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In The
Supreme Court of the United States

IVORY JOE TISDALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES IT VIOLATE DUE PROCESS FOR A DEFENDANT TO BE
REQUIRED TO WAIVE HIS RIGHT TO APPEAL IN ORDER TO ENTER INTO
AN OTHERWISE FAVORABLE PLEA AGREEMENT WITH THE
GOVERNMENT?

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OPINION BELOW

The Court of Appeals for the Fourth Circuit decided this case on April 10, 2023 in an order granting the Government's motion to dismiss the appeal as barred by an appeal waiver in the plea agreement, United States v. Tisdale, No. 21-4714 (4th Cir. 2023). The order appears in the Appendix herein, p. A-1.

JURISDICTION

The case in the Court of Appeals was decided on April 10, 2023. This petition is timely filed within 90 days, pursuant to Rule 13.1 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 11(b)(1)(N), Federal Rules of Criminal Behavior

(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.

U.S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On June 22, 2020 Ivory Joe Tisdale was charged in an indictment in the Middle District of North Carolina with violating 21 U.S.C. 841(a)(1), 21 U.S.C. 856(a)(1), 21 U.S.C. 856(b), 18 U.S.C. 924(c)(A)(iii), 18 U.S.C. 922(g)(1), and 18 U.S.C. 924(a)(2), all on December 10, 2019.

Pursuant to a plea agreement, Ivory Joe Tisdale on June 14, 2021 entered a plea to Counts One and Four of the June 10, 2020 indictment, Possession of Cocaine with Intent to Distribute, in violation of 21 U.S.C. 841(a)(1)(C), and of Carrying and Using, by discharging a firearm during federal drug trafficking crimes, in violation of 18 U.S.C. 924(C)(1)(A)(iii).

On December 14, 2021 Ivory Joe Tisdale was sentenced to a term of 200 months, and judgment was entered on December 16, 2021. Timely notice of appeal was filed on December 20, 2021 and the appeal was dismissed in the Court of Appeals on April 10, 2023, United States v. Tisdale, No. 21-4714 (4th Circuit). This certiorari petition is thus timely filed.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

A very high number of federal criminal cases, in excess of 95%, are resolved through guilty pleas, most by way of plea agreements. While a plea agreement is analogous to a contract between the defendant and the Government, few are the

product of anything approaching evenhanded arms length negotiation. Take it or leave it is more the norm. Sometimes the Government insists on an appeal waiver, but not always, not even in the same United States Attorney's Office and not even in cases prosecuted by the same Assistant U.S. Attorney. Nor is there a national policy in such matters laid down by the Attorney General. It is truly hit or miss whether a defendant will have to waive his appeal rights in order to be able to enter into an otherwise favorable plea agreement. Sometimes, as in this case, there are valid and viable appellate issues which deserve an airing in the Court of Appeals, yet the defendant, as here, does not want to go to trial, but to plead guilty. And the Government is benefited by such a guilty plea. The case does not have to be tried and the Government does not have to prepare for trial. The Government should arguably be grateful, but instead wants more, freedom from having to brief and perhaps argue an appeal. And the poor defendant has little or no choice but to give up a valuable right. The time to do away with appeal waivers in plea agreements has come, and the writ here should accordingly be granted.

ARGUMENT

Ranking the Bill of Rights of 1791 in order of importance would be difficult and risky, though it is fair to say that few would miss the Third Amendment if it were to disappear. Certainly the Fourth Amendment to the Constitution is right up there near the top. And this is a Fourth Amendment case.

The privacy, property, and safety of Ivory Joe Tisdale was breached on December 9, 2019 by law enforcement officers in Greensboro, North Carolina armed

with a search warrant. Ivory Joe Tisdale, in his pajamas and just out of bed, thought his house was being broken into, and indeed he had recently experienced a home burglary. Accordingly he was on heightened alert. He shot toward to floor and the door in order to frighten the intruders away, and then ran to the back of the house. When he saw police officers at the back door he let them in and surrendered. He claims he did not previously know the supposed intruders were cops. The significant issue in the District Court was his motion to suppress the search warrant, which was denied. Ivory Joe Tisdale entered a plea pursuant to a plea agreement, which contained an appeal waiver. He has claimed since, claims now, and would have argued in the Fourth Circuit had he had the opportunity to do so, and will testify if ever he is given the opportunity to do so, that:

- A. He did not understand the scope of the waiver.
- B. That his District Court counsel did not adequately explain it to him.

A defendant validly waives his appeal rights if he agreed to the waiver “knowingly and intelligently.” United States v. Manigan, 592 F.3d 621, 627 (4th Cir. 2010). In this case we contend now, and would have argued before the Fourth Circuit in Richmond, that Tisdale did not agree “knowingly and intelligently.”

We have come a long way since this Court held 129 years ago that the right to appeal was not “a necessary element of due process of law,” in McKane v. Dunston, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed867 (1894). And this Court has now held that a defendant may knowingly and voluntarily waive his Fourth Amendment rights, in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed 2d 854

(1973). We suggest that the key here is whether the waiver is made knowingly by a fully informed defendant. And, as indicated in our brief in the Fourth Circuit, Ivory Joe Tisdale very much claims he was the victim of the ineffective assistance of counsel in the District Court. Interestingly, in United States v. Abarca, 985 F.2d 1012 (9th Cir. 1993), the Ninth Circuit held that an appeal waiver also operates as a waiver of rights under 28 U.S.C. 2255, except for the Sixth Amendment claim of ineffective assistance of counsel. Abarca thus supports the general principle that ineffective assistance of counsel issues are not waived.

A minority of courts reject appeal waivers altogether as impermissibly challenging the right to appeal in violation of due process. Among the most frequently cited cases in support of that proposition is a state case, People v. Butler, 204 N.W.2d 325 (Michigan 1972), a case which relied in part on a federal case, Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966). In Worcester, the First Circuit strongly condemned the practice as “constitutionally obnoxious.”

It should be noted too that if the District Court here was in error in denying the motion to suppress, then the conviction of Ivory Joe Tisdale fails as to Count One of the June 22, 2020 indictment, the charge under 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(C). He would then be actually innocent of that charge, leaving at most only the charge in Count Four under 18 U.S.C. 924(c)(1)(A)(iii). Ivory Joe Tisdale is now in North Carolina state custody, serving a sentence of 96 to 128 months on the same facts as in this federal case, with a projected release date of

December 8, 2027. That state sentence runs concurrently with his federal sentence of 200 months in this case. There is of course a federal detainer in place.

Alternatively, we argued in our Fourth Circuit brief that that Court should defer the Government's motion to dismiss, pending briefing and argument, as it has done elsewhere. See, e.g., United States v. Cohen, 888 F.3d at 679 (4th Cir. 2018) (deferring consideration of government's motion to dismiss to permit full briefing and argument); United States v. Ziadeh, 104 F.App'x 869, 871-873 (4th Cir. 2004) (deferring consideration of the motion to dismiss pending oral argument and concluding that the defendant's challenge was not barred by appellate waiver).

In writing a brief or a certiorari petition, help can be found in unusual places. The Office of Justice Programs of the U.S. Department of Justice "an official website of the United States Government, Department of Justice" is not where we might ordinarily have sought help in a case such as this. That office however clearly thought it appropriate to highlight Criminal Defendants Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, by G.M. Dyer and B. Judge, 65 Notre Dame Law Review, 649-670 (1990).

The practice of conditioning the acceptance of sentence or plea bargains upon defendants waiving their rights to appeal represents a systemic deprivation of defendants' rights to have their convictions reviewed. Consequently, it violates the due process clause of the fourteenth amendment. The right to appeal a criminal conviction has become too integral a part of the criminal justice system to be sacrificed in the name of "efficiency." courts should hold that such waivers are invalid. At present, this is a minority review. The courts that have yet to address the issue of permitting appeal

waivers should recognize that the right to appeal a criminal conviction has taken on an added significance as a safeguard in a system that depends so heavily upon plea-based convictions for its administration.

Although written 33 years ago, the Government still highlights this persuasive argument on the Office of Justice Programs website, and we happily agree with the thesis that “Courts should hold that such waivers are invalid.”

See also Waiver of the Right to Appeal by Robert K. Calhoun, 23 Hastings Const. L. Quarterly 127 (1995).

CONCLUSION

For all the reasons set forth above, the writ should be granted, the judgment below should be vacated, and the case remanded for briefing and argument in the Court of Appeals.

Respectfully submitted,

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APPENDIX

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FILED: April 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**No. 21-4714
(1:20-cr-00209-TDS-1)**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IVORY JOE TISDALE,

Defendant - Appellant.

O R D E R

Ivory Joe Tisdale pled guilty to drug and firearm offenses and received a 200-month sentence. On appeal, Tisdale challenges the district court's denial of his motion to suppress certain evidence and the court's application of a six-level sentencing enhancement under U.S. Sentencing Guidelines Manual § 3A1.2(c)(1) (2018). The Government has moved to dismiss the appeal as barred by Tisdale's waiver of the right to appeal included in the plea agreement. Upon review of the record, we conclude that Tisdale knowingly and voluntarily waived his right to appeal and that the issues Tisdale seeks to raise on appeal fall squarely within the scope of his waiver of appellate rights. Accordingly, we grant the Government's

motion to dismiss and deny at this juncture the motion to withdraw filed by Tisdale's appellate counsel.

Entered at the direction of the panel: Judge King, Judge Rushing, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk