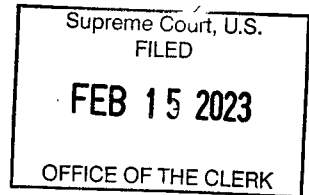


22-6838

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Demetrius Beachem — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

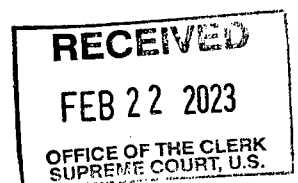
PETITION FOR WRIT OF CERTIORARI

Demetrius Beachem
(Your Name)

FBI-Milan, P.O. Box 1000
(Address)

Milan, Michigan, 48160
(City, State, Zip Code)

N/A
(Phone Number)



QUESTION(S) PRESENTED

- Whether a court can take into account acquitted, dismissed, or uncharged conduct, conduct of which no jury ever found and Petitioner, herein, never admitted.
- Whether a court can enforce an appeal waiver, when the enforcement in itself, would result in a miscarriage of justice by negating an involuntary and unknowing plea agreement, clear and convincing ineffective assistance of counsel

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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- ACCA Pg. 3a
- VICAR Guidelines 18 U.S.C. 1959 Pg. 5
- U.S. Const. Amend. VI
- Fed. R. App. P. 4(b) Pg. 5

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- 18 U.S.C. 1959 Pg. 5
- 18 U.S.C. 924(c) Pg. 5
- 18 U.S.C. 3231 Pg. 5
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- 28 U.S.C. 1291

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at Appeal No. 21-3211; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at Crim. Case No. 1:17-CR-07(1) DRL; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was November 15, 2022.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. 2E1.3
U.S.S.G. 1B1.2
U.S.S.G. 1B1.3
U.S.S.G. 1B1.2.cmt.n.1
U.S.S.G. Amendment 613 (2001)
18 U.S.C. 1959 "VICAR"
18 U.S.C. 924(c)
18 U.S.C. 3231
18 U.S.C. 3742
28 U.S.C. 1291
Fed. R. Crim. P. 11(b)(1)(N)
Fed. R. App. P. 4(b)
U.S. Const. Amend. VI
ACCA

STATEMENT OF THE CASE

See Attached (pages 5-7) subsequently, herein.

On April 13, 2022, Mr. Beachem filed his direct appeal in the District Court for the Northern District of Indiana. Petitioner was charged by indictment with violations of 18 U.S.C. 1959 and 18 U.S.C. 924(c). The district court had jurisdiction under 18 U.S.C. 3231. Mr. Beachem pleaded guilty to specific charges and was sentenced to terms of imprisonment and supervised release. The district court imposed the sentence on November 12, 2021 and entered a final judgment on November 15, 2021.

Mr. Beachem then subsequently following and timely filed his notice of appeal on November 24, 2021. See Fed. R. App. P. 4(b). Mr. Beachem submitted three questions as the statement of the issues.

Whether the district court erred by sentencing Mr. Beachem based on so-called "real offense" conduct, when the VICAR Sentencing Guideline, U.S.S.G. 2E1.3, instead requires sentencing based on the crime of conviction.

Whether the district court erred by sentencing Mr. Beachem based on the so-called, "real offense" conduct recited in the plea agreement, even though the Sentencing Guidelines prohibit reliance on such a recitation where, as here, the defendant has not consented.

Whether, because of appeal waivers, Mr. Beachem's sentence must stand notwithstanding the district court's two legal errors.

The Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959 ("VICAR"), makes it a federal crime to commit

any number of state law offenses for the purposes of "racketeering." This case presents two fundamental questions about whether, under the sentencing guideline associated with that statute, a criminal defendant can be sentenced based on a crime for which he was neither charged nor convicted. In exchange for Appellant's guilty plea, the government agreed to drop its charge of VICAR attempted murder and instead (as relevant here) pursue only a charge of VICAR assault with a dangerous weapon. Yet the district court then sentenced Mr. Beachem on the premise that each had committed VICAR attempted murder, the very charge the government had dropped. In so doing, the court ignored that the applicable sentencing guideline compels consideration of the underlying crime, "U.S.S.G. 2E1.3 - an instruction the Second Circuit has held to require focus on the crime of conviction. By ignoring that instruction and instead recasting as an entirely different offense the conduct underlying the conviction, the court second-guessed the government's charging decision, voided the consideration that induced Mr. Beachem's to enter into their plea agreements, and committed clear legal error.

Moreover, regardless of what Guidelines section 2E1.3 permits, the district court's sentence independently contravenes Guidelines section 1B1.2. Under that provision, a sentencing court may use a plea agreement's stipulated facts to apply a Guidelines section for a more serious offense only if both the defendant and the government express and explicitly agree that

the factual statement or stipulation is a stipulation for such purposes." U.S.S.G. 1B1.2, cmt. n.1. It is undisputed and indisputable that no such agreement is present here.

Neither of those errors fall within Mr. Beachem's appeal waiver. His claims are to the contrary and aimed at enforcing the terms of the plea agreements so that they can receive the benefit of the bargain they struck: a sentence for the crimes Mr. Beachem admitted committing, not a sentence based on charges that the government dropped. Because the sentence frustrates the parties' agreements, this case presents claims that Mr. Beachem did not and could not have anticipated at the time of the plea, and the appeal waiver is inapplicable.

REASONS FOR GRANTING THE PETITION

See Attached (pages 8

Reasons For Granting The Petition

1. The Seventh Circuit's decision exacerbates an important and entrenched Circuit conflict over the United States Guideline Manual 1B1.3 to consider defendant's uncharged conduct during sentencing. The Seventh Circuit's opinion directly implicates a deep divide among the federal court of appeals, as such with *McClinton v. United States*, 23 F.4th 732 (7th Cir. 2022). Albeit, the Seventh Circuit felt itself bound by controlling *United States v. Watts*, 519 U.S. 148, 157 (1997); see also *United States v. Bravo*, 26 F.4th 387, 399 (7th Cir. 2022). However, many Circuit court judges and Supreme Court justices have questioned the fundamental fairness and constitutionality of allowing courts to factor acquitted, dismissed, or uncharged conduct into sentencing guidelines. See *Jones v. United States*, 574 U.S. 948, 949-50 (2014) (Scalia, J., dissenting from the denial of certiorari joined by Thomas and Ginsburg, JJ.) (arguing that the Court of Appeals have over-construed "our continuing silence"), that argument "has garnered increasing support among many circuit court judges and Justices." *McClinton*, 23 F.4th at 735. See, e.g., *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of r'hrq en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *id.* at 929-32 (Millet, J., concurring in denial of r'hrq en banc); *United States v. Canania*, 532 F.3d 1342 764, 776 (8th Cir. 2008) (Bright, J., concurring); *United States v. Faust*, 456 F.3d 1343,

1350 (11th Cir. 2006) (Barkett, J., concurring specially); United States v. Medley, 972 F.3d 399, 340, 440 n.12 (4th Cir. 2020) (Quattlebaum, J., dissenting) (cataloguing cases)

Mr. Beachem has stark similarities, however, there are clear and distinguishable differences in the details from the McClinton case. McClinton was hammered for a bank robbery in which a death occurred despite being found not guilty of murder, had his sentence upheld by the Seventh Circuit of Appeals. Whereas Mr. Beachem was sentenced by facts that no jury ever found, but more important Mr. Beachem never admitted.

Mr. Beachem strongly believes that if the decision is to stand, it would adversely create and propel a miscarriage of justice. Petitioner looks to the Armed Career Criminal Act ("ACCA") as a Guideline vehicle for comparison purposes. "The Court further finds that applying the waiver in this case, where the ACCA was improperly imposed, would be a miscarriage of justice." *Mitchell v. Warden, FCI-Greenville, No. 19-CV-0539-BJD, 2019 U.S. Dist. LEXIS 195933, 2019 WL 5893401, at *5 (S.D. Ill. Nov. 12, 2019)* (collecting cases and discussing the Seventh Circuit's opinion that improperly or inaccurately labeling someone as a armed career criminal under a mandatory, non-discretionary sentencing scheme such as the ("ACCA") is a fundamental sentencing defect that results in a miscarriage of justice.); see also *Chazen v. Marske, 938 F.3d 851 at 856 (7th Cir. 2019)* ("We have held that a defendant sentenced in error as an armed career criminal" is a "miscarriage of justice"); *United States v. Litos, 847 F.3d 906, 910 (7th Cir. 2017)* (deciding not to enforce a knowing and voluntary appellate waiver because doing so would result in a miscarriage of justice).

Mr. Beachem, is in a state of legal purgatory because on one hand the Guidelines Manual 1B1.3 permit it, nonetheless, and

contrary to current standing the United States Sentencing Commission published in the Federal Register the Guidelines proposals to amendments, such as eliminating the use of acquitted, dismissed, or uncharged conduct that would take effect in November of 2023. This simply does not go far enough. The question presented, herein, is precisely characterized similarly to McClinton and should be casted collectively within the group of (5) cases that have been relisted and waiting for the issue to be picked up for review.

2. The Seventh Circuit resolved the question incorrectly and erroneously was silent to adequately and properly analyzing the appeal waiver. There are several scenarios in which Mr. Beachem's appeal waiver arguments would prevail in one fashion or another. Nevertheless, the Court's conclusion was flawed and misguided to say the least.

In one view, the Court of Appeals erred by affirming Mr. Beachem's sentence and enforcing his appeal waiver when, in fact, Mr. Beachem's challenges fall outside the scope of the appeal waiver. To start, we look at the term 'appeal waivers.' While the word is useful shorthand for clauses like those in Mr. Beachem's plea agreement, it can misleadingly suggest a monolithic end to all appellate rights. With certainty, however, no appeal waiver serves absolute. Compare *Cambell v. U.S.*, 686 F.3d 353, 359 (CA6 2012); *Watson v. U.S.*, 493 F.3d 960, 964 (CA8 2007); *U.S. v. Poindexter*, 492 F.3d 263, 273 (CA4 2007); *U.S. v. Tapp*, 491 F.3d 263, 266 (CA5 2007); *Campusano v. U.S.*, 442 F.3d 770, 775 (CA2 2006); *Gomez-Diaz v. U.S.*, 433 F.3d 788, 791-794 (CA11 2005); *U.S. v. Sandoval-Lopez*, 409 F.3d 1193, 1195-1199 (CA9 2005); *U.S. v. Garrett*, 402 F.3d 1262, 1266-1267 (CA210 2005) with *Nunez v. U.S.*, 546 F.3d 450, 455 (CA7 2008); *U.S. v. Marby*, 536 F.3d 231, 241 (CA3 2008).

As courts widely agree, "[a] valid and enforceable appeal waiver... only precludes challenges that fall within the scope." *United States v. Hardman*, 778 F.3d 753, 771 (2008).

Mr. Beachem's claims and challenges demand and require that the Seventh Circuit look precisely at the content of the claim in its entirety, in order to determine if the challenge falls outside the scope of the waiver. After that step is complete it is appropriate to move onto the effects of the waiver and the plea agreement. Mr. Beachem's claim(s) and challenge(s) fall outside the reach of the waiver, such as the exceptional situations of (1), a plea agreement that was involuntary or unknowing, (2) constitutionally impermissible factors, and (3) ineffective assistance of counsel. *United States v. Whitlow*, 287 F.3d 638, 640 (7th Cir. 2002) ("We have held time and again that a waiver of appeal stands or falls with the rest of the bargain."). If defendant did not enter the plea agreement knowingly and voluntarily, the appellate waiver cannot bar his claims.

If the Seventh Circuit was to disagree with Petitioner and conclude that his claims fall within the scope of the appeal waiver, then the waiver is invalid because Mr. Beachman did not knowingly and voluntarily waive his right to appeal a sentence based on a crime to which he did not plead guilty and the charges for which were dropped. "To determine whether the plea was knowing and voluntary, we ask whether looking at the total circumstances surrounding the plea, the defendant was informed of his or her rights." See *United States v. Perillo*, 897 F.3d at 883 (7th Cir. 2018) (quoting *United States v. Kelly*, 337 F.3d 897, 902 (7th Cir. 2003)). Looking at the the "total circumstances surrounding the

plea, "Id., including the objections to the PSR and motion to withdraw the guilty plea, appellant was clearly unaware of the possibility that he could be unlawfully sentenced for committing a crime of which he was not convicted.

Moreover, the district court did not warn him that it planned to unlawfully use the stipulated facts to find a more serious offense than the one to which he pleaded guilty.

The court's silence as to the possibility of sentencing on uncharged conduct, at the time the plea was accepted, defeats any contention that the waiver was knowing and voluntary.

See *United States v. Sura*, 511 F.3d at 662 (7th Cir. 2007)

Indeed, it is due to this exact concern that the Guidelines were amended to allow a sentencing court to use the base offense level for a crime more serious than the one admitted only "if both the defendant and the government explicitly agree...."

U.S.S.G. 1B1.2, cmt. n.1; see U.S.S.G. Amendment 613 (2001)

(collecting cases). See *United States v. Loos*, 165 F.3d 504, 508 (7th Cir. 1998).

The Circuit Court should decline to enforce the waiver because the case presents an "exceptional situation[.]"

United States v. Litas, 847 F.3d 906, 910 (7th Cir. 2017). The district court's incorrect application of the VICAR

guideline and contravention of section 1B1.2 were exceptionally prejudicial. For Mr. Beachem, a recommended sentence 120-147 months longer than the likely recommended sentence under the appropriate guideline. No defendant would knowingly

risk such an absurd and unfair result. It would be fundamentally unjust to permit the district court's errors to stand when the effect of those errors was to nullify the very consideration that induced Mr. Beachem to enter into the agreement in the first place. In *United States v. Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002), the Supreme Court instructed that "the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances - even though the defendant may not know the specific detailed consequences of invoking it."

A defendant may waive his right to collaterally challenge his sentence and review through a plea agreement, assuming it is knowing and voluntary. See *Dowell v. United States*, 694 F.3d 898, 901-02 (7th Cir. 2012); Fed. R. Crim. P. 11(b)(1)(N). "[A] valid and enforceable waiver ... only precludes challenges that fall within the scope." *Garza v. Idaho*, 139 S. Ct. 738, 744, 203 L. Ed. 2d 77 (2019). "We generally enforce an appellate waiver if its terms are express and unambiguous and the record shows that it was knowing and voluntary." See *United States v. Bridgewater*, 995 F.3d 591, 595 (7th Cir. 2021). In determining the scope of a waiver, "[w]e interpret the term of [a plea] agreement according to the parties' reasonable expectations' and construe any ambiguities in the light most favorable to [the petitioner]." *Dowell*, 694 F.3d at 902 (quoting *United States v. Quintero*, 618

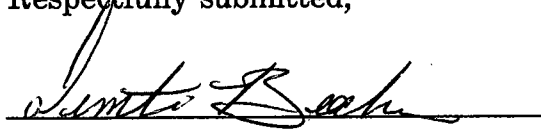
render the appellate waiver inapplicable and not enforceable. The facts of the case, herein, are undeniable and go squarely against the jurisprudence in this Circuit and the core narrative that each control and firmly hold. A number of other federal Court of Appeals have said they won't enforce even voluntary and knowing waivers in plea agreements, if enforcing them would result in a "miscarriage of justice." See, e.g., *United States v. Velez-Luciano*, 814 F.3d 553 (1st Cir. 2018); *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003); *United States v. Khattak*, 273 F.3d 557, 562 (3rd Cir. 2001); and *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001)

Rejecting the Seventh Circuit's conclusion is the just thing to do in this situation. At minimum, the judgment must be vacated, so that a plea can be made to uphold the actual bargain that Mr. Beachem effectively and appropriately negotiated its terms for. This Court should grant Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: February 14, 2023