NO._____

In The
Supreme Court of the United States

CURTIS MARCEL BARNETTE,

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 24, 2023 in an opinion granting the Government's motion to dismiss the appeal as barred by an appeal waiver in the plea agreement, United States v. Barnette, No. 22-4269 (4th Cir. 2023). The order appears in the Appendix herein, p. App. 1.

JURISDICTION

The case in the Court of Appeals was decided on April 24, 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 October 26, 2020 Curtis Marcel Barnette was charged in an Indictment in the Middle District of North Carolina as follows:

Count One – Carjacking on September 26, 2019 of a 2005 Ford Expedition, by force and violence, resulting in serious bodily injury, in Durham County, in violation of 18 U.S.C. 2119(2).

Count Two – Knowingly carrying and using, by discharging, a firearm during and in relation to a federal crime of violence, carjacking resulting in serious bodily injury, on September 26, 2019 in Durham County, in violation of 18 U.S.C. 924(c)(1)(A)(iii).

Count Three-Unlawfully transporting a stolen vehicle from North Carolina to Virginia, on September 26, 2019 in violation of 18 U.S.C. 2312.

Count Four – Knowingly possessing a handgun, having been convicted of a felony, on September 26, 2019 in Durham County, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2).

On June 15, 2021, pursuant to a plea agreement, Curtis Marcel Barnette entered a plea of guilty to the charges in Counts Three and Four of the indictment i.e. the Dyer Act charge in Count Three and the firearm charge in Count Four. He was sentenced on April 28, 2022 to a term of 240 months, judgment was entered on May 4, 2022, and timely notice of appeal was filed on May 5, 2022. The appeal was dismissed in the Court of Appeals on April 24, 2023, United States v. Barnette, No. 22-4269 (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

There were two sentencing issues in the District Court, both worthy of airing in the Court of Appeals:

A. On March 28, 1991 Curtis Marcel Barnette was charged with Felony First Degree Murder at age 15 in Durham County Superior Court. On his guilty plea he was sentenced on May 16, 1995 to Life Imprisonment for Felony Second Degree Murder. On June 30, 2015 the life sentence was vacated and on July 2, 2015 he was resentenced to 20 years or time served and was released. Three criminal history points were assessed in the PSR under Section 4A11(a), Federal Sentencing Guidelines.

The resentencing on July 2, 2015, effectively to time served, was more than 20 years after the initial sentence on May 16, 1995, the sentence that was later vacated. This is very much distinguishable from Frazier v. United States, 355 F.Supp.2d 575 (D. Massachusetts 2005), United States v. Randall, 472 F.3d 763 (10th Cir. 2006), and United States v. Semsak, 336 F.3d 1123 (9th Cir. 2003).

We must concede that though that the current Supreme Court law on this is against us, in Jones v. Mississippi, 593 U.S. ____, 141 S.Ct. 1307, 209 L.Ed.2d 390 (2021), which effectively overruled Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2255,

183 L.Ed.2d 407 (2012) and Montgomery v. Louisiana, 577 U.S. 190, 136 S.Ct. 718, 193 L.Ed.2d 599 (2015). In her dissenting opinion in Jones v. Mississippi, supra, Justice Sotomayor, joined by Justice Breyer and Justice Kagan, noted that:

> "Time and again, this Court has recognized that "children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S., at 471. In Roper v. Simmons, 543 U.S.C. 551 (2005), the Court held that the Eighth Amendment forbids sentencing children to death because "[c]apital punishment must be limited to those offenders…whose extreme culpability makes them the most deserving of execution." Id., at 568 (internal quotation marks omitted). Juvenile offenders "cannot with reliability be classified among the worse offenders" for several reasons. Id., at 569. First, "as any parent knows," and as scientific and sociological studies have confirmed, juveniles are less mature and responsible than adults, which "often result[s] in impetuous and ill-considered actions and decisions." Ibid. (internal quotation marks omitted). Second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures" and "have less control…over their own environment." Ibid. Finally, "the character of the juvenile" is "more transitory" than that of an adult. Id., at 570 "[A]s individuals mature, the impetuousness of recklessness that may dominate in younger years can subside."

It is difficult to square Justice Sotomayor's reasoning above with assessing three criminal history points in Curtis Barnette's PSR for his juvenile case when he was 15 years old, but then she was in the minority. We note this because what is good Supreme Court law today may not be good law tomorrow. Good examples are:

Scott v. Sandford, 60 U.S. 393, 15 L.Ed 691 (1857)

Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)

B. Curtis Barnette did not receive credit for acceptance of responsibility under Section 3E1.1, Federal Sentencing Guidelines. The PSR contains the following:

> The defendant provided a written, signed statement to the probation officer on June 28, 2021, which reflects that he freely admits he committed the offenses in interstate transportation of a stolen motor vehicle and being a felon in possession of a firearm. The statement further indicates the defendant agrees with the Factual Basis filed by the government except for the statements made by Lamont Bacchus. In October 2021, the government received information from officials at the Guilford County Detention Center, Greensboro, NC, that the defendant was found in possession of contraband in the form of three cellular telephones and $1,300 in cash in his cell at that facility. The investigation indicates the defendant is the individual responsible for facilitating the transfer of the phones. Jail officials have yet to determine the outside source. Based on this continued criminal conduct, it does not appear the defendant has acted in a manner consistent with acceptance of responsibility.

Barnette's plea was entered on June 15, 2021 pursuant to his plea agreement. The Government thus knew at least from that date that the case would not have to be tried. So far, so good, but then came the violation of the jail rules the Government learned about in October 2021 while he was awaiting sentencing in the Guilford County Jail in Greensboro. This is covered in the testimony of Deputy Sheriff Arthur King. On October 7, 221 King searched Barnette's room and found currency among his legal paperwork. After he was found to have $600, Barnette volunteered that he has a total of $1380. A jail nurse, a contract employee, had

brought the money to Barnette. King also discovered that some other jail inmates in the same area had cell phones, also furnished by the nurse. It should be noted that no cell phone was found in Barnette's possession, actual or constructive. It was assumed though that as he had been in communication with the nurse, Barnete must have somehow arranged for the entry of the cell phones into the jail. This is an unwarranted conclusion. The nurse was certainly capable of acting on her own. That she apparently brought $1380 to Barnette is interesting, but has nothing to do with cell phones she may have brought to others.

It is a criminal violation of North Carolina law, N.C. G.S. 14-258.2, for a jail inmate to possess a dangerous weapon, or a non-prescribed controlled substances, N.C.G.S. 14-258.1, or "tools for escape," N.C.G.S. 14-258, but so far as we can determine, it is not a criminal offense to possess currency in a county jail. It may be a violation of the jail rules, and it apparently was in this instance a violation of the Guilford County Jail rules for Barnette to have $1380, but it was not a crime, nor was he prosecuted for anything he did in the jail. Nor could he have been prosecuted so far as we know. Barnette should have been given credit at sentencing for acceptance of responsibility. Barnette was enhanced for obstruction of justice for his flight from law enforcement in Virginia, under Section 3C1.2 of the Guidelines, and that enhancement was objected to in the District Court. In a case where a defendant has obstructed justice and who has accepted responsibility for his criminal acts, as Barnette did in this case, so extraordinary that he gets both, the

good and the bad? We suggest that is so in this case, and there is some case law on our side. See United States v. Talladino, 38 F.2d 1255 (1st Cir. 1994).

In United States v. Thorpe, 287 F.Supp.2d 646 (E.D. Virginia 2003), the defendant continued illicit drug use after his arrest, but that unlawful conduct did not bar an offense level Guideline reduction for acceptance of responsibility.

In United States v. Khang, 36 F.3d 77 (9th Cir. 1994), the defendants lied about their motive for the commission of a drug offense. Their lies would not establish a defense to their crime or avoid criminal liability, though they were intended as a means to obtain a departure sentence. Accordingly their lies did not preclude a downward departure adjustment to their offense level for acceptance of responsibility. We suggest lying for that purpose is more grievous than possessing cash furnished by a jail nurse.

United States v. Hopper, 27 F.3d 378 (9th Cir. 1994) was also more grievous than this case. Hopper burned evidence and tried to procure false alibis, yet he got credit for acceptance of responsibility. See also United States v. Restrapo, 936 F.2d 661 (2nd Cir. 1991) and United States v. Cotto, 793 F.Supp.64 (EDNY 1992).

Curtis Marcel Barnette entered his 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 Barnette 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, Curtis Marcel Barnette very much claims he was the victim of 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."

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,

/s/ James B. Craven III
James B. Craven III
Attorney for the Petitioner

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4269

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CURTIS MARCEL BARNETTE,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:20-cr-00434-TDS-1)

Submitted: April 20, 2023 Decided: April 24, 2023

Before KING and QUATTLEBAUM, Circuit Judges, and FLOYD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

ON BRIEF: James B. Craven, III, Durham, North Carolina, for Appellant. Sandra J. Hairston, United States Attorney, Kyle D. Pousson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Curtis Marcel Barnette appeals the aggregate 240-month sentence imposed following his guilty plea, pursuant to a written plea agreement, to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and transporting a stolen vehicle in interstate commerce, in violation of 18 U.S.C. § 2312. On appeal, Barnette argues that the district court erred in computing his criminal history score and in declining to award an acceptance-of-responsibility reduction. Barnette also asserts an unspecified challenge related to his pre-plea suppression motion, which was not ruled on by the district court. In its response brief, the Government moves to dismiss this appeal as barred by the broad appellate waiver included in Barnette's plea agreement and because Barnette did not enter a conditional guilty plea. *See* Fed. R. Crim. P. 11(a)(2). Barnette declined the opportunity to oppose dismissal.

"When the government seeks to enforce an appeal waiver and has not breached the plea agreement, we will enforce the waiver if it is valid and if the issue being appealed falls within the scope of the waiver." *United States v. Boutcher*, 998 F.3d 603, 608 (4th Cir. 2021) (internal quotation marks omitted). "We review the validity of an appellate waiver de novo." *United States v. Soloff*, 993 F.3d 240, 243 (4th Cir. 2021) (emphasis omitted). "A waiver is valid if the defendant knowingly and intelligently agreed to waive the right to appeal." *Id*. (internal quotation marks omitted). "When a district court questions a defendant during a [Fed. R. Crim. P.] 11 hearing regarding an appeal waiver and the record shows that the defendant understood the import of his concessions, we generally will hold that the waiver is valid." *Boutcher*, 998 F.3d at 608.

Barnette does not assert on appeal that the appellate waiver was not knowing or intelligent or that his agreement to the waiver was involuntary. Our review of the plea hearing transcript confirms that Barnette was competent to plead guilty and that he understood the terms of the plea agreement, including the appellate waiver. Therefore, the waiver is valid and enforceable. Moreover, Barnette's challenges to the computation of his criminal history score and adjusted offense level fall within the scope of the waiver, which precluded an appeal of Barnette's sentence on any grounds, save for three exceptions inapplicable here. Finally, we observe that Barnette's attempt to preserve any issue related to his pre-plea motion to suppress fails because Barnette did not enter a conditional guilty plea. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."); *United States v. Abramski*, 706 F.3d 307, 314 (4th Cir. 2013) ("Absent a valid conditional guilty plea, we will dismiss a defendant's appeal from an adverse pretrial ruling on a non-jurisdictional issue." (cleaned up)).

Accordingly, we dismiss this appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED