which is a case of first impression in this Court.

The First Circuit ruled that Petitioner waived his right to appeal and thus declined to reach this issue on the merits. It is, however, incorrect because a one-sentence inquiry at a change of plea hearing is insufficient to establish the appellate waiver is knowing, intelligent and voluntary. *See* Point I.

At sentence, the Government agreed with Petitioner. It specifically argued " ... this enhancement should not apply to this case" because Petitioner's " ... crime has to be significantly more sophisticated than a typical fraud case of its kind[,]" and this is not.

Certiorari should thus be granted, preliminarily, to find that, once the Government concedes an issue at a change of plea hearing in a District Court, it cannot later challenge it on appeal in the Circuit Court. *See United States v. Rivera-Ruperto*, 846 F.3d 417, 431 n.10 (1st Cir. 2017)("[A] party cannot concede an issue in the district court and later, on appeal, attempt to repudiate that concession and resurrect the issue.").

The position of both Petitioner and the Government was sound. In applying for the PPP loans, Petitioner submitted 11 bank loan applications in either his own name, or those of his father, girlfriend or girlfriend's brother, in which he sought $4.7 million in forgivable loans guaranteed by the Small Business Administration. For each loan, he attached IRS form 941, an Employer's Quarterly Federal Tax Return. On that form, Petitioner simply misrepresented the number of employees and average monthly payroll. There was nothing sophisticated about this fraud. His PPP bank fraud was no more complex, and demonstrated no

greater intricacy and planning, than any other routine PPP bank fraud. Hence, sophisticated means were not employed.

The loan application itself did not require sophisticated means. The PPP loan application is four pages, and could be filled out in a very short period of time, without great effort or thought. So too could IRS form 941, which comprises only three pages. Completing forms which are specifically designed with simplicity in mind for United States' citizens, during a pandemic, requires no degree of sophistication.

In completing the forms, Petitioner did not, significantly, show any real effort at concealment. Indeed, Petitioner used his own name on the loans, or those of family or those related to them. The fraud simply did not require a greater level of concealment than the typical fraud. *United States v. Pacheco-Martinez*, 791 F.3d 171, 179 (1st Cir. 2015)(the enhancement requires "a greater level ... concealment than a typical fraud")(*quoting United States v. Knox*, 624 F.3d 865, 870-72 (7th Cir. 2010)).

Petitioner did not need co-conspirators to perpetrate the PPP fraud. He never recruited or attempted to convince others to participate in the scheme. *Compare United States v. Jiménez*, 946 F.3d 8, 15 (1st Cir.

2019)("The district court determined that Jiménez's conduct went beyond the typical fraud of making misrepresentations on a loan application form (which it characterized as 'a conventional way to defraud a bank'), and instead encompassed recruiting individuals to act as straw buyers (which required them to pretend that they were going to live in the short-sold homes), using aliases, and advising mortgagors on whether to continue making their mortgage payments. The evidence on which the district court relied was solid, and the court thus reasonably found that the planning and concealment in this scheme surpassed that required for simple mortgage fraud."). *Compare United States v. Pacheco-Martinez*, 791 F.3d 171, 179 (1st Cir. 2015)(enhancement proper where "Pacheco set up multiple corporate entities in order to facilitate his fraudulent schemes and hide his ill-gotten gains from creditors during the bankruptcy proceeding. He convinced investors to participate in a scheme by having them sign a contract in English that differed from the Spanish-language document they had been given, and he made 'lulling' payments to them at the outset so they would think that their investment would in fact make a return.").

Significantly, no federal case, as of the date of this petition, has ever found that filing a PPP bank loan application, accompanied by an IRS form 941, warrants a sophisticated means enhancement.

The commentary to the United States Sentencing Guidelines is in accord. It defines "sophisticated means" as " ... especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense." Here, however, there was nothing especially complex about filing a PPP application, or attaching an IRS form 941.

This Court should thus grant certiorari to find that Petitioner's appellate waiver is unenforceable and his sophisticated means enhancement is inapplicable.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: November 18, 2022
Manhasset, New York

Respectfully Submitted,

Steven A. Feldman
Steven A. Feldman

UNITED STATES
SUPREME COURT

MICHAEL J. MOLLER,

Petitioner,

v.

AFFIDAVIT OF SERVICE

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on November 19, 2022, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney for the District of Rhode Island, 50 Kennedy Plaza, 8th floor, Providence, RI 02903, and on Michael J. Moller, 92613-038, FCI Butner Medium II, Old NC Hwy., 5 Butner, NC 27509.

Steven A. Feldman
Steven A. Feldman

United States Court of Appeals
For the First Circuit

No. 22-1227

UNITED STATES,

Appellee,

v.

MICHAEL J. MOLLER, a/k/a Michael Robinson,

Defendant - Appellant.

Before

Barron, Chief Judge,
Howard and Gelpí, Circuit Judges.

JUDGMENT

Entered: November 15, 2022

Defendant appeals his conviction and sentence for one count of bank fraud. Defendant contends that the appeal waiver, which applies by its terms, should not be enforced for a litany of reasons relating to the accuracy and completeness of the plea colloquy. Furthermore, applying the appeal waiver would be a miscarriage of justice because the district court erroneously applied the enhancement for sophisticated means to defendant's Paycheck Protection Program fraud. Bypassing the question of whether the appeal was timely filed, the government seeks summary disposition on the grounds that no substantial question is presented. After careful review of the parties' filings in this court and the record below, we grant the government's motion. The plea agreement and the plea colloquy, taken in context, were sufficient to inform defendant adequately of the appeal waiver provision in his plea agreement and no miscarriage of justice is apparent on this record. The appeal waiver is enforceable and therefore the appeal is dismissed. United States v. Teeter, 257 F.3d 14, 25-26 (1st Cir. 2001) (standard for enforcement of appeal waivers).

By the Court:

Maria R. Hamilton, Clerk

cc:
Steven Alan Feldman, Michael J. Moller, Lee H. Vilker, Sandra Rae Hebert, Lauren S. Zurier